CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

Submission to the House of Commons Standing Committee on Justice and Human Rights

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 17, 2018

Abby Deshman, Director, Criminal Justice Program

Canadian Civil Liberties Association
90 Eglinton Ave. E., Suite 900
Toronto, ON M4P 2Y3
Phone: 416-363-0321
www.ccla.org
Contact: media@ccla.org

Canadian Civil Liberties Association (CCLA)

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, non-profit, non-governmental organization, working in the courts, before legislative committees, in the classrooms, and in our communities, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

Summary

The Canadian Civil Liberties Association supports the stated goals of Bill C-75, and applauds the government for taking steps to address several pressing issues in Canada's criminal justice system. We in particular welcome the government's efforts to stem the deluge of administration of justice offences, address racial discrimination in the jury system, tackle a bail system that unnecessarily detains and restricts the legally innocent, and end mandatory victim fine surcharges. These issues disproportionately impact those who are racialized, living in poverty, and experiencing mental health and addiction challenges. The failures of our criminal justice system in these and other areas further entrench existing disadvantage, marginalization, and discrimination.

Reform is overdue. In a number of areas – the bail system, administration of justice offences and addressing racial discrimination in the jury system – our submissions will outline a number of ways in which we believe the proposed provisions should be strengthened in order to achieve the government's objectives. We strongly believe that, if change is to be achieved in these areas, more fundamental reforms are necessary.

There are, however, several aspects of Bill C-75 that have been the subject of significant criticism from the legal community. CCLA agrees with many of the concerns that have been raised, and strongly urges this Committee to address these concerns. These include:

- Removing the provisions shielding police testimony from defence scrutiny;
- Reverting to the existing maximum sentence structure for summary offences; and
- Softening the restrictions on the availability of preliminary inquiries;

A consolidated list of recommendations is provided as an appendix to the submissions.

1. Strengthening bail system reform

CCLA strongly supports significant reforms to Canada's bail system. Despite a steadily declining crime rate, including marked reductions in violent crime rates, the remand rate in Canada has nearly tripled in the past 30 years. Currently the majority of people detained in provincial and territorial jails are legally innocent, waiting for their trial or a determination of their bail. 2005 marked the first time in Canadian history that our provincial institutions were primarily being used to detain people prior to any finding of guilt, rather than after they had been convicted and sentenced.

The CCLA has made it a priority to understand and propose reforms to Canada's bail system. As outlined in our 2014 report, *Set up to Fail: Bail and the Revolving Door of Pre-trial Detention*, our bail system is slow and risk-averse. Bail proceedings regularly impose unnecessary conditions and onerous forms of release that do little more than set a person up for further criminal charges. In CCLA's study we conducted weeks of in-court observations across the country. We documented 196 observed bail

releases across five jurisdictions; not a single person was released without restrictive conditions. The legal presumption in the law of bail – that the starting point is unconditional release – is too often ignored. The cycle of incarceration, conditional release, and reincarceration disproportionately impacts individuals from remote communities, those who are living in poverty, struggling with addictions and mental health issues, and racialized populations.

For these reasons, the CCLA welcomes the government's attempts to address Canada's bail system through legislative reform. We strongly support the proposed amendments that reinforce the 'ladder' principle and restraint in the use of sureties, as well as the direction to give particular attention to the circumstances of Indigenous accused or those belonging to other vulnerable, overrepresented populations.

In our view, however, further reforms will be necessary if there is to truly be a change in the on-the-ground realities of Canada's pre-trial release process. The proposed amendments fall short of the wholesale legislative reset of pre-trial release that experts have suggested is necessary in order to address the culturally ingrained risk aversion in this area. There are also significant power imbalances inherent to the bail stage of criminal proceedings that undermine the application of established law. The ladder principle and restraint in the use of sureties, for example, have been part of the law of bail in Canada for decades; it is not just the law, but the application on the ground that needs to be addressed. Legislative reform can help, but to be truly impactful it must go beyond 'tinkering' to signal a true and fundamental change in the operation of this area of law.

We view many of the bail provisions in this legislation as first welcome step towards wholesale reform. To assist in making the first of many significant changes that are necessary in this area, however, CCLA strongly urges this Committee to make further amendments to strengthen the proposed bail reforms. Below we outline eight amendments that we believe could make a truly significant difference in the operation of pre-trial release in Canada.

a. Clarification of the scope of the secondary ground of detention, s. 515(10)(b).

In *R v Morales*, [1992] 3 S.C.R. 711, the Supreme Court determined that the *Charter* right to reasonable bail required a restrictive reading of the secondary grounds of detention. The Court found, at para 737, that to satisfy s. 11(e) of the *Charter of Rights and Freedoms* the "scope of the public safety component of s. 515(10)(b)" must be "sufficiently narrow…":

> Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public." Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.

In practice, however, the secondary grounds are too often used to justify detention or impose conditions where there is even a small risk an individual will commit any other *Criminal Code* offence. An individual who is addicted to drugs should not be detained simply because there is a risk that he or she will continue to be subject to the throes of addiction. As the Supreme Court ruled in *Morales*, pre-trial detention and conditional release must have a tighter focus on addressing serious risks to safety.

The language of the secondary grounds for detention should be amended to clarify that detention (and by extension the imposition of conditions of release) is not justified unless it is "necessary to address a substantial likelihood an individual will commit an offence or interfere in the administration of justice in a manner that is substantially likely to endangers the protection or safety of another individual." This language would more clearly fulfill the requirements of the *Charter* right to reasonable bail and reflects the Supreme Court's holding in *Morales*.

b. Systematize and strengthen the language regarding the required connection between conditions and the grounds for detention.

The law on the required connection between form and conditions of release and the statutory grounds for detention is clear: restrictive forms of release, and any conditions imposed upon release, may "'only be imposed to the extent that they are necessary' to address concerns related to the statutory criteria for detention and to ensure that the accused can be released." *R v Antic*, 2017 SCC 27 at para 67.

Bill C-75, however, uses different language in different places to describe the standard that should be met before a condition or a restrictive form of release is imposed.

In provisions regarding police-imposed conditions, for example, the Bill states that conditions must be "reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety and security of any victim or witness to the offence, or to prevent the continuation or repetition of the offence or the commission of another offence" (Bill C-75, Cl 217, s. 501(3)). The ability to impose police conditions in order to prevent any offences future offences extends far beyond the statutory grounds for detention, and in CCLA's view would contravene the *Charter* right to reasonable bail.

For judicially-imposed conditions, a variety of different language is used. For example:

- the prosecution must "show cause" why less onerous forms of release would be "inadequate" (cl 227(1), s. 515(2.01));
- the justice must be satisfied that a surety is "the least onerous form of release possible… in the circumstances" (cl 227(1), s. 515(2.03));
- a release order "may include any additional conditions… that the justice considers desirable" (cl 227(7), s. 515(7)); and
- the justice "may direct the accused to comply with one or more of the following conditions," including "any other reasonable conditions … that the justice considers desirable" (cl 227(3), s. 515(4)(h)).

Again, the *Charter* right to reasonable bail requires that conditions be necessary, reasonable, and clearly tied to statutory grounds of detention; much of the above language suggests otherwise.

The language regarding the imposition of conditions and forms of release should be standardized and brought into compliance with the *Charter* and Supreme Court jurisprudence. Conditions of release must both reasonable in the circumstances and strictly necessary to address concerns related to the statutory criteria for detention. In particular:

- **Clause 217, s. 501(3) should be amended to reflect requirement that conditions be necessary to address the statutory grounds for detention in the *Criminal Code* (s. 515(10));**

- **Language that suggests that judicial conditions can be imposed in situations where they are not strictly necessary (eg. conditions "that the justice considers desireable") should be amended; and**
- **Bill C-75's proposed amendment to the *YCJA* clarifying when conditions (cl 371, s. 29(1)) should be imposed is a clear and useful format that should be reproduced in the *Criminal Code* and made applicable to police conditions and judicially imposed conditions for adults.**

c. Enhance fairness in the bail adjudication process by specifying that decisions on form of release can be made through a two-step procedure

In *R v Antic*, 2017 SCC 27, the Supreme Court of Canada reinforced the basic principles applicable to bail proceedings in an attempt to bring legal rigor and uniformity to bail decision-making. The legal requirement to adhere to the ladder principle, which is also helpfully reinforced in Bill C-75, was a primary focus for the Court.

In Ontario, the bail process has strayed considerably from the ladder principle. Most bail releases proceed with a surety or another restrictive form of supervision intended to be a surety substitute. Sureties are usually required to testify in-person – even when a matter proceeds on consent – and in a fully contested application there is a default expectation that the defence will call a surety to testify. Not only does this run counter to the *Charter* right to reasonable bail, it also disproportionately impacts accused from remote communities – including in particular Indigenous accused – who are frequently subject to bail proceedings in locations that are far from their home communities, friends and families.

One way to assist the application of the ladder principle in bail courts is to establish a default bifurcated contested bail procedure. In Crown-onus bail hearings, the Crown must prove that the restrictive form of release being requested is necessary to address concerns with a statutory ground of detention. If the judge or justice of the peace finds that the Crown has met its burden to show that a surety is required, evidence may then be presented about a proposed surety. In some jurisdictions it is common for this second step to occur at a later time. This avoids a situation where defence counsel is required to call a potential surety to testify before the Crown has met its evidentiary burden, a practice that in many cases confuses the burden of proof and results in a *de facto* requirement being put on the accused to "present" a suitable release plan to justify his or her release.

In *R v Tunney*, 2018 ONSC 961, Justice Di Luca ruled that it was an error to refuse to bifurcate the bail hearing. In many jurisdictions a bifurcated process is the norm. While this process may not always be preferable, CCLA strongly agrees with Justice Di Luca that in "most cases" a bifurcated approach "will be appropriate" (para 56).

This process reinforces the law by ensuring the appropriate burden of proof in Crown onus situations. Forcing the court to rule first on the appropriate form of release significantly assists in addressing the tendency in some jurisdictions to assume that, absent proof, a surety is required and the burden is on the accused to satisfy the court that a suitable surety is available.

Without reforms to the procedures and practices in in bail courts, many of the amendments proposed in Bi C-75 will fall short of making the necessary changes to the bail process. As Justice De Luca wrote at para 57:

> I conclude by recognizing that there is an inherent comfort in "doing things" as they have been done for years. Change is uncomfortable. However, much like the *Jordan* decision called for a change to the culture of complacency and delay, the *Antic* decision signals the need for a change in our bail culture. The message is clear. We need to do things differently.

Change – and in particular change after many years of established practice in a relatively informal setting such as bail court – is slow. This Committee has the opportunity to significantly assist Ontario courts in making the necessary procedural changes to the bail process. **The CCLA recommends adding a provision putting in place a presumption that, in Crown-onus show cause hearings, the justice or judge shall first decide on the appropriate form of release, before deciding on the suitability of a surety if necessary. These processes should only be blended with the consent of the accused.**

d. Ensure a previous conviction is not an elevated factor in the bail consideration process

Bill C-75 introduces s. 515(3)(b), which, if passed, would specifically directing judges to consider an individual's prior convictions during the bail decision. Although the existence and nature of a criminal record should be a factor in the determination of bail, it should not receive elevated priority over other relevant considerations. Highlighting this factor to the exclusion of almost all others risks signaling to judges and justices of the peace that a prior conviction is uniquely important in the determination of judicial interim release for unrelated charges. **Clause 227(3), s. 515(3)(b) is unnecessary and risks increasing unjustified detentions and conditions of release; it should be removed.**

e. Address circumstances where an individual is held in pre-trial detention for longer than he or she is likely to be incarcerated upon conviction

Although punishment is not the intended purpose of pre-trial detention, every day an individual spends behind bars is a punitive experience. It is widely recognized that conditions for an individual held in a pre-trial detention facility are generally harsher than those experienced by convicted and sentenced offenders, and courts regularly give enhanced credit for time served pre-trial to reflect this reality.

It is not unusual, however, for a person to be held in pre-trial custody for longer than he or she would likely be sentenced to if found guilty of the underlying charge. Under these circumstances, the pressure on an individual to plead guilty simply in order to be released from jail with a sentence of 'time served' is overwhelming. This is unacceptable and an affront to the presumption of innocence; as stated by the Supreme Court, "[a]n accused is presumed innocent and must not find it necessary to plead guilty solely to secure his or her release." *R v Antic*, 2017 SCC 27 at 66.

In a functional criminal justice system, individuals should be punished only after a finding of guilt; under no circumstances should the pre-trial process operate in a more punitive manner than an appropriate sentence for the underlying offence.

The *Criminal Code* should directly address situations where the operation of the bail system subjects an individual to greater punishment than he or she would generally face upon a finding of guilt. If there is little to no prospect that a person would be subject to a term of imprisonment, he or she should not be subject to pre-trial detention. Similarly, there should be a remedy if the length of time it takes to determine an appropriate bail exceeds the likely range of sentence that a person would receive upon conviction.

This can be accomplished by introducing two additional amendments. **CCLA urges this Committee to introduce a provision that requires a person to be released pending trial if there is little to no prospect that he or she would be subject to a term of imprisonment upon conviction. Section 525 of the *Criminal Code* should also be amended to allow an individual to bring an application for review and immediate release if they have already been detained for longer than the likely sentencing range that would be considered upon conviction.**

f. Remove the new reverse onus provision, and repeal existing reverse onuses applicable to bail proceedings

Multiple reports have recommended repealing various reverse onus bail provisions in the current *Criminal Code*.[1] The reverse onus provision for administration of justice charges has been singled out as having a particularly detrimental impact on the bail system. Instead of repealing these provisions, however, Bill C-75 proposes to *add* a new reverse onus.

Section 515(6)(b.1), if passed, would create a new reverse onus for some individuals who have previously been convicted of an offence that involved violence, threatened violence or attempted violence against any intimate partner. CCLA understands that the goal of this provision is to restrict access to bail for individuals who represent ongoing threats to their intimate partners. As is the case with many *Criminal Code* provisions, however, a very wide range of individual conduct, situations and circumstances can lead to a criminal charge and conviction. In recent years, for example, there has been an increase in the number of women arrested in connection with allegations of intimate partner violence; studies have shown that most women arrested in these circumstances were living with men who were abusive.[2] Mandatory or pro-charging and prosecution policies, while effective in increasing the number of abusive partners brought before the criminal justice system, can also have the effect of criminalizing victims who are caught in an abusive relationship.[3] Research has shown that "women who are marginalized by poverty, racism or other social factors experience particular negative impacts."[4] Broad reverse onus provisions interfere with the difficult, individualized judgment calls that are necessary in domestic violence-related bail proceedings and compound existing problems in our bail system.

As recommended by expert reports, an amendment should be introduced to repeal s. 515(6) of the *Criminal Code.* At a minimum, s. 515(6)(c) should be repealed.

---

[1] See, for example, Hon Justice Raymond E. Wyant, "Bail and Remand in Ontario" (Dec 2016), Recommendation 11.5; Steering Committee On Justice Efficiencies And Access To The Justice System, "The Final Report On Early Case Consideration" (2006), Recommendation Ten; Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (July 2014), Recommendation 7.2; John Howard Society of Ontario, "Reasonable Bail?" (Sept 2013), Recommendation 1.4.

[2] Shoshana Pollack, Melanie Battaglia and Anke Allspach, "Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies" (March 2005), http://www.oaith.ca/assets/files/Publications/womenchargedfinal.pdf.

[3] Cheryl Fraehlich and Jane Ursel, "Arresting Women: Pro-arrest Policies, Debates, and Developments" *J Fam Viol* (2004) 29: 507-518.

[4] Deborah E Conners and Holly Johnson, "What do women survivors of partner abuse think about mandatory charging? A review of the research" (March 2017) http://www.buildingabiggerwave.org/images/uploads/Lit_Review_-_Mandatory_Charging.pdf.

g. Amend s. 516(1) of the *Criminal Code* to allow for increased flexibility when determining where an accused will be held after an adjournment.

Currently, section 516(1) of the *Criminal Code* requires that, after the first appearance before a justice, an accused whose bail remains undecided be remanded "to jail". This has been interpreted to mean that all accused whose bail is not yet decided must be remanded to a correctional institution after the first remote appearance, regardless of the circumstances. In 2013 the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group recommended examining whether s. 516(1) should be amended *"*to permit an accused person, with his or her consent, to be remanded to somewhere other than "custody in prison" before or during a bail hearing. Such an amendment could potentially allow an accused person to remain in the community for his or her bail hearing."[5] **CCLA urges this Committee to amend s. 516(1) by deleting the words "to jail"; this would provide latitude to the provinces to implement flexible solutions and explore in place a range of custody arrangements for accused from remote communities while their bail is being determined.**

h. Expand scope for bail review under s. 520

In *R v St-Cloud*, 2015 SCC 27, the Supreme Court took a restrictive view of the scope of review available under s. 520 of the *Criminal Code*. The Court found that, upon application, a reviewing court can only intervene if there was an error in law, if the decision was clearly inappropriate, or there was a material change in circumstances.

A narrow approach to bail review is inappropriate. Studies have clearly shown that there are significant difficulties applying the law in bail courts. This stems in part from the nature of the proceedings. Bail court is not a typical adjudicative forum, where defence and crown counsel regularly argue the merits of a case. Almost all releases proceed by consent, and many accused persons will agree to any condition in order to be released immediately rather than wait in jail for a contested bail hearing with an uncertain outcome. Moreover, unlike plea deals at the sentencing stage, the timeframe for receiving legal advice and weighing options at bail is very compressed. Most accused persons only benefit from a brief discussion with a duty counsel, who may or may not be the same duty counsel they spoke to previously, before deciding whether to consent to conditions or request a contested bail hearing. In short, bail release decisions are made when accused persons are uniquely vulnerable. The consensual nature of 'consent' releases is questionable. In these circumstances, reviewing courts should have a broad latitude to reexamine a bail decision, including where a release decision initially proceeded by consent and there have been no material changes in circumstances.

S. 520 of the *Criminal Code* should be amended to ensure that bail reviews are conducted on a standard of correctness and that there is broad latitude for the reviewing court to receive evidence not produced at first instance.

2. Administration of justice offences

As noted above, unnecessary and unrealistic release conditions lead to the criminalization of otherwise legal behaviour. One of the symptoms of this problem is the well-documented deluge of administration of justice charges that are coming before our criminal courts.

[5] Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group, "Report on fly-in court operations" (August 2013), http://www.ontariocourts.ca/ocj/ocj/publications/fly-in-court-operations/.

CCLA supports the government's attempts to address this issue. We have significant concerns, however, that the specific measures proposed in this Bill – creating a parallel non-criminal procedure available to some individuals accused of violating a bail condition – will not have the intended effect. The decision about whether or not an eligible individual will be sent to this new process is entirely within the discretion of prosecutors and police officers. Studies have consistently pointed to risk aversion as an overarching, long-term driver of bail and police detention trends. In this context, there is a real risk that this process could be net widening: instead of diverting those who would otherwise face criminal charges, it is likely instead to sweep up individuals who commit minor breaches and who the police would currently choose to simply let go with a warning. Prosecutors already have processes to dispense of minor bail breaches: they can ask for a reconsideration of bail under s. 524, and may exercise their discretion to withdraw charges.

The real issue is not a lack of police or prosecutorial options for dealing with bail violations – it is an overly broad criminalization of otherwise legal and relatively harmless behaviour.

CCLA strongly supports the recommendations of Professor Marie-Eve Sylvestre: ss. 145(4)(a) and (5)(a) of the *Criminal Code* should be amended to limit the offence to breaches of conditions that resulted in a threat to the safety of the public, a victim, or a witness.

At a minimum, any alternative process to deal with bail breaches must be accompanied by clear presumptions that automatically divert individuals who are currently likely to be criminalized into the non-criminal stream. In addition to police and crown counsel, defence counsel should also be able to trigger consideration under this alternative process.

3. Sentencing reforms

Bill C-75 proposes significant changes to the *Criminal Code*'s sentencing regimes. Currently, most summary offences are subject to a maximum 6 month sentence. Clause 318 of the Bill would increase the maximum sentence to 2 years less a day for all summary conviction offences.

The benefits of these changes are uncertain at best. What is clear, however, is that there will be significant collateral impacts to such broad amendments. These include:

- Prohibiting paralegals and law students from assisting on summary conviction matters, creating increased access to justice barriers in a system already experiencing a crisis of unrepresented accused persons;
- Greatly increasing the legal jeopardy of permanent residents charged with summary conviction offences, as the threshold cutoff for "serious criminality" under the *Immigration and Refugee Protection Act* is over six months; and
- Expanding the class of individuals who will be inadmissible to the United States due to the commission of a crime of moral turpitude.[6]

It does not appear that the government intended these sentencing changes to interfere with access to justice or increase the punitiveness of the Canadian criminal justice system. Without addressing these collateral impacts, however, that is precisely the outcome that will be achieved.

[6] The submissions to this Committee from lawyer Kenneth Golish are helpful on this point.

CCLA recommends eliminating the new presumptive maximum for summary offences and reverting to the existing maximum sentences.

At a minimum, if the sentencing presumptions are changed, s. 802.1 of the *Criminal Code* and s. 36(1)(a) of the *Immigration and Refugee Protection Act* must also be amended to address the unintended collateral consequences of the new sentencing structure. The *Criminal Code* sentencing changes should not come into force until discussions with the United States can occur to negotiate the required coordinated changes to US immigration law.

4. Relaxed admission of police evidence

Bill C-75 would introduce major changes with respect to police evidence.

First, clause 278 of the bill would allow "routine police evidence", if otherwise admissible through testimony, to be admitted into evidence in criminal proceedings via affidavit or solemn declaration. The presiding judge would have discretion to decide whether to allow admission of this evidence in written form or to require attendance to the officer in court, for an examination-in-chief and/or cross-examination.

Second, clause 294 would establish that transcripts of police evidence are admissible in criminal trials where that evidence had been given in the presence of the accused at a *voir dire* or a preliminary inquiry on the same charge. Once again, the presiding judge would have discretion to decide whether to require the attendance of the officer in court, for examination-in-chief and/or a cross examination.

The government has argued that clause 278 provides effective protection of the accused's *Charter* rights because it would require the judge to call the police for cross-examination when necessary.[7] The judge would be guided by enumerated factors, including the accused's right to make full answer and defense and the importance of promoting a fair and efficient trial. For clause 294, the government has argued that because the accused would have been present at the initial judicial hearing where the police evidence was given, the accused would have already benefitted from any relevant procedural or *Charter* protections. [8]

These arguments are unconvincing. In CCLA's view, these amendments are at best superfluous, and at worst a serious and unjustifiable infringement of *Charter* rights.

First, it is unclear why these amendments are necessary. A Crown and an accused may already admit brief, necessary and relevant evidence quickly via a statement of admission or of agreed facts. If both parties agree that information is uncontroversial, this provision serves no purpose. These provisions would therefore only come into play when there is a real dispute concerning the reliability or appropriateness of admitting transcripts of previous police testimony. By requiring judges to presume the credibility of contested police evidence, these provisions reverse the onus from the Crown to the accused to demonstrate whether evidence is credible. This is a frontal assault on the presumption of innocence.

The rationales for limiting cross-examination – that the evidence is 'routine' (clause 278) or has already been subject to cross-examination (clause 294) – are ill conceived. The definition of "routine police

[7] *Ibid.*
[8] Charter Statement

evidence" is broad and vague, ostensibly including evidence flowing from almost any form of police activities that are "routine". The fact that police activity is 'routine' in no way ensures that the evidence derived from that activity should be accepted without cross-examination.

Clause 294 raises additional concerns. *Voir dires* and preliminary inquiries are distinct pre-trial procedures with very specific purposes. Testimony and cross-examination at a *voir dire*, for example, will only be relevant to a relatively narrow legal question – for example, the voluntariness of a particular statement, or whether there was a *Charter* violation during a police search. The same police evidence, however, will be relevant to a much broader set of issues at trial. Similarly, in a preliminary inquiry credibility of Crown witnesses is not at issue – this is not the case at trial, where witness credibility is often a central issue to be determined. Even where a particular police witness' credibility is not at issue trial, cross examination at a preliminary inquiry – which will often take place part way through the preliminary inquiry process, without the benefit of having heard all the Crown's evidence – is not equivalent to subsequent cross-examination at trial. Conflating these two processes undermines the discovery functions of a preliminary inquiry.

These proposed amendments are a serious affront to due process, fundamental justice and the *Charter* rights of the accused. CCLA strongly urges this Committee to remove clauses 278 and 294 from the Bill.

5. Preliminary inquiries

Bill C-75 contains provisions that would limit the availability of preliminary inquiries (PIs) to accused adults charged with offences punishable by life imprisonment, such as murder and kidnapping. The government's primary rationale for the elimination of preliminary inquiries is that the elimination of PIs for certain offences may lead to speedier trials.[9]

There is, unfortunately, insufficient evidence to ground this conclusion. Published studies and statistical analyses on this issue show mixed results.[10] The most recent published academic study on this matter concluded that "alterations to the preliminary inquiry are unlikely to have a significant impact on the speed or efficiency with which cases are resolved in the criminal justice system."[11]

The statistics do show that charges with a preliminary inquiry took more time to reach a final decision than charges that did not have a preliminary inquiry. Causation, however, cannot be inferred from correlation. We simply do not have the data to show that these same cases would have taken less time without the benefits of a PI. Cases that stream into PI may by nature be longer cases because they contain charges that must involve complex trials if they are protect the rights of the accused. Moreover, many other factors play an important role in trial length, including the volume of charges laid by the police, the capacity of the court system (number of court rooms), the availability of court resources (number of judges), the availability of legal aid and other initiatives (e.g., restorative justice programs, alternatives measures, etc.). Many have argued the opposite proposition: that PIs save time by 'weeding out' unmeritorious cases, narrowing this issues that should go to trial, and facilitating plea deals. Determining the likely overall impact of PIs on trial length is even more difficult because PIs are used in very different ways across the country.

---

[9] Charter Statement

[10] Department of Justice, "JustFacts" (June 2017), http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jun01.html.

[11] Cheryl Webster and Howard Bebbington, "Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations" (2013) 55(4) *Canadian Journal of Criminology and Criminal Justice* 513 at 526.

While the benefits are uncertain, many in the legal community have raised significant concerns about the impact that eliminating preliminary inquiries will have on the right to a fair trial. In the experience of many defence counsel, the discovery functions of a preliminary inquiry cannot be adequately fulfilled through *Stinchcombe* disclosure. The Criminal Lawyers Association and others point to the increasing complexity, scale and scope of the evidentiary record, and the identification of possible *Charter* issues not reflected in written material; CCLA supports these submissions. CCLA also agrees with the CLA that the benchmark of a maximum sentence of life imprisonment is not an accurate proxy for cases where significant liberty interests are at stake.

CCLA supports the Criminal Lawyers' Association's recommendations to maintain the existing availability of preliminary inquiries, or in the alternative provide for a process whereby parties can apply for a preliminary inquiry where it is in the interests of justice.

6. Addressing biased and unrepresentative jury panels

CCLA welcomes the government's attempts to address discrimination through jury selection reform. Simply removing peremptory challenges, however, will be insufficient to address the current racial disparities in juries. **CCLA fully supports the recommendations of Professor Kent Roach regarding further amendments that should be made to ensure fairness and equality in the jury selection process. CCLA also supports the recommendations from the Criminal Lawyers' Association and Professor Roach that this change must be accompanied by an expansion of challenges for cause**.

Appendix: Consolidated Recommendations

1. Strengthening bail system reform

    a. The language of the secondary grounds for detention should be amended to clarify that detention (or the imposition of conditions) is not justified unless it is "necessary to address a substantial likelihood an individual will commit an offence or interfere in the administration of justice in a manner that is substantially likely to endangers the protection or safety of another individual." This language would more clearly fulfill the requirements of the *Charter* right to reasonable bail and reflect the Supreme Court's holding in *Morales*.
    b. The language regarding the imposition of conditions should be standardized and brought into compliance with the *Charter* and Supreme Court jurisprudence. Conditions of release must both reasonable in the circumstances and strictly necessary to address concerns related to the statutory criteria for detention. In particular:
        - Clause 217, s. 501(3) should be amended to reflect requirement that conditions be necessary to address the statutory grounds for detention in the *Criminal Code* (s. 515(10));
        - Language that suggests that judicial conditions can be imposed in situations where they are not strictly necessary (eg. conditions "that the justice considers desireable") should be amended; and
        - Bill C-75's proposed amendment to the *YCJA* clarifying when conditions (cl 371, s. 29(1)) should be imposed is a clear and useful format that should be reproduced in the *Criminal Code* and made applicable to police conditions and judicially imposed conditions for adults.
    c. The CCLA recommends adding a provision putting in place a presumption that, in Crown-onus show cause hearings, the justice or judge shall first decide on the appropriate form of release, before deciding on the suitability of a surety if necessary. These processes should only be blended with the consent of the accused.
    d. Clause 227(3), s. 515(3)(b) is unnecessary and risks increasing unjustified detentions and conditions of release; it should be removed.
    e. CCLA urges this Committee to introduce a provision that requires a person to be released pending trial if there is little to no prospect that he or she would be subject to a term of imprisonment upon conviction. Section 525 of the *Criminal Code* should also be amended to allow an individual to bring an application for review and immediate release if they have already been detained for longer than the likely sentencing range that would be considered upon conviction.
    f. As recommended by expert reports, an amendment should be introduced to repeal s. 515(6) of the *Criminal Code.* At a minimum, s. 515(6)(c) should be repealed.
    g. CCLA urges this Committee to amend s. 516(1) by deleting the words "to jail"; this would provide latitude to the provinces to implement flexible solutions and explore in place a range of custody arrangements for accused from remote communities while their bail is being determined.
    h. S. 520 of the *Criminal Code* should be amended to ensure that bail reviews are conducted on a standard of correctness and that there is broad latitude for the reviewing court to receive evidence not produced at first instance.

2. Administration of justice offences

CCLA strongly supports the recommendations of Professor Marie-Eve Sylvestre: ss. 145(4)(a) and (5)(a) of the *Criminal Code* should be amended to limit the offence to breaches of conditions that resulted in a threat to the safety of the public, a victim, or a witness.

At a minimum, any alternative process to deal with bail breaches must be accompanied by clear presumptions that automatically divert individuals who are currently likely to be criminalized into the non-criminal stream. In addition to police and crown counsel, defence counsel should also be able to trigger consideration under this alternative process.

3. Sentencing reforms

CCLA recommends eliminating the new maximum sentences for summary offences and reverting to the existing maximum sentences.

At a minimum, if the sentencing presumptions are changed, s. 802.1 of the *Criminal Code* and s. 36(1)(a) of the *Immigration and Refugee Protection Act* must also be amended to address the unintended collateral consequences of the new sentencing structure. The *Criminal Code* sentencing changes should not come into force until discussions with the United States can occur to negotiate the required coordinated changes to US immigration law.

4. Relaxed admission of police evidence

These proposed amendments are a serious affront to due process, fundamental justice and the *Charter* rights of the accused. CCLA strongly urges this Committee to remove clauses 278 and 294 from the Bill.

5. Preliminary inquiries

CCLA supports the Criminal Lawyers' Association's recommendations to maintain the existing availability of preliminary inquiries, or in the alternative provide for a process whereby parties can apply for a preliminary inquiry where it is in the interests of justice.

6. Peremptory challenges

CCLA fully supports the recommendations of Professor Kent Roach regarding further amendments that should be made to ensure fairness and equality in the jury selection process. CCLA also supports the recommendations from the Criminal Lawyers' Association and Professor Roach that this change must be accompanied by an expansion of challenges for cause.