Brief submitted to the Standing Committee on Justice and Human Rights relating 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

"Towards real implementation of the right to reasonable bail and respect for the rights of marginalized people"

submitted by

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Summary of recommendations

This brief deals with the proposed amendments to the **interim release** provisions of the Criminal Code (sections 212 to 237 of the Bill, referring to sections 493.1 to 525 CCC). Between 2012 and 2016, I led a national study on the conditions of release imposed on poor and marginalized people, funded by the Social Sciences and Humanities Research Council of Canada (Sylvestre et al., 2017; 2018).

Bill C-75 is intended to clarify certain release provisions while emphasizing the need to release the accused unconditionally and to consider the unique circumstances of Aboriginal and marginalized persons. The bill provides a number of interesting measures, but on the whole, **I do not think it goes far enough to achieve the goals it has set, and in particular, to protect the rights of marginalized persons and address the over-representation of those groups in the criminal justice system**.

I propose the following amendments:

- Define the term "vulnerable populations";
- Eliminate the possibility of detaining a person who poses no real and imminent threat to a victim, a witness or the public, or where there is little or no likelihood that the person will be sentenced to incarceration if found guilty of the alleged offence;
- Require peace officers to issue an unconditional issue of appearance notice (and not a conditional promise) to those who do not pose a real and imminent threat to the safety and security of victims, the public or a witness;
- Require that conditions imposed by peace officers be reasonable and proportionate considering the nature and seriousness of the alleged offence, the circumstances surrounding the alleged offence and the need to ensure the safety and security of victims or witnesses or to prevent that the alleged offence that threatens the safety and security of victims or witnesses continues or repeats, or that any other offence likely to cause actual harm to victims or witnesses is committed;

- Require that the conditions imposed to ensure attendance in court be proportionate to the seriousness of the alleged offence;
- Eliminate the power of peace officers to impose geographic conditions unless there is a real and imminent threat to the safety and security of a victim, a witness or the public;
- Require that the peace officer and the justice consider the accused's level of dependence on alcohol or drugs when imposing a condition related to the use of one of those substances and favour harm-reduction measures rather than abstinence, to the extent to which there is no real and imminent threat to the safety and security of a victim, a witness or the public;
- Define "drug paraphernalia" as medical harm-reduction material and prohibit the imposition of conditions that limit access to or possession of such medical material;
- Completely decriminalize breaches of conditions that pose no real and imminent threat to the safety and security of the public, a victim or a witness;
- Eliminate all mandatory minimum sentences;
- Repeal sections 213, 213 (1.1) and 286.1 to 286.5 criminalizing sex work.

Detailed explanatory notes

I. Principles and values.

I welcome the addition of sections 493.1 and 493.2 CCC.
Section 493.1 reflects the state of the law in Canada (section 11(e)) of the Canadian Charter; *R. v. Antic*, (2017) SCC 27.

Section 493.2 recognizes that Aboriginal people from so-called "vulnerable" populations[1] are not only overrepresented in interim detention (Beattie et al., 2013), but are also discriminated against in the imposition of release conditions (Sylvestre et al., 2017; 2018). Those are simply restorative justice measures the same as section 718.2(e) CCC (*R. v. Ipeelee*, (2012) SCC). The latter should be amended accordingly, for the sake of harmonization.

Inclusion of vulnerable populations could benefit Aboriginal offenders. Since the addition of section 718.2(e) CCC and the Supreme Court judgment *R. v. Gladue* (1999), the rate of incarceration and criminalization of Aboriginal people continues to increase (see *R. v. Ipeelee*, (2012) SCC 13). A recent study has shown that judges are reluctant to apply remedial measures to this provision, particularly under the principle of parity of sentences (Denis-Boileau and Sylvestre, 2018, on post-*Ipeelee* effects). Extending this measure could increase its use for all targeted groups.

[1] I question the choice of the term "vulnerable" which reflects a certain shift in the discourse. In recent decades, poor people whose rights must be defended have indeed become "vulnerable" people who must instead be protected. Vulnerability is primarily relational and contextual. People experiencing homelessness and poverty, drug and alcohol users, sex workers, people with mental health problems, racialized people and Aboriginals are not only overrepresented in the criminal justice system because of their vulnerability, but also because they are victims of profiling and discrimination.

However, it is necessary to define the term "vulnerable populations" in the bill. In its current form, the bill does not specify whether this term includes, for example, persons experiencing homelessness or poverty, drug and alcohol users, persons with a mental health problem, sex workers and racialized minorities who are all overrepresented in the criminal justice system and who are placed at a disadvantage, in particular because they are overexposed to police surveillance and are often victims of profiling and discrimination.

Finally, it would be essential to train peace officers and justices on the unique realities of Aboriginals and targeted vulnerable populations to ensure the effective implementation of those provisions.

Suggestions for amendments:

a) Define the term "vulnerable populations," including persons living in poverty or with homelessness, persons who are addicted to drugs and alcohol, persons with a mental health problem, sex workers and racialized minorities who are overrepresented and who suffer from some disadvantage.
b) Amend section 718.2(e) CCC to include the same overrepresented vulnerable populations within the criminal justice system and who are disadvantaged when it comes to obtaining an alternative sanction to incarceration.

II. Interim detention

[In our system], "we first administer the major part of the punishment and then enquire whether the accused is guilty."

Ernst Puttkammer, Administration of Criminal Law, Chicago University Press, 1963, p. 69

The number of adults placed in interim detention significantly exceeds the number of persons sentenced to imprisonment in Canada since 2004-2005 (Malakieh, 2018). These high interim detention rates also have disproportionate effects on some groups, including Aboriginals and persons with mental health issues (Beattie et al., 2013, p. 5). The decision to detain is first made by the police and directly influences the continuation of the proceedings: indeed, a detained person who appears before court is much more likely to plead guilty at the earliest opportunity (Kellough and Wortley, 2002). This is all the more true when the detainee is accused of committing a minor offence since, in this case, the person will have often served a period of incarceration longer than the period that would have been imposed had they been found guilty of the offence. Moreover, in many cases, those persons would not have been sentenced to imprisonment had it not been for their initial detention (Sherrin 2012 refers to "excessive pre-trial incarceration").

Incarceration periods, even short ones, have devastating and disproportionate effects on accused Aboriginals or poor and marginalized populations. For example, persons addicted to drugs and alcohol may experience withdrawal symptoms, which increases the risk of overdosing upon release. There are also the obvious risks of overdosing in prisons.

We believe therefore that the peace officer and justice should not have the power to temporarily detain a person who poses no real and imminent threat to the safety and security of a victim, a witness or the public or where there is little or no likelihood that the accused would be sentenced to incarceration if found guilty of the alleged offence, unless such detention is necessary to protect the safety and security of the victim, a witness or the public, that is, unless the person poses a real and imminent threat to the safety and security of those persons. The *Bail Reform Act*, S.C. 1971, 19-20 Elizabeth II, c. 37, which came into effect in 1972, included that possibility before being amended in the years following its adoption (Friedland, 2012).

Suggestion for amendments:

For the peace officer:

c) amend sections 497(1.1)(iii) and 498 (1.1)(iii): "prevent that the continuation or repetition of the offence, that poses a real and imminent threat to the safety and security of the public, a victim or a witness, continues or that the commission of another offence, likely to cause actual harm to the public, to a victim or a witness, is committed,"

d) amend sections 497(1.1) and 498(1.1) by adding 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,"

For the justice:

e) amend section 515(10)(b) to read "... including any substantial likelihood that the accused will, if released from custody, commit a criminal offence that is likely to cause actual harm to the public, a victim or a witness,"

f) amend section 515(10) by adding a second part: "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."

A similar provision was introduced in England in 2012. The *Bail Act*, 1976, was amended as follows:

"A justice of the peace may not remand a person in, or commit a person to, custody under subsection (5) if—

… (d) it appears to the justice of the peace that there is no real prospect that the person will be sentenced to a custodial sentence in the proceedings."

III. Generalized imposition of unreasonable conditions leading to repeated breaches of conditions

> *It is trite to say that conditions in an undertaking which the accused cannot or almost certainly will not comply with cannot be reasonable. Requiring the accused to perform the impossible is simply another means of denying judicial interim release.*
>
> *R. v. Omeasoo, (2013) ABPC 328*

In a nation-wide project conducted in several Canadian cities, our research team studied the release conditions imposed on marginalized people (Sylvestre et al., 2017; 2018). We made the following observations:

1) Contrary to the requirements of the *Canadian Charter* (section 11(e)), the *Criminal Code* (section 515) and recent jurisprudence by the Supreme Court of Canada (*R. v. Antic*), release following an inquiry for unconditional release is quite exceptional in Canada. Excluding persons detained pending trial, 95.3% of the judicial decisions made at the release stage at the Municipal Court of Montreal between 2002 and 2014 included the issuance of conditions (Sylvestre et al., 2018). This rate is 97% in Vancouver according to data from the Provincial Court of British Columbia, between 2005 and 2012 (Sylvestre et al., 2017). This confirms data obtained by the Department of Justice Canada (DJC) (Beattie et al., 2013, p. 21: 100% of the judicial decisions identified include the imposition of conditions). (See also Wyant, 2016 in Ontario.)
2) While conditions should be designed and used as an alternative to unconditional release, they have become the only possible alternative to incarceration at the judicial release stage. The vast majority of people "agree" to comply with the conditions imposed because they want to be released as quickly as possible. This consent is flawed.
3) Release information obtained from the responsible officer or peace officer were rarer. However, according to Beattie et al. (2013), between 44.3% and 76.4% of those released by a peace officer are released with conditions (Table 6, page 14).
4) According to Malakieh (2018), there were an average of 7 conditions imposed on judicial release orders in British Columbia in 2016-2017. In Alberta, the number of conditions came to 8 during the same period. However, according to our studies, as the number of conditions increases, so does the likelihood of breaching release conditions, leaving marginalized people in a spiral of criminalization and clogging the justice system.
5) Our interviews with legal stakeholders show that the conditions imposed are often arbitrary, unreasonable and excessive, with no proven link or without regard to the nature and low severity of the alleged offences. For example, the conditions prohibiting a person from being found in a designated area are often too wide on the geographical level and exaggerated, while other conditions are too restrictive of freedom (e.g., curfew imposed in cases of vandalism) or unrealistic (prohibition to consume alcohol imposed on an alcoholic or obligation to report to the police station for a homeless person who travels on foot). The imposition of unreasonable and potentially disruptive conditions is just another way of denying release and imposing detention.

6) Our interviews with justice stakeholders have demonstrated that justices and judges rely first on the second grounds for detention under 515(10) (the prevention of crime and the risk of "recidivism") when they impose conditions. This also confirms the results obtained by Vanhamme (2015) in a separate study. They also invoke the first grounds (ensuring attendance in court) to justify the imposition of restrictive conditions, particularly on marginalized or homeless persons who are unable to offer the expected guarantees (for example because they do not have a fixed address or a stable employment situation, or relatives they can count on). These conditions are discriminatory because they are more restrictive than those imposed on persons who can provide such guarantees on the basis of their social class or their family and professional network.

The proposed amendments to the Criminal Code in **Bill C-75 do not go far enough to limit the proliferation of conditions that are often unreasonable and unrealistic with respect to the circumstances of the individuals involved and the subsequent accumulation of breaches of conditions.** Parliament should review the grounds for detention in depth to ensure that the new principles in sections 493.1 and 493.2 are effective.

The following additional amendments would be necessary:

g) amend section 501(3) which could read as follows: "It may be subject to one or more of the following conditions if they are reasonable and proportionate having regard to the nature and seriousness of the alleged offence, the circumstances surrounding the alleged offence and the need to ensure the attendance of the accused in court or the safety and security of the victims and witnesses of the offence or to prevent that the alleged offence, that poses a real and imminent threat to the safety and security of the victims or witnesses continues or repeats or that any other offence likely to cause actual harm to the victims or witnesses is committed."
h) as mentioned previously in point 3 above, amend section 515(10)(b): "... including any substantial likelihood that the accused will, if released from custody, commit a criminal offence that is likely to cause actual harm to the public, a victim or a witness.".
i) Amend section 515(10)(a) to ensure that the conditions imposed to ensure attendance of the accused in court be proportionate to the seriousness of the alleged offence.

IV. Some problematic conditions

A. Geographic conditions ('red zones' and other prohibitions from being found in a specific location).

Our studies have shown that imposing geographic conditions is particularly problematic for vulnerable populations (Sylvestre et al., 2017; 2018). These conditions are among the most frequently imposed: according to Malakieh (2018) for example, 58% of the judicial release orders imposed in British Columbia in 2016-2017 included a prohibition from being found in a specific location. In addition, according to analyzes we made from court records in British Columbia, the perimeter prohibitions (red zones) and the prohibitions from being found in a specific location represented 20.7% of all conditions imposed during release in Vancouver between 2005 and 2012. Furthermore, 53% of all judicial release orders issued in the context of

drug-related offences included a perimeter prohibition (red zone) and in Vancouver, 92% of those were imposed in the same Downtown Eastside neighborhood.

Although those conditions are necessary in cases where the accused poses a real and imminent threat to the safety and security of a victim, a witness or the public (for example, in cases of domestic violence), they have disastrous consequences for marginalized people, including drug users and street sex workers, by distancing them from the resources essential for their life and on-street survival (for example, access to health services, including harm-reduction services like supervised injection sites, access to food banks, access to community-based social service agencies, etc.), forcing them to offer their services in isolated and unsupervised locations (in the case of sex workers) and increasing the likelihood of breaches of conditions that constantly bring them back into the justice system (Sylvestre et al., 2017). It is essential that such conditions be used only to protect the safety and security of victims, witnesses or the public.

Prior to the tabling of Bill C-75, section 503(2.1) of the *Criminal Code* did not contain specific provisions allowing peace officers (formerly the responsible officer) to impose geographic conditions and we are concerned that the drafting of the new section 501(3) will create an incentive to impose such conditions even more frequently without subsequent verification by a crown attorney or even a judge. In fact, when a peace officer releases an accused on the basis of a promise, the conditions imposed are not systematically reviewed by prosecutors, except at the request of the accused. It may take several weeks, or even months, before the accused appears and those conditions are revised for the first time. In some cases, the charges will never be filed by the prosecution. This can lead to many abuses with no possibility of control (those abuses were clearly confirmed in our interviews).

Suggestions for amendments:

j) delete section 501(3)(e) OR amend section 501(3)(e): “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[2] 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), ”.

k) 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),”.

[2] As noted above, it will be essential to properly train and educate peace officers for those special situations.

B. **Conditions of abstinence and conditions prohibiting the possession of drug- and alcohol-related paraphernalia**

Conditions of abstinence and conditions prohibiting the possession of drug paraphernalia are frequently imposed at the release stage. According to Malakieh (2018), between 38% and 49% of court orders imposed in British Columbia and Alberta in 2016-2017 included a condition of abstinence. Those conditions are unreasonable and unrealistic for persons who are addicted to drugs or alcohol and are frequently breached (Senate Report, 2017, p. 156, Sylvestre et al., 2017). The Alberta Provincial Court has also indicated that imposing such a release condition on an alcoholic would not be reasonable within the meaning of section 11(e) of the Charter and that this must be taken into consideration in case of breach (*R.* v. *Omeasoo*, (2013) ABPC 328). In addition, conditions prohibiting possession of drug-related paraphenalia prevent drug-dependent persons from obtaining sterile harm-reducing medical materials.

In this sense, I welcome removing from section 501(3) the power of the peace officer to impose such a condition, except to the extent that this condition is absolutely essential to ensure the safety and security of the victims or witnesses (under 501 (3)(k)).

Moreover, in all cases, peace officers and justices of the peace should be required to consider the accused's dependence on a substance (alcohol or drug), as proposed by Rosborough J. in *R. v. Omeasoo* (2013 ABPC 328)[3] and focus on the inclusion of harm-reduction measures rather than advocating abstinence. Conditions prohibiting the possession of medical materials related to the use of drugs should be prohibited.

<u>Suggestions for amendments:</u>

l) Add a paragraph to section 501(3) and section 515(4) CCC: "<u>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, in the extent that the safety and security of a victim, a witness or the public is not compromised, harm-reduction measures rather than abstinence</u>.".

m) Define "drug paraphernalia" as harm-reduction medical materials.

n) 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.

[3] "Accordingly, where a peace officer or officer in charge of charges shall be imposed on the condition described in ss.499(2)(g)(I) or 503(2.1)(g)(I) CC (s)he must first address his or her mind to the question of whether the detainee is an alcoholic. If so, and an election is made not to detain him or her, further inquiries must be made in order to determine: (I) whether the detainee is reasonably capable of complying with an 'abstinence clause'; (ii) if so, under what circumstances; and (iii) whether those circumstances are themselves reasonable. […] » (par. 40)

V. New procedures for failing to comply with release orders

The imposition of often unrealistic conditions generates an impressive number of offences against the administration of justice (OAJ) and in particular the offences of failure to comply with a release order under the current section 145(5.1) CCC (corresponding to section 145(5) of Bill C-75 as proposed) (see Sylvestre et al., 2017).

In 2013-2014, almost 40% of all cases for adults settled before the courts in Canada had at least one OAJ, and 50% of those cases were for breach of recognizance (Burczycka & Munch, 2015).

The fact that an accused has committed an OAJ not only increases the likelihood that the accused will remain in custody after being arrested and at the end of the inquiry for release, but also that the accused may eventually be found guilty and sentenced to imprisonment (Beattie et al., 2013, pp. 5, 12 and 14, and Burczycka and Munch, 2015, p. 14).

In other words, people quickly sink into a spiral of broken conditions and incarceration. For example, at the Municipal Court of Montreal, two-thirds (66.2%) of those with two or more records and almost all (99.1%) of those with seven or more records between 2002 and 2014 had at least one OAJ in one of their records. There is a very strong correlation between the breaking of conditions and the accumulation of records. Thus, **recidivism is institutional rather than criminal**, that is, people accumulate records because they do not respect their conditions rather than because they commit new substantive offences (Sylvestre et al., 2018).

Over the years, people have spoken about the need to highlight the magnitude of the problem surrounding those specific offences that are the result of judicial activity and that are likely to transform otherwise legal behaviour (for example, alcohol consumption) to criminal offences (e.g., Cowper, 2012; 2016 Segal, 2016; Wyant, 2016; Justice-Québec Table, 2016; Senate Report, 2017, p. 155).

By creating a bypass or a separate procedure, we are not dealing directly with the problem of the increase in the number of charges for breach of conditions, nor with the problem of congestion in the courts. The new section 523.1(3) will allow a justice to do nothing when confronted with a breach, to revise release orders (sometimes unreasonable) or to detain the person.

Thus, it is possible that this type of procedure may have a dissuasive effect on prosecutors by forcing them to question their decision to lay charges in the event of a breach of conditions where such failure has not caused injury or prejudice to a victim.

But it is also possible that this type of procedure would only institutionalize an unofficial practice that is already before the courts (especially in Vancouver) and where prosecutors repeatedly bring the accused who breach their conditions back before the judge so that they receive a simple “warning” and then withdraw the breach charges. This round of court appearances, which are often accompanied by short periods of pretrial detention, will therefore continue to

clog the justice system while having significant consequences for the most vulnerable of the accused (for example, by exposing them to a state of withdrawal, increasing the risk of overdosing and depriving them of the health services they need).

In addition, it is possible that this new procedure would increase the control on persons who would not have been subject to such a review for breach of conditions because of the low severity of the alleged breach, thereby widening the net (*net widening*).

It would be more effective to **completely decriminalize the breaching of conditions** that do not cause harm or do not actually threaten the safety of a victim or witness. In doing so, peace officers, prosecutors and justices would be required to strictly define conditions for release and to limit themselves to a series of conditions concerning the protection of the public, the safety and security of victims and witnesses and attendance in court. Let's not forget that the person subject to conditions is always presumed innocent under law.

Suggestion for amendment:

o) 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;".

Other suggestions for amendments to Bill C-75:

VI. I welcome the amendments to sections 737(1.1) and 737(5) CCC pertaining to mitigate the cumulative effect of the victim surcharge for vulnerable persons, particularly in the case of breach of conditions, and to give judges discretion to consider the particular circumstances of those populations. Once again, it is necessary to define the term "vulnerable population."

VII. The bill contains no provision to **eliminate minimum sentences**. It is clear that those sentences have a disproportionate and discriminatory effect on Aboriginals and poor and marginalized populations. Those penalties are a true obstacle to considering special situations (and in particular to giving full effect to sections 493.2 (in this bill) and 718.2(e) CCC). In addition, courts face daily constitutional challenges to the validity of those sentences, and many of them have been declared unconstitutional and inoperative. Bill C-75 is a missed opportunity to make the long-awaited changes to minimum sentences.

VIII. As well, the bill does not contain amendments to decriminalize sex work activities that put the lives, health and safety of those persons at risk (*Canada v. Bedford*, (2013) SCC 72). In that sense, I fully support the proposals put forth by the Canadian Sex Work Law Reform Alliance in its submission to these consultations.

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