May 7, 2019

Standing Senate Committee on Legal and Constitutional Affairs
Senate of Canada
111 Wellington Street
Ottawa, ON  K1A 0A9

Attention: Senator Serge Joyal, P.C.
Chair, Standing Senate Committee on Legal and Constitutional Affairs
and
Keli Hogan
Committee Clerk

Dear Senator Joyal and Ms Hogan:

Re: Bill C-75

Thank you for the opportunity to appear before the Standing Senate Committee on Legal and Constitutional Affairs to discuss Bill C-75 on May 2, 2019.

Further to that discussion, we are writing to provide draft amendment language to the Bill that we believe would further access to justice and mitigate any unintended negative impacts on people from Indigenous, racialized, or immigrant communities.

Negative Impacts of Bill C-75’s Increased Maximum Penalties for Minor Offences:

As we have previously outlined, in our view Bill C-75’s proposed increased maximum penalties for summary conviction offences would negatively affect the efficient and effective functioning of the justice system in a variety of ways.

We are concerned that, without the ability for accused persons to retain the services of regulated agents, more people facing longer sentences will go without representation. This would further increase pressures on underfunded legal aid programs across the country,
expanding the “gap population” of people who do not qualify for legal aid but who also cannot afford to retain a lawyer. It would also strain court resources and exacerbate delays, weakening the constitutional rights to counsel and to be tried in a reasonable time.

Moreover, we are concerned that the impacts of these proposed sentencing changes will be felt disproportionately by people from Indigenous, racialized, or immigrant communities. Indigenous and racialized defendants are already disproportionately represented in the criminal justice system, in terms of higher conviction rates, and higher rates and lengths of incarceration. The Supreme Court of Canada has indicated that, when Parliament increases a maximum penalty, it signals to courts that stronger sentences should be imposed. Because of overrepresentation at all stages of the criminal justice system (resulting in, among other impacts, a greater likelihood of prior convictions), Indigenous and racialized persons are more likely to be disproportionately affected by any such sentencing increases.

The proposed changes under Bill C-75 could also seriously affect the admissibility of permanent residents or foreign nationals into Canada. Under the Immigration and Refugee Protection Act, these individuals will be inadmissible on the grounds of “serious criminality” if they have been convicted “of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.” Under the proposed new sentencing structure, permanent residents and foreign nationals would be at risk of a finding of inadmissibility when charged with any Criminal Code offence.

Besides challenging personal consequences that result from such a finding, the imposition of a term of imprisonment of more than six months also bars a permanent resident from appealing their loss of status or any removal order to the Immigration Appeal Division of the Immigration and Refugee Board of Canada. It is only at that appeal stage that permanent residents can raise humanitarian and compassionate grounds in support of their claim for status in Canada. Persons who are unable to appeal an inadmissibility finding will lose this avenue for presenting their case. Moreover, we are concerned that the current significant strain on legal aid services that are available for refugee and immigration matters would leave these vulnerable persons less likely to be assisted by a legal representative despite facing this increased legal jeopardy.

Proposed Amendment:

In our view, these negative impacts could be avoided by maintaining a category of summary conviction offences in the Criminal Code that are punishable by a maximum of six months’ imprisonment. If such a category were maintained, there would be no issue with the continued operation of section 802.1, and regulated agents would be permitted to appear on those offences (but not on all other summary conviction offences).
We recognize that the federal government proposed these changes so that formerly indictable offences, which would be made hybrid under Bill C-75, could be tried in summary conviction court and involve substantial penalties. In our view, though, this objective could be accomplished in a more targeted manner that impairs neither access to justice nor efforts to streamline and improve court processes.

Bill C-75 proposes to replace the current s. 787(1) of the Criminal Code with the following provision:

**General penalty**

787 (1) Unless otherwise provided by law, every person who is convicted of an offence punishable on summary conviction is liable to a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or to both.

We recommend rejecting that amendment, and maintaining the current s. 787(1) in the Criminal Code, which provides for “a term of imprisonment not exceeding six months”. Consequently, for any hybrid offence for which Parliament wishes to provide a longer potential term of imprisonment, it could expressly provide for that penalty within the specific offence provision.

**Alternative Amendments:**

If this Committee should decline to recommend our requested approach, we would also support the amendment put forward by the Federation of Law Societies of Canada as preferable to the current version of Bill C-75.

This approach, which would amend s. 802.1, would effectively preserve representation abilities for agents such as paralegals, articling students, and law students across Canada who provide services subject to the regulation of provincial law societies. The amendment recommended by the Federation is as follows (changes underlined):

**Limitation on the use of agents**

802.1 Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless

(a) the defendant is an organization;

(b) the defendant is appearing to request an adjournment of the proceedings; or
(c) the agent is authorized to do so under a program approved — or criteria established — by the lieutenant governor in council of the province; or
(d) the agent is authorized to do so by the law of a province.

In our view, this language provides greater certainty that a “regulated agent”, who provides services pursuant to a provincial law society’s legislated authority, can be exempted from s. 802.1’s restrictions on unregulated agents, and can therefore provide summary conviction legal services subject to any restrictions imposed by the legal regulator (for example, lawyer supervision requirements for law students).

This amendment would correct a significant oversight in the Bill, and would do so in a way that best respects shared provincial-federal responsibilities within the administration of the Canadian justice system. Absent such an amendment, Bill C-75 would inappropriately interfere with the independent regulatory mandate of provincial law societies, and by reliance on ongoing provincial government action would insufficiently guarantee continued affordable access to competent legal representation.

Thank you for your attention to our comments. Please let us know if you require any further information.

Yours truly,

Malcolm Mercer
Treasurer

c.c.: The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada

The Honourable Anthony Housefather, P.C., M.P.
Chair of Standing Senate Committee on Justice and Human Rights