October 1, 2018

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada
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Dear Minister Wilson-Raybould,

Thank you very much for your ongoing work to address the alarming rise in pre-trial detention and the related, troubling issues in Canada's bail system. We very much support the government's efforts to address the destructive cycle of pre-trial detention, unnecessarily restrictive pre-trial release, criminalization, and return to detention. As you know, these issues disproportionately impact Indigenous people as well as marginalized populations, such as the homeless, drug users, and individuals with mental health issues.

Many of the signatories to this letter have appeared before the Standing Committee on Justice and Human Rights to share their views on the bail and pre-trial release amendments in Bill C-75. Given that many of the witnesses who appeared before the Committee provided similar evidence on these portions[1] of the Bill, we thought it would be helpful to provide an overview of widely shared views and suggested enhancements.

Most of C-75's proposed amendments to the *Criminal Code*'s pre-trial release and administration of justice provisions are steps in the right direction. We particularly support the provisions reinforcing the principle of restraint, the ladder principle, and the requirement to pay attention to the circumstances of Indigenous accused and other vulnerable, over-represented populations.

For the most part, however, the bail-related provisions in the Bill are simply re-statements of the *status quo.*

Given the significant rule of law challenges and ingrained cultural risk aversion in Canada's bail system, the current legislative proposals are unlikely to result in significant change in the operation of bail and pre-trial release. Ultimately, we believe that the best course of action would be to write a new Bail Act that more clearly structures the discretion to detain or release on restrictive conditions. This is clearly a longer-term endeavor.

For the purposes of this Bill, we believe there are a number of targeted amendments that could significantly improve the administration of bail and pre-trial release in Canada. The signatories to this letter strongly urge you to make the following amendments to strengthen the bail and administration of justice provisions in Bill C-75 and better achieve the government's goals.

[1] Many signatories also have submissions regarding other aspects of Bill C-75. This letter will only address suggested amendments related to bail, pre-trial release, and administration of justice charges.

1. **Narrow the scope of s. 515(10)(b)**

- Amend s. 515(10)(b) to read "where the detention is necessary for the protection or safety of any individual, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances, including a substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere in the administration of justice in a manner that will endanger the protection or safety of another individual."

2. **Clean up the language regarding the required connection between conditions and the statutory grounds for detention**

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 be both reasonable in the circumstances (i.e. proportionate) and strictly necessary to address concerns related to the statutory criteria for detention. In particular:

- Cl 371, s. 29(1) should be reproduced in the *Criminal Code* and made applicable to police conditions and judicially imposed conditions for adults;
- S. 498(1.1)(a)(iii) should be amended: "…prevent the continuation or repetition of the alleged offence or the commission of another criminal offence that will endanger the protection or safety of another individual";
- Cl 217, s. 501(3) should be amended to reflect the requirement that conditions be proportionate and necessary to address the statutory grounds for detention in the *Criminal Code* (s. 515(10)): "…if the condition is reasonable and proportionate having regard to the nature, seriousness and circumstances of the alleged offence, and necessary to ensure the accused's attendance in court, the safety and security of any victim of or witness to the offence, or to address a substantial likelihood that the accused will continue or repeat the offence or commit another criminal offence in a manner that will endanger the protection or safety of another individual."; and
- Ss. 515(4)(f), 515(7), 515(8), 524(9) should be amended to replace the phrase "that the justice considers desirable" with "that the justice finds to be necessary and reasonable in the circumstances". Desirability does not reflect the Charter requirements of reasonableness.

3. **Require judges or justices to provide reasons for the imposition of each restrictive form of release and condition**

The law is clear that conditions and restrictive forms of release may only be imposed when reasonable in the circumstances and necessary to address a statutory ground of detention.

- Amend cl. 227(1) to add a new subsection, 515(2.04): "Upon making an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) or under 515(4), the justice shall state, on the record, the grounds for imposing the conditions."

4. Place limits on some of the most problematic conditions of release

Certain common conditions of release have a disproportionately negative impact on marginalized populations. The following amendments would address some of the most negative collateral impacts:

- Amend cl. 212, s.493.1 to add: "conditions are not to be imposed to punish or solely to modify undesirable behaviour."
- Delete section 501(3)(e) or amend it as follows: "abstain from going to any specified place or entering any geographic area; the perimeter thus delimited must be reasonable having regard to the situation of the accused including those who are Aboriginal or who belong to vulnerable populations, and it must be reasonably necessary to ensure the safety and security of the person referred to in paragraph (d)."
- Amend section 515(4)(e) in the same way to add: "the perimeter thus delimited must be reasonable having regard to the situation of the accused, including those who are Aboriginal or who belong to vulnerable populations, and reasonably necessary to ensure the safety and security of the person referred to in paragraph (d)."
- Add a paragraph to section 501(3) and section 515(4) CCC: "When a peace officer or justice imposes a condition relating to the use of alcohol or drugs, the latter must take into account the accused's level of dependence on one of those substances and give priority to, to the extent that the safety and security of another individual is not compromised, harm-reduction measures rather than abstinence."
- Add a paragraph to sections 501(3) and 515(4) CCC to prohibit the imposition of conditions that limit access to or possession of harm-reduction medical materials or drug paraphernalia.

5. Codify the *R v Tunney* decision to affirm the appropriate process for contested bail hearings

- Add a provision to codify the presumption that, in Crown-onus show cause hearings, the justice shall first rule on the appropriate form of release, before deciding on the suitability of a surety if necessary. These processes may be combined with the consent of the accused.

6. Repeal reverse onuses

- Add an amendment to repeal s. 515(6) of the *Criminal Code.* At a minimum, s. 515(6)(c) should be repealed.

7. Address circumstances where pre-trial detention extends for longer periods of time than the likely sentence upon conviction

Courts have recognized that "public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if convicted"[2] and have ordered individuals released on this basis after lengthy periods in pre-trial custody. This principle should be clearly codified in statute.

[2] *R. v. White*, 2010 ONSC 3164, cited with approval in *R. v. Whyte*, 2014 ONCA 268.

- Amend cl 215(1) s 498(1.1) to add a second part: "A peace officer may not detain a person if there is little or no likelihood that the person will be sentenced to incarceration if found guilty of the alleged offence or if pre-trial detention will likely exceed incarceration after sentence."
- Add a new subsection after section 515(10): "In any event, the justice may not detain a person if the justice is of the opinion that there is little or no likelihood the accused will be sentenced to incarceration if found guilty of the alleged offence."
- Amend section 525 by adding a new subsection permitting an accused to bring an application for review and immediate release if the judge is of the opinion that there is little to no likelihood that the accused will be sentenced to further incarceration if found guilty of the alleged offence.

8. Strengthen the diversion of administration of justice charges

Decriminalize breaches of conditions that pose no real and imminent threat to the safety and security of the public, a victim or a witness.

- Add a clause to amend sections 145(4)(a) and (5)(a): "is at large on an undertaking and who fails, without lawful excuse, to comply with a condition of that undertaking and in doing so, threatens the safety of the public, a victim or a witness;".

At a minimum, make the judicial referral hearing a more robust diversion process that will target individuals likely to otherwise receive a criminal charge:

- Amend cl 214 s. 496 to read:

  496(1) If a peace officer has reasonable grounds to believe that a person has failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required the peace officer shall, before starting judicial proceedings or taking any other measures under this Act, consider whether it would be sufficient to take no further action, warn the accused, or administer a caution.

  496(2) If a peace officer determines that, in the circumstances, the actions under (1) are insufficient and the person's actions did not cause a victim physical or emotional harm or significant property or economic damage, the peace officer shall, without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under section 523.1.

  496(3) In all other circumstances where the person's actions did not cause a victim physical harm, the peace officer may, without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under section 523.1.
- Amend cl 236 s. 523.1(3) to read: "… and that failure did not cause a victim physical harm, the judge or justice shall …"
- Amend cl 236 s. 523.1(2)(a) and (b) to read: "… and the prosecutor or accused seeks a decision under this section;"
- Cl 366 s. 24.1 should be reproduced in the *Criminal Code* and made applicable to adults;

9. **Increase flexibility for provinces when dealing with accused from remote communities**

- Add a clause to amend s. 516(1) by deleting the words “in prison”.

10. **Increase the scope of bail reviews**

- Amend s. 520 to clarify that bail reviews should be conducted on a standard of correctness and that there is broad latitude for the reviewing court to receive evidence not produced at first instance

We would be pleased to elaborate on the rationale for any of the above suggestions. Much of the explanation was included in briefs and evidence provided to the Committee. We would welcome further conversations with a subset of this letter’s signatories about possible amendments as this Bill moves forward. We also look forward to working with you on longer-term bail reform and the writing of a new Bail Act.

Sincerely,

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