Submission to the Standing Committee on Justice and Human Rights

Re: 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*

From: Association for Canadian Clinical Legal Education (ACCLE)

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Introduction

The Association for Canadian Clinical Legal Education (ACCLE) respectfully submits feedback 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*.[1] ACCLE is concerned with several aspects of the proposed Bill C-75. We have divided these concerns into two primary categories; impacts on legal clinics and clinical law students and impacts on clients. Throughout, we draw on data from Statistics Canada and other independent reports.

Impacts on Clinical Law Students

There are approximately ten law schools across Canada that have legal clinics representing clients in summary conviction criminal matters. Students are always closely 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 under a legal aid scheme.

As it stands, Bill C-75 will prevent students in clinical law programs from representing accused persons in criminal proceedings, if the provinces do not have legislation or Orders in Council specifically allowing students to appear. The rationale for this change is not clear. There is no suggested amendment to s. 802.1, which could permit student representation under the supervision of a lawyer. It is difficult to project the exact numbers of people that will no longer be able to access clinic representation. In some provinces such as Saskatchewan (with only one legal clinic, CLASSIC (Community Legal Aid Service for Saskatoon Inner City)), clients will have no other option.

For decades, law students at legal clinics across Canada have been assisting accused persons who cannot afford to pay a lawyer or who are not eligible for legally aided lawyers. Each law school clinic has its own history but in general terms, the legal clinic program in Canada was initiated by law students, eager to assist marginalized people navigating legal processes. Since the late 1960's, law school education has provided opportunities for law students to work at legal clinics, including representing accused persons in criminal matters. In fact, law student clinics were created by law students and have become a foundational aspect of increasing access to representation for marginalized accused.[2] Law school clinics provide quality services to marginalized people, foster and enhance legal education for law students, enhance commitments to access to justice, and prepare students for the practice of law.

There is vast scholarship spanning decades emphasizing the important role that legal clinics play in teaching students to be lawyers, deepening their commitment to social justice and *pro bono* work, enhancing representation for people with low income, and in promoting access to justice.[3]

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[1] Bill C-75, *An act An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, online: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading>.

[2] Frederick Zemans, "Legal Aid and Legal Advice in Canada: An Overview of the Last Decade in Quebec, Saskatchewan and Ontario" (1978) 16:3 Osgoode Hall LJ 663 at 664.

[3] See for example: Sarah Buhler, "The View From Here: Access to Justice and Community Legal Clinics" (2012) 63 UNB LJ 436; Lenny Abramowicz, "The Critical Characteristics of Community Legal Aid Clinics in Ontario (2004)

It is not at all clear what interest Parliament is responding to by eradicating this important component of access to representation for clients facing criminal charges.

Impacts on Clients

ACCLE is also concerned with several aspects of the Bill that have the potential to impact the availability of legal representation for people with low income, set out below.

Crown Discretion

The underlying goal of the proposed amendment to s.787(1) is that it would provide a greater range of discretion for Crown Attorneys who would have more latitude to try more serious cases in provincial court. The Bill would hybridize most indictable offences in the *Criminal Code*, creating the opportunity for the Crown to elect to proceed either summarily or by indictment. The Bill also raises maximum penalty for all summary conviction offences from 6 months to two years less a day. The purpose of this reclassification is to provide the Crown with a wider range of options as to forum for the trial, longer sentencing ranges upon conviction, and more 'efficient' use of court resources.

Currently, for all hybrid offences, where the Crown elects to proceed by indictment, the accused is put to his election (see s.536(2) of the *Criminal Code*) to be tried either in the Superior Court by judge alone or by judge and jury or can elect to be tried by judge alone in the provincial court (unless it is a s.469 offence in which case the Superior Court has exclusive jurisdiction). One factor that impacts the Crown decision to elect is the length of the potential jail time the accused may face if convicted. For example, if an accused is charged with the hybrid offence of theft under $5,000 contrary to s.343(b) of the *Criminal Code*, the Crown can elect to proceed by indictment, the maximum penalty being not more than two years of jail time, or if proceeded by way of summary conviction, the maximum penalty would be six months of incarceration. If the Crown Attorney wants more than six months of jail time to be served upon conviction, they are forced to proceed by indictment which means that the accused can elect to be tried by judge and jury or by judge alone in the Superior Court and includes the option to have a preliminary inquiry.

The proposed increase in maximum penalty for summary conviction offences means that the Crown can proceed summarily but can seek much longer sentences upon conviction than are currently available. Where the Crown proceeds summarily, the accused has no option of forum and is not entitled to a preliminary inquiry or to a trial in a Superior Court. The proposed changes mean that the Crown can seek more jail time without the accused having the option of being tried by a jury or the option to proceed in the higher court.

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19 JL & Social Pol'y 70; Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy* (Emond Publishing: Canada, 2015); Stephen Wizner & Jane Aiken, "Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice" (2004) 73:3 Fordham L Rev 997; Ann Juergens, "Teach Your Students Well: Valuing Clients in the Law School Clinic" (1993) 2:2 Cornell JL & Pub Pol'y 339; Colleen F. Shanahan et al, "Measuring Law School Clinics" (2018) 92:3 Tulane L Rev 547.

Charter Rights

The preclusion of law student representation proposed in Bill C-75 implicates fair trial rights and could potentially violate ss.7, 11(d), and 15 of the *Charter*. Although the caselaw on the parameters of an accused's rights to state funded counsel are relatively well settled, the common underlying thread of these decisions is the availability of state funded representation for accused people. As noted in *R v Rowbotham*, the reason that a proposal to include a section in the *Charter* guaranteeing state funded counsel was not enacted was premised on assurances that low-income accused persons would have access to legal aid:

> In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within the provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.[4]

If Parliament makes sweeping changes precluding law students from representing low income clients, this combined with the evisceration of many legal aid programs across Canada[5], may mean that constitutional arguments regarding state funded counsel can be reinvigorated (ss.7 and 11(d) having regard to s.15 in terms of disproportionate impact on particular groups).

We are also of the opinion that insufficient attention has been paid to the interpretation of *Charter* rights with respect to those who will be most disproportionately impacted if Bill C-75 is passed into law. In its "*Charter Statement*", the Department of Justice claims that,

> Many of the issues that Bill C-75 seeks to address have disproportionate impacts on groups that are over-represented in Canada's criminal justice system, in particular Indigenous persons and individuals from vulnerable populations including persons with mental illness and addictions.[6]

However, many of the proposed changes do not properly address the interests of people who are over-represented in the criminal justice system and will not alleviate this over-representation. It

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[4] *R v Rowbotham*, 1988 CanLII 147 at para 156.

[5] For example, legal aid funding has experienced serious cuts and is plagued with under-funding in many provinces including: Ontario: Laura Howells, "Legal Aid Ontario Facing $26M deficit, scaling back services for criminal matters" (18 December 2016), online: <http://www.cbc.ca/news/canada/toronto/legal-aid-ontario-certificates-1.3902058>; British Columbia: Clare Hennig, "Legal aid funding in BC budget doesn't cover demand for services, CBA says (21 February 2018), online: <http://www.cbc.ca/news/canada/british-columbia/2018-budget-falls-short-on-legal-aid-1.4545805>; Alberta: Lauren Krugel, "Alberta defence lawyers demand boost to Legal Aid funding" (17 April 2018), online: <https://www.theglobeandmail.com/canada/alberta/article-calgary-defence-lawyers-group-demands-boost-to-legal-aid-funding/>.

[6] Department of Justice, "Charter Statement – Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts to make consequential amendments to other Acts" (Ottawa: Department of Justice, 2018), online: <http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html>.

is imperative that constitutional considerations are contemplated in a manner that considers the interests of those most disproportionately impacted.[7] Failure to properly address the interests of racialized and Indigenous accused could lead to conclusions that many aspects of the Bill are constitutionally infirm on the basis of s.15 of the *Charter*.

Delay, Guilty Pleas

Delays and Self-Represented Litigants

Curtailing law student representation will also result in further court delays and further burdens on the provincial courts. It is widely understood that unrepresented litigants cause court delays and that the legal system as a whole works more efficiently when people come to court with legal representation. As noted by The Honourable Beverly McLachlin, unrepresented litigants further compound issues of access to justice:

> To add to this [the cost of legal representation], unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case…The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant. Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be 'unbundled', allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is 'absurd', not unlike allowing a medical patient to administer their own anesthetic.[8]

The available data supports Justice McLachlin's comments. Research shows that self-represented litigants spend more court resources and time, face repeated barriers in understanding court procedures, make more mistakes and, as a 2002[9] study corroborated, sometimes plead guilty to minor offences just to get it over with.[10] Self-represented litigants are not a small group. In the 2015/2016 Canada Statistics Adult Criminal Court Processing Times, it was reported that 24% of charges in the adult criminal provincial courts in Nova Scotia, New Brunswick, Quebec, Ontario, Saskatchewan and British Columbia were against an unrepresented accused.[11] The Department of

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[7] See *R v Golden*, 2001 SCC 83 at para 83. Also see: David M. Tanovich, "Ignoring the *Golden* Principle of Charter Interpretation" (2008) Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 42, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1160&context=sclr>.

[8] The Right Honourable Beverly McLachlin, "The Challenges We Face" (July 2008) 4.2 The High Court Quarterly Review 33 at page 35.

[9] Robert G. Hann et al (2002), "Court Site Study of Adult Unrepresented Accused in The Provincial Criminal Courts" (Department of Justice, September 2002), online: <http://publications.gc.ca/collections/Collection/J3-2-2002-3E.pdf.>; Malcom Mercer & Susan McGrath, "Unmet Legal Needs in Ontario" (16 October 2014), online: <https://www.lsuc.on.ca/uploadedFiles/abs-unmet-legal-needs-oct16-2014.pdf>.

[10] Department of Justice, "Self-Represented Litigants in Family Law" (Justfacts, 2006), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.

[11] Ashley Maxwell, "Adult criminal court processing times, Canada, 2015/2016" *Juristat* (13 February 2018), online: < http://www.statcan.gc.ca/pub/85-002-x/2018001/article/54900-eng.pdf>.

Justice Canada[12] collected data from nine provincial court sites across Canada using individual case records, disposed cases in electronic format, and direct observation of proceedings. Taking the Scarborough region of Toronto as an example, the authors noted that a significant proportion of individuals did not have thorough understanding of the English language to navigate the court system. In fact, it was noted that "Legal Aid Ontario officials suggested that the average reading level of their clientele was Grade 3 or 4."[13]

These impacts are particularly egregious for already marginalized populations in Canada. For example, a 2017 study, "Guilty Pleas Among Indigenous People in Canada",[14] demonstrated that Indigenous accused disproportionately plead guilty when charged with an offence. The authors conclude that aspects of the criminal justice system incentivize guilty pleas, including the lack of access to affordable representation, the denial of bail, and the nature of bail conditions. Furthermore, they noted that Indigenous individuals are more likely to plead guilty because of their social vulnerabilities, such as lack of income, unfamiliarity with the justice system, and challenges with mental health and addiction stemming from colonialism.[15]

Greater Numbers of Summary Offences

Bill C-75 also hybridizes most indictable offences. Expanding the scope of hybrid offences in the *Criminal Code* combined with raising the maximum penalty for summary conviction offences, means that Crown Attorneys will be able to elect to proceed by summary conviction for a greater number of what are currently thought of as more serious offences. This means that more criminal cases can potentially be heard in the provincial courts of justice.

Many provincial courts are already experiencing crisis levels of cases passing through this level of court. As one poignant example, the Toronto Star recently reported on a letter that was sent by the Crown Attorneys of the College Park Courthouse in Toronto to the Ministry of the Attorney General. In the letter to MAG, signed by 17 Crown Attorneys, Crowns indicated that the volume of cases each is assigned is unmanageable and that, "This crisis is compromising our ability to prosecute our cases properly and it is also compromising our health".[16] Court decisions have also recognized the realities of provincial courts as being busy and overburdened.[17]

The rationale that more cases being heard in provincial courts will alleviate an overburdened criminal justice system simply does not accord with the realities of the lower courts. According to recent statistics in Ontario, the Ontario Court of Justice heard 227,164 criminal cases between

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[12] *Supra* note 9.
[13] *Supra* note 9 at 196 and 214. While the authors warned against making a causal link between lack of representation and rate of conviction, they acknowledged and presented self-reports that illustrated the inherent imbalance in our criminal court system, where SLRs face many obstacles and a significant number receive criminal records (50%) and jurisdiction custodial sentencing (10%).
[14] Angela Bressan & Kyle Coady, "Guilty pleas among Indigenous people in Canada" (Department of Justice, 2017), online: <http://publications.gc.ca/collections/collection_2018/jus/J4-62-2017-eng.pdf>.
[15] *Ibid* at 10.
[16] Betsy Powell Courts Bureau, "Crown attorneys warn College Park office is in 'crisis'" (13 April 2018), online: <https://www.thestar.com/news/gta/2018/04/13/crown-attorneys-warn-college-park-office-is-in-crisis.html>.
[17] See for example *R v J(S)*, 2018 ONCA 489 at para 59 where Justice Fairburn noted the "…reality of extremely busy provincial courts, handling the vast majority of criminal matters".

April 2017- May 2018.[18] In 2016, the Ontario Superior Court of Justice has had a total of 186,186 (all areas of law, not just criminal) heard[19]. Similar trends are present in British Columbia where, in 2016/2017, the provincial courts reportedly heard 144,100 criminal cases while the Superior Courts heard 1,400 criminal cases.[20] A recent Statistics Canada report indicates that 99.6% of criminal cases in Canada are heard in the provincial courts while 0.4% are heard in the Superior Courts.[21] Given these statistics, the logic that providing more options for proceeding in the provincial courts will reduce overall court delays is very difficult to understand.

Race, Indigeneity and Bill C-75

As noted above, Bill C-75 has the potential to exacerbate existing problems for racialized and Indigenous communities in Canada. In a 2010 Toronto Star report on arrests in Toronto, the authors collected data related to the total number of charges and the race of the individual(s) charged for each offence. For summary conviction related offences such as shoplifting (3,392), loitering (10,885), gun related offences (891), and general investigation (158,685), Black persons accounted for alarmingly disproportionate rates of arrest, carding, and police stops.[22] Data collected by the Office of the Correctional Investigator[23] depicts the troubling rise in incarceration for specific groups.[24] As is quickly apparent, racialized (especially Black) and Indigenous people, women (especially young, racialized and Indigenous women and girls), people with lower rates of education and income, people with addictions, people with mental health challenges, and people with a history of sexual abuse all are disproportionately represented in Canada's prisons.[25]

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[18] Obtained from: Ontario Courts, *Offence Based Statistics* (Ontario Courts, 2018), online: <http://www.ontariocourts.ca/ocj/files/stats/crim/2018/2018-Offence-Based-Criminal.pdf>.

[19] Ontario Courts, "The Superior Court of Justice: Realizing Our Vision, Report for 2015 and 2016" (Ontario Courts, 2016) at 643, online: <http://www.ontariocourts.ca/scj/files/annualreport/2015-2016.pdf>.

[20] Ministry of Attorney General, Court Services Branch, online: <https://app.powerbi.com/view?r=eyJrIjoiOWRmM2U5OTgtYmE4Yy00OTllLTliOTItMjc2ZGFiMTQ4MzZiIiwidCI6IjZmZGI1MjAwLTNkMGQtNGE4YS1iMDM2LWQzNjg1ZTM1OWFkYyJ9>.

[21] Statistics Canada, "Adult criminal court statistics in Canada, 2014/2015, Catalogue No 85-002-X" (Ottawa: Statistics Canada, 2017), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14699-eng.htm>.

[22] For example, for all FIR (Field Information Reports) contact cards handed out, 22% are to Black, 48% to white & 16% to Brown adults (Note that "Brown" is classified as South Asian, West Asian and Arab. "Other" is any visible minority other than Black or South Asian, West Asian or Arab). For comparison, we note that people who are Black comprise 8% of the Canadian population. For loitering specifically, 27% FIR contact cards are for people who are Black, 39% to people who are white and 21% to Brown adults. Obtained from: Toronto Star, "Toronto Star Analysis of Toronto Police Service Data - 2010 - Advance Findings", online: <https://www.thestar.com/content/dam/thestar/static_images/advancedfindings2010.pdf>.

[23] Office of the Correctional Investigator, "44th Annual Report to parliament 2016-2017 Presentation Deck" (31 October 2017), online: <http://www.oci-bec.gc.ca/cnt/comm/presentations/presentationsAR-RA1617-eng.aspx>.

[24] *Ibid.* As of 2017, the percentage of inmates by race are as follows: Caucasian (54%), Black (8.6%), Asian (4.8%), Indigenous (27%), Hispanic (1%) and Other (2%).[24] The overall makeup of the Canadian population at this time is as follows: Blacks (3.5%), Aboriginal identity (4.9%), Caucasian or other (72.9%).

[25] The most recent data coming from the 2015/2016 Statistics Canada: Jamil Malakieh, "Youth Correctional Statistics in Canada, 2015/2016" *Juristat* (1 March 2017), online: <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.pdf>.; Department of Canada, "Youth Criminal Justice in Canada: A compendium of Statistics" (2016), online: <http://publications.gc.ca/collections/collection_2018/jus/J4-58-2016-eng.pdf>.

Unfortunately, most data cannot be directly correlated to specific offences, but some of the most prevalent forms of summary conviction offences do coincide with certain vulnerability groups. For example, Statistics Canada released an report titled "Women in Canada: A Gender-based Statistical Report, Women in the Justice System" which tracked data from 2014-2015 and again in 2017.[26] The aggregate reports show that while men statistically commit more summary conviction offences as theft under $5000, fraud, and other *Criminal Code* violations - women, particularly in relation to non-violent *Criminal Code* offences, represent 37% of individuals accused of theft under $5,000, and 33% of individuals accused of fraud.[27] In fact, women commit the largest number of property crimes, followed by other *Criminal Code* violations.[28] When looking at the distribution of women committing such crimes (i.e. theft under $5000) young women are more typically charged, especially young women ages 12-17, followed by women aged 18 to 25.[29] We are concerned that the Bill will further exacerbate the number of women, especially racialized and Indigenous women, facing carceral sanctions.

Although Bill C-75 proposes to enact provisions that specifically call for restraint in judicial interim release decisions[30], the amendments are not responsive to the current bail crisis which disproportionately impacts Indigenous and racialized people. Lawyers, legal scholars, and justice system participants have variously described the bail system in Canada as broken, in crisis, and failing.[31] In fact, the proposed changes leave police and judicial discretion intact while adding procedural complexity with the inclusion of the possibility of referral hearing[32] at the bail stage. Additionally, less access to student representation may lead to less access to challenging unfair bail terms imposed by police[33] and increased guilty pleas to administrative breach charges. Increased police and judicial discretion have not historically lead to a decrease in the over-representation of Indigenous people in custody; quite the opposite. Since the 1972 reforms to the *Criminal Code*,[34] which broadened police discretion to release accused persons on bail and attempted to minimize cash bails, over-incarceration rates of Indigenous people have dramatically increased. Instead of heading calls to overhaul the bail system for example by placing a moratorium on onerous conditions of bail[35], or by abolishing the use of surety bails, Parliament is proposing to maintain the status quo.

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[26] Statistics Canada, "Study: Women in Canada: Women and the Criminal Justice System" (06 June 2017), online: <http://www.statcan.gc.ca/daily-quotidien/170606/dq170606a-eng.htm>.
[27] *Ibid.*
[28] *Ibid.*
[29] Correctional Service of Canada, "Women Offenders: Major Findings from the DFIA-R Research Studies" (August 2017), online: <http://www.csc-scc.gc.ca/005/008/092/r-395_w-eng.pdf>.
[30] *Supra* note 1 at ss 493.1 and ss 493.2.
[31] See for example: Canadian Civil Liberties Association, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention", by Abby Deshman & Nicole Myers (Toronto: Canadian Civil Liberties Association and Education Trust, July 2014), online: <ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf> ; John Howard Society of Ontario, "Reasonable Bail?" (Toronto: Centre of Research, Policy & Program Development, September 2013), online: <www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report- final.pdf> ; Martin L Friedland, "The Bail Law Reform Act Revisited" (2012) 16:3 Can Crim L Rev 315; Cheryl Marie Webster, "Broken Bail" in Canada: How We Might Go About Fixing It", (Department of Justice: Ottawa, 2015): online: <https://www.scribd.com/document/307198427/Broken-Bail-in-Canada-How-We-Might-Go-About-Fixing-It.>
[32] *Supra* note 1 at ss 496 and ss 523.1.
[33] Currently, s 503(2.2) of the *Criminal Code* allows for an application to a justice for review of police-imposed bail.
[34] See the 1972 *Bail Law Reform Act*, SC 1970-71-72, c 37.
[35] At least two reports call for a moratorium on abstention conditions of release. See: Canadian Civil Liberties Association, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention", by Abby Deshman & Nicole

Immigration Status and Bill C-75

The proposed amendment to the maximum penalty for summary conviction offences will also have serious impacts on the inadmissibility of individuals who hold permanent resident or foreign national status. Under the *Immigration and Refugee Protection Act*, foreign nationals (those without permanent immigration status in Canada) and permanent residents of Canada may be inadmissible on the grounds of "serious criminality". Serious criminality is defined as "having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, **or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed**."[36] Therefore, under the existing sentencing provisions, a permanent resident or foreign national convicted of a summary conviction offence is not at risk of becoming inadmissible on the grounds of serious criminality. However, under Bill C-75, all non-citizens of Canada will be at risk of a finding of inadmissibility regardless of whether they are convicted a summary or indictable offence. A non-citizen is at risk of this finding even for minor criminal offences; a person can be deported for stealing a chocolate bar (theft under contrary to s. 334 of the *Criminal Code*) if convicted.

The consequences of inadmissibility are devastating to those seeking to enter or remain in Canada. Foreign nationals who are inadmissible on the grounds of serious criminality may find their applications to visit Canada or for permanent residence in Canada refused, while current permanent residents of Canada, including long-term residents, may lose their permanent resident status and face deportation to their country of citizenship. As discussed elsewhere in this paper, these consequences are likely to have a disproportionate impact on racialized and low-income populations.

The imposition of a sentence greater than six months also impacts a permanent resident's ability to appeal the loss of their status in Canada, and any subsequent removal order. The Immigration Appeal Division ("IAD") of the Immigration and Refugee Board of Canada ("IRB") is barred from considering an appeal from a permanent resident who has been sentenced to jail time of six months or more.

The loss of a right of appeal in the context of an inadmissibility finding is significant. The Immigration Division ("ID") of the IRB, which makes admissibility findings and issues removal orders, cannot consider humanitarian and compassionate factors when deciding whether a permanent resident or a foreign national is inadmissible to Canada and should therefore be removed. For example, factors such as the length of residence in Canada, lack of ties to the country of citizenship, Canadian-born children, family and community in Canada, and extenuating circumstances surrounding the conviction may only be considered by the IAD on appeal. Those who are unable to appeal an inadmissibility finding and removal order due to receiving a sentence of six months or more may never have an opportunity to present their

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Myers (Toronto: Canadian Civil Liberties Association and Education Trust, July 2014), online: <ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf> ; John Howard Society of Ontario, "Reasonable Bail?" (Toronto: Centre of Research, Policy & Program Development, September 2013), online: <www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report- final.pdf>

[36] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 36(1)(a).

circumstances for humanitarian and compassionate consideration and will likely be removed from Canada. Raising the maximum sentence for summary conviction offences over six months will increase the number of people charged with criminal offences who may be found inadmissible to Canada as a result, with no right of appeal.

Implications & Recommendations

The impact that Bill C-75 can potentially have on already disadvantaged groups is a fundamental access to justice issue. The passage of this Bill, in its current form, will mean that relatively minor offences which previously held 6-month incarceration terms, can increase to 24 months. With this increase of jail time, there will also be a decrease of access to representation. Paralegals, law students, and articling students will be barred from representing vulnerable individuals who will be disproportionately impacted, and whom already disproportionately populate our criminal justice system. Bill C-75 has the potential to cause undue hardship on provinces, clinics, and clients who do not have the means to afford the representation of a licenced lawyer.

Why Not a Provincial-Level Response?

In response to questions about the proposed changes with respect to law student representation, a spokesperson on behalf of the Federal Minister of Justice indicated that the provinces could permit representation by approving programs by order in council as per s.802.1 of the *Code*.[37] There are least two major problems with this approach. First, the provinces may or may not act to do so. They may decide to reallocate the funds to provide different programs for legal aid. They may not take any action. Secondly, even if the provinces do respond, it is unlikely that they will respond in time to prevent a gap in representation for those accessing legal clinics and law student representation. Bill C-75 will also mean that provinces will be left to deal with the administrative burdens of providing more, or reallocating resources to legal aid schemes – if they so choose to do so.

Recommendations

Given the above context, ACCLE recommends the following:

1. **Reconsider the proposed amendment to s. 787 of the *Criminal Code*; do not raise the maximum penalty for summary conviction criminal offences.** Raising the maximum penalty for summary conviction offences will: result in longer prison sentences and will contribute to over-incarceration, particularly of racialized and Indigenous people; will preclude law student representation in criminal courts; and will negatively impact people who are not Canadian citizens including increased risk in loss of status, deportation, and the loss of appeal rights. It will also result in further delays as more matters will be tried in already overburdened provincial courts where accused people will now find themselves with less access to legal representation.

[37] Jacques Gallant, "Federal plan would kick paralegals, law students out of provincial courtrooms, critics say" (19 April 2018), online: <https://www.thestar.com/news/canada/2018/04/19/federal-plan-would-kick-paralegals-law-students-out-of-provincial-courtrooms-critics-say.html.>

2. **Amend s. 802.1 of the *Criminal Code*** to ensure that law students can continue to represent accused persons charged with summary *Criminal Code* offences. This option does nothing to alleviate the dire consequences that raising the maximum penalty will have particularly for racialized and Indigenous accused. However, if Parliament proceeds with amending s.787, it must consider amending s.802.1 for the reasons stated above.

3. **Undertake a more thorough *Charter*** analysis of the proposed amendments having regard to gender, race, and Indigeneity. This includes finding measures to reduce court delays that do not disproportionately impact women, racialized people, and Indigenous people. One example of a means of reducing court delays with regard to race and Indigeneity is to repeal all mandatory minimum sentences which disproportionately impact African Canadian and Indigenous accused persons. Deep consideration of the recommendations made by the Truth and Reconciliation Commission, including Call to Action 32, which calls for judicial discretion to depart from mandatory minimum sentences, should also be undertaken to ensure that Bill C-75 aligns with a sincere attempt to reduce Indigenous over-incarceration.

4. **Undertake a consultation process** to ensure that any proposed amendments to the *Criminal Code* are made in consultation with those most impacted including: those accused of criminal offences and the communities they derive from; criminal defence lawyers; clinic law students and legal clinics; practitioners; and law schools. There has not been a consultation process that is informing the changes that are being proposed. The very people who are most impacted have not had a voice in these sweeping changes many of which may have significant consequences.

About ACCLE

This brief is submitted on behalf of the Association for Canadian Clinical Legal Education (ACCLE), which is a national organization made up of lawyers, clinical legal educators, professors, clinicians, law students, and others committed to the advancement of clinical legal education in Canada. More information about our organization can be found at www.accle.ca.