



TAB 7

Report to Convocation September 27, 2018

Government and Public Affairs Committee

Committee Members

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Purpose of Report: For Information

**Prepared by External Relations and Communications
Aaron Denhartog 416-947-3300 ext. 5269**

FOR INFORMATION

LAW SOCIETY RESPONSE TO BILL C-75, AN ACT TO AMEND THE CRIMINAL CODE, THE YOUTH CRIMINAL JUSTICE ACT AND OTHER ACTS AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1. On March 29, 2018 Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada introduced Bill C-75, an overhaul of the *Criminal Code*, aiming to improve the efficiency of the criminal justice system and reduce court delays.
2. At Convocation's direction, a report was prepared and tabled with the Standing Committee on Justice and Human Rights on September 1, 2108. The submission can be found at [Tab 7.1](#).
3. Treasurer Malcolm Mercer and Bencher Suzanne Clément presented the Law Society's submission to the Standing Committee on Justice and Human Rights on Monday, September 17, 2018.
4. Law Society staff will continue to monitor progress of the bill through Parliament.



LAW SOCIETY OF ONTARIO

SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS on

BILL C-75

An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

September 2018

Introduction

The following submission is made by the Law Society of Ontario (the “Law Society”) which regulates the province’s more than 52,000 lawyers and almost 9,000 licensed paralegals. The Law Society has the duty to protect the public interest, to maintain and advance the cause of justice and the rule of law, and to facilitate access to justice.

Executive Summary

The Law Society is pleased to offer the following comments on Bill C-75, “*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*” (the “Bill”), which introduces significant reforms to the *Criminal Code* (“the Code”). While the Bill is very broad in scope, our comments are focused on those provisions that pose threats to access to justice and the independent regulation of the legal professions. Specifically, the Law Society draws attention to the proposed classification of offences and the maximum penalties that attach to them as these changes would restrict paralegals, lawyer licensing candidates¹ and law students (“regulated agents”) from appearing on summary conviction matters.

The Bill converts most indictable offences punishable by a maximum penalty of 10 years or less into hybrid offences and increases the default maximum penalty for summary conviction offences from 6 months to two years less a day of imprisonment.

However, section 802.1 of the *Code* prohibits a regulated agent from appearing before a criminal court if the defendant is an individual and is liable to imprisonment for a term of more than six months. When the proposals for higher maximum sentences are read in conjunction with s. 802.1 of the Code, the effect is that regulated agents will lose the ability to appear

¹ Most lawyer licensing candidates are articling students. Other candidates participate in the Law Practice Program or Le Programme de pratique du droit.

before courts on summary conviction offences because the new default penalty will exceed six months imprisonment.

Regulated agents currently provide affordable and accessible representation to vulnerable clients who might not otherwise have representation. While the Law Society supports the government's intention in developing the Bill, the provisions mentioned above will have the unintended and counterproductive effect of restricting access to justice, particularly for marginalized people.

We recommend a straightforward amendment to the Bill to maintain a separate category of summary conviction offences that are subject to a default maximum penalty of six months' imprisonment. This approach will correct a significant oversight in the Bill while supporting the government's efforts to streamline offences and improve court processes.

Background

The Law Society acknowledges the federal government's commitment to advancing access to justice, reducing judicial delays and enhancing fairness. We recognize that the Bill includes several proposals that are consistent with these goals. However, as discussed below, longer potential sentences result in fewer options for representation. This proposed change may be especially detrimental to vulnerable groups who are already disproportionately represented in the criminal justice system.

a. Potential Impact on Scope for Agents

Most summary conviction offences in the *Code* are currently punishable by a maximum penalty of six months' imprisonment. The Bill converts most indictable offences punishable by a maximum penalty of 10 years or less into hybrid offences and, at the same time, increases the default maximum penalty for summary conviction offences to two years less a day of imprisonment.

The *Code* permits an accused person to appear before a court on a summary conviction offence either personally, by counsel, or by agent. In Ontario, licensed paralegals, licensing candidates, and law students are all considered “agents” for the purposes of the *Code*.² However, section 802.1 of the *Code* restricts an agent’s ability to appear before a criminal court if the defendant is an individual and is liable to imprisonment for a term of more than six months.

When the proposed provisions related to higher maximum penalties for summary convictions are read in conjunction with section 802.1 of the *Code*, it becomes clear that the Bill would effectively eliminate the ability of Ontario’s regulated agents to appear before courts in the criminal matters in which they currently are permitted to appear.

b. Roles of Ontario Paralegals, Licensing Candidates and Law Students

Ontario’s regulated agents play an active role in appearing before the Ontario Court of Justice to represent individuals on summary conviction offences.

In Ontario, paralegals are independent legal professionals who are licensed and regulated by the Law Society to provide a defined set of legal services to the public based on their training and education. Overall, criminal and quasi-criminal law accounts for the largest area of legal services provided by Ontario paralegals and many paralegals report that they dedicate a significant portion of their practice to representing clients on summary conviction offences before the Ontario Court of Justice.

Likewise, Ontario’s articling students and law students are involved in court appearances related to summary conviction matters. Articling students report either regularly or frequently

² The Law Society of Ontario’s *Rights of Appearance* document sets out certain matters for which the Law Society’s governing legislation and by-laws permit paralegals, licensing candidates and law students to appear. Available online at: <http://www.lsuc.on.ca/licensingprocess.aspx?id=2147498113>.

attending court or tribunal hearings to speak to routine administrative matters (for example unopposed adjournments, uncontested and consent motions, and set dates). Articling students also conduct permitted hearings or trials regularly or frequently. These activities include participating in summary conviction matters.

Regarding law students, there are approximately ten law schools across Canada, including Ontario's seven law schools, that operate legal clinics representing clients in summary conviction matters. Students who are enrolled in these programs are supervised by licensed lawyers in each jurisdiction. In these clinics, clients are able to access law student representation if they are financially eligible and if they do not otherwise qualify for a lawyer through legal aid. This includes access to representation in criminal matters.

Moreover, numerous criminal lawyers and firms hire law students, particularly during the summer months. These student jobs can involve regular court appearances for routine aspects of summary conviction matters.

Law Society's Recommendation

The Law Society recommends maintaining a separate category of summary conviction offences that are subject to a default maximum penalty of six months' imprisonment. If such a category were maintained in the *Code*, there would be no issue with the continued operation of s. 802.1, and agents would be permitted to appear on those offences but not on all other summary conviction offences. This outcome would effectively preserve the status quo.

Analysis

The Law Society's recommended approach would address three critical issues raised by the Bill: negative impacts on access to justice, disproportionate impacts on Indigenous and racialized people and the Law Society's jurisdiction to regulate scope of practice.

a. Negative Impacts on Access to Justice

i. The Gap Population

The Law Society has a statutory duty under the *Law Society Act* to facilitate access to justice for the people of Ontario. We understand that access to justice is also one of the federal government's priorities.³ A troubling challenge to access to justice is the presence of a "gap population", a sector of the population that does not qualify for legal aid based on income but cannot afford legal representation.⁴ A study commissioned by Legal Aid Ontario shows that this gap population is more likely to be made up of the working poor, Indigenous people and visible minorities.⁵ If agent representation is eliminated, it is likely that more vulnerable people facing longer sentences will fall into the gap population and go without representation, hindering efforts to improve access to justice.

ii. Court Delays

By eliminating a relatively affordable option for representation, the Bill may contribute to longer court delays. Unrepresented accused are generally ill-equipped to conduct criminal

³ Department of Justice. 2018–2019 Departmental Plan, page 13. Available online at:

http://publications.gc.ca/collections/collection_2018/jus/J1-18-2018-eng.pdf.

⁴ "Access to Justice Part 2: Legal Aid". Report of the House of Commons Standing Committee on Justice and Human Rights, October 2017. "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada". Report of the Standing Senate Committee on Legal and Constitutional Affairs, August 2016.

⁵ Information presented by Legal Aid Ontario to the House of Commons Standing Committee on Justice and Human Rights. (JUST, Evidence, 1st Session, 42nd Parliament, 2 February 2017). Available online at:

<http://www.ourcommons.ca/Committees/en/JUST>.

trials. Judges and crown attorneys must frequently assist these accused to ensure the proceedings are fair and these circumstances have been shown to significantly slow criminal proceedings, frustrating access to justice efforts.⁶ Furthermore, court delays interfere with an individual's *Charter* right to be tried in a reasonable time. The Minister of Justice has acknowledged that the system is under significant strain and that delays are becoming an increasingly serious problem.⁷ The need to address this issue, which became clear in the *Jordan* decision, motivated the development of Bill C-75.

iii. Right to Counsel

The Law Society is also concerned that potentially longer conviction sentences for summary offences and the consequent elimination of agent representation will weaken the constitutional right to counsel recognized by Canadian courts.

b. Disproportionately Negative Impacts on Indigenous, Racialized Persons and Immigrants

Reducing the rate of overrepresentation of Indigenous and marginalized Canadians in the justice system and the exploration of sentencing alternatives are priorities for the federal government.⁸ However, maximum penalty increases for summary conviction offences would disproportionately impact Indigenous and racialized persons, thereby undermining broader justice sector goals.

⁶ For example, Department of Justice data indicates that cases with intermittent legal representation required, on average, 298 days to reach conclusion. In comparison, cases with total representation took an average of 160 days and those with no representation took an average of 189 days to reach completion. "Jordan: Statistics Related to Delay in the Criminal Justice System". Just Facts, Department of Justice, Research and Statistics Division, December 2017. Available online at: <http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/dec01.pdf>.

⁷ Department of Justice Charter Statement - Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, March 2018. Available online at: <http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html>.

⁸ Minister of Justice and Attorney General of Canada Mandate Letter (November 12, 2015). Available online at: <https://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

When Parliament increases a maximum penalty, courts interpret this as a signal that stronger sentences should be imposed.⁹ Statistics show that Indigenous and racialized adults account for a disproportionately high number of all incarcerations¹⁰. Therefore it is likely that longer sentencing ranges will disproportionately impact these populations and will increase, rather than reduce, their rates and lengths of incarceration.

Moreover, because historical overrepresentation at all stages of the criminal justice system has resulted in Indigenous and racialized persons being more likely to have prior convictions, they may be more significantly affected by increases in sentencing ranges.

Further, Indigenous and racialized people are arrested and incarcerated at higher rates than the general population and also tend to have lower average incomes¹¹. Consequently, it is likely that the lack of affordable representation would have a greater impact on these groups.

The proposed amendment to summary conviction offences will also impact the admissibility of permanent residents and foreign nationals into Canada. Under the *Immigration and Refugee Protection Act*, a permanent resident or foreign national may be inadmissible on the grounds of “serious criminality” which includes cases where a person has been sentenced to a term greater than six months. In addition, the Immigration Appeal Division of the Immigration and Refugee Board of Canada will not consider an appeal from a permanent resident who has been given a sentence of six months or more.

⁹ *R. v. Lacasse*, 2015 SCC 64 at para 7; *R. v. Nur*, 2011 ONSC 4874 at paras 54, 56.

¹⁰ Office of the Correctional Investigator, 44th Annual Report to Parliament. 2016-2017 Presentation Deck. Available online at: <http://www.oci-bec.gc.ca/cnt/comm/presentations/presentationsAR-RA1617-eng.aspx>. As of 2017, the representation of inmates by race are as follows: Caucasian (54%), Black (8.6%), Asian (4.8%), Indigenous (27%), Hispanic (1%) and Other (2%). The makeup of the Canadian population is as follows: Blacks (3.5%), Aboriginal identity (4.9%), Caucasian or other (72.9%).

¹¹ Statistics Canada. 2016 Census Data. Available online at: <https://www12.statcan.gc.ca/census-recensement/index-eng.cfm>.

Overall, Bill C-75 results in more vulnerable people, whether from Indigenous, racialized or immigrant communities being deprived of affordable, accessible legal representation.

c. Importance of Preserving Law Society Jurisdiction over Scope for Agents

The Law Society has authority to determine the scope of legal services provided by its licensees and training candidates. It is a critical component of self-regulation and independence of the legal professions. This authority would be diminished by a federally-legislated removal of established scope for certain regulated professionals, licensing candidates and students.

Self-regulation for the profession (through the Law Society) has been identified as fundamental to preserving professional independence, the rule of law and access to justice. Regulation of paralegals and oversight of licensing candidates and law students are key elements of providing accessible, competent and independent legal services to the public.

The scope of representation allowed for Ontario paralegals, licensing candidates and law students was designed to take into account the parameters of s. 802.1. These individuals are permitted to represent clients in matters that s. 802.1 covers, but are not permitted to represent individuals in more serious matters beyond s. 802.1's limitations. Education, training and licensing standards have consequently been designed according to this scope. Unless a category of summary convictions offences punishable by a maximum of six months' imprisonment is maintained, Bill C-75 will eliminate the Law Society's current regime that establishes scope of practice for regulated agents in criminal matters.

Exception for a Program Approved by the Lieutenant Governor in Council

The Law Society acknowledges that each provincial cabinet could permit agent representation by approving programs by order in council pursuant to s. 802.1 of the *Code*, which provides (emphasis added) :

*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 the defendant is a corporation **or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.***

Although this avenue exists in the *Code*, the Law Society does not believe seeking the creation of a program by the provincial Lieutenant Governor in Council is a sufficient or appropriate method to address challenges introduced by the proposed amendments for a number of reasons. First, this approach would cede a vital part of the Law Society's independent regulatory authority to the provincial government, which may or may not adopt such a program. Second, this option would require the provincial government to oversee and resource a program on an ongoing basis and make adjustments to it as required. This is more appropriately managed within the regulatory mandate and expertise of the Law Society. Finally, the time it would take to implement such a program may be detrimental to individuals who seek agent representation for summary conviction matters.

Conclusion

The Law Society believes that the proposed amendment to Bill C-75 is a straightforward solution that will preserve access to justice while promoting the goals of the Bill. The Law Society would like to thank the Standing Committee on Justice and Human Rights for the opportunity to make this submission.