SOCIETY of UNITED PROFESSIONALS

EXECUTIVE SUMMARY

The Society of United Professionals (Society) is pleased to make submissions to the House of Commons Standing Committee on Justice and Human Rights in relation 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.*

The Society is the union representing more than 350 lawyers employed by Legal Aid Ontario. Our lawyers are on the frontlines of the criminal justice system, representing low-income Ontarians at key stages of the criminal justice process, including judicial interim release, summary legal advice, resolutions and sentencing.

We support legislative changes that reflect the *Canadian Charter of Rights and Freedoms* and promote a fairer and more just legal system. To this end, we welcome the bill's provisions that would:

- codify the principle of restraint in all bail decisions
- require that decision-makers consider the background of Indigenous peoples and individuals from vulnerable groups in bail decisions
- provide judges with the discretion to impose fewer victim fine surcharges or not to impose a victim fine surcharge at all
- require that valid guilty pleas be factually supported

At the same time, we have concerns that aspects of Bill C-75 are moving Canada's criminal justice system in the opposite direction. These include proposals that would:

- allow written evidence from police on routine matters to be admitted at trial instead of oral evidence
- reduce the use of preliminary hearings
- uphold mandatory minimum sentences
- increase summary conviction maximum sentences to 24 months
- maintain the cap for enhanced credit at 1.5:1 for each day of pre-sentence custody

We will focus our submissions, however, on specific proposals related to the discretion of peace officers and judicial interim release — areas in which we have considerable expertise. It is estimated that our lawyers do 80 percent of all bail hearings in Ontario.

We have three main recommendations:

1. Ensure that conditions imposed by officers on undertakings are imposed only to the extent that they are necessary to protect public safety and that they are not imposed to change an accused's behaviour or to punish an accused person.
2. Honour the principles of restraint and the presumption of innocence by narrowing the application of the reverse onus provision in the bail regime.
3. If a peace officer has reasonable grounds to believe that a person has failed to comply with a release and that the failure did not cause a victim physical or emotional harm, property damage, or economic loss, the officer should not lay a charge.

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PART 1 - CONDITIONS ON UNDERTAKINGS AND JUDICIAL INTERIM RELEASE

Recommendation 1: Ensure that conditions imposed by officers on undertakings are imposed only to the extent that they are necessary to protect public safety and that they are not imposed to change an accused's behaviour or to punish an accused person.

Conditions on judicial interim release or undertaking: in theory

When a person is charged, the legal default is for the accused person to be released on an undertaking without conditions. This is in recognition of the presumption of innocence or what the Supreme Court of Canada calls the "golden thread woven throughout the web of criminal law". As a principle of bail, "terms of release imposed… 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. They must not be imposed to change an accused person's behaviour or to punish an accused person." There are currently three statutory criteria for detention:

1. ensure attendance at court;
2. the protection of the safety of the public; and
3. maintain confidence in the administration of justice.

A former criterion, 'to protect the public interest', was deemed unconstitutional by the Supreme Court of Canada in 1992.

Conditions on judicial interim release or undertaking: in practice

In practice, however, there has been growing concern by those involved in the judicial system that bail is not only being unreasonably denied, but that accused persons are being released on unreasonable and overly-restrictive bail conditions. This problem is only exacerbated by allowing police officers the latitude to impose onerous conditions on an undertaking.

Recommendation 1.1: Ensure that officers cannot impose conditions which are serious incursions on the liberty of accused persons

Strike the following provisions from Bill C-75:

501(2)

...

Additional conditions

~~**(a) report at specified times to the peace officer or other specified person;**~~

~~**(b) remain within a specified territorial jurisdiction;**~~

~~**(c) notify the peace officer or other specified person of any change in their address, employment or occupation;**~~

~~(f) deposit all their passports with the peace officer or other specified person;~~

~~(g) reside at a specified address, be at that address at specified hours and present themselves at the entrance of that residence to a peace officer or other specified person, at the officer's or specified person's request during those hours;~~

(h) abstain from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and surrender those that are in their possession to the peace officer or other specified person and also any authorization, licence or registration certificate or other document enabling them to acquire or possess them;

~~(i) promise to pay an amount specified in the undertaking, which shall not be more than $500, if they fail to comply with any condition of the undertaking;~~

~~(j) deposit, with the peace officer specified in the undertaking, money or other valuable security whose value does not exceed $500 if, at the time of giving the undertaking, the accused is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place in which they are in custody; and~~

(k) comply with any other specified condition for ensuring the safety and security of any victim of, or witness to, the offence.

A release on an undertaking occurs without the oversight of a justice of the peace or judge and without the benefit of a defence lawyer at the side of the accused person. It leaves a vulnerable accused person at the whim of the officer writing the conditions of her release. Due to the power imbalance, accused persons will often agree to any condition, no matter how unreasonable or unlawful, simply because they are afraid of the prospect of being held for bail in a detention centre.

Although there are provisions for the review of the conditions by the courts, accused persons often do not have the ability to challenge these conditions in practice. Defence lawyers often do not find out that a client has been released on unreasonable or unworkable conditions until the client is back in custody for a breach of those conditions. Further, there is little incentive for already-busy defence lawyers to fight these conditions in court due to a lack of funding for these types of challenges. Many clients simply do not have the resources or wherewithal to make such a challenge. As duty counsel lawyers, we already have more work than we can handle. We often do not have the resources to assist clients with challenging additional conditions. As the Canadian Civil Liberties Association has said: "individuals will often not have the means to challenge these conditions independently, and courts have ruled that many conditions may not be legally challenged at trial due to the rule against collateral attack on judicial orders."

Officers already have the discretion to release accused persons on undertakings. If allegations are so severe that such harsh conditions as provided in the current version of the Bill are appropriate, it is likely more appropriately dealt with in court. The conditions which we have recommended be struck are all deep incursions on an individual's liberty.

For example, we have grave concerns about the ability of an officer to require an accused person to reside at a specified address at specified hours and present themselves at specified hours as enumerated in condition (g).

As the Bill reads currently, there is little reining in an officer's ability to impose strict restrictions on an accused person's freedom of mobility. Strict curfews are often an element of conditional sentences, that is, punishments that are only imposed after an accused person is found guilty of a criminal offence. It is

completely inappropriate for officers to impose conditions that effectively amount to a sentence before an individual has been found guilty.

Many of our clients find that their regular addresses become unsafe environments for them and need to leave, whether it be due to an abusive relationship or an unhealthy living environment. Such restrictions can have disastrous consequences. The case of Kimberly Rogers is an excellent illustration. Ms. Rogers was subject to strict conditions allowing her to leave her apartment only at specified times. Like many of our clients, Ms. Rogers lived in poverty and had mental and physical health issues. Due to these restrictive conditions, Ms. Rogers was unable to work. Her mental health deteriorated, she became socially isolated, and was ultimately found dead in her apartment.

Recommendation 1.2: Conditions should only be imposed if necessary to protect the safety of the public

Amend Bill C-75 to read:

217 Sections 500 to 502 of the Act are replaced by the following:

...

(3) The undertaking may contain one or more of the following conditions, if the condition is reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety **of the public** ~~**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**~~**:**

Except for in extremely exceptional circumstances, rights as outlined in the *Canadian Charter of Rights and Freedoms* are paramount over all other legal provisions. Accused persons have a *Charter* right to a reasonable bail, and life, liberty, and the security of the person. Any restriction on an accused person's rights must be imposed only to protect another person's rights. Therefore, conditions must only be applied to the extent that they protect another person or group of people from the substantial likelihood that their own rights could be infringed.

As it currently reads, Bill C-75 would allow an officer to impose conditions on an undertaking which could restrict an accused person's freedom regardless of whether those restrictions are necessary to protect the *Charter* rights of another person. Conditions should only be imposed to the extent that they are necessary to protect public safety.

We often see clients charged with breaches for conditions which had no connection to public safety. Many conditions that are imposed by officers and sometimes even the courts are unworkable for our clients. For example, an accused person who has been charged with theft of an item of food may be prohibited from being within five-hundred meters of a particular grocery store. Unfortunately for that accused person, the community health centre where they meet their mental health worker is within 400 metres of the grocery store.

Recommendation 1.3: Conditions must be clearly related to the specific facts of the case

Amend Bill C-75 to read:

217 Sections 500 to 502 of the Act are replaced by the following:

...

(3) The undertaking may contain one or more of the following conditions, if the condition is reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety **of the public**

~~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~~**:**

(3.1) must be clearly related to the specific facts of the case

As it reads currently, the provision allows an officer to impose any condition that would prevent the "continuation or repetition of the offence or the commission of another offence". Such a provision is potentially overbroad and is vulnerable to abuse. Overly broad or vague criminal provisions violate section 7 of the Charter. Arguably, this provision would allow an officer to impose any condition even if it was not related to the allegations.

For example, many of our clients with serious mental health issues or serious addictions are individuals who are "known to police". Due to a lack of health resources, they have frequent interactions with police. An officer would simply have to say that she was imposing a condition to prevent the commission of another offence. Such an argument would be difficult to scrutinize for an accused person who is charged frequently, even for non-violent offences.

We have seen clients with unreasonably strict bail conditions which had little to do with the facts of the case. We have seen clients with releases requiring them to follow strict curfews simply because the allegations took place at night.

Recommendation 1.4: Conditions must not be imposed to change an accused person's behaviour or to punish an accused person

Amend Bill C-75 to read:

(3) The undertaking may contain one or more of the following conditions, if the condition is reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety **of the public** ~~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~~**:**

(3.1) must be clearly related to the specific facts of the case

(3.2) Such conditions may not be imposed to change an accused person's behaviour or to punish an accused person

Despite the the fact that the principles of bail have been well-established in law by the Supreme Court of Canada since the early 1990s, in practice, the release conditions that have been imposed by officers and courts have often not followed these principles. The Supreme Court of Canada recognized that in practice, judicial interim release has fallen below these standards and re-stated the principles of bail in the 2017 *R v Antic* decision. *Antic* made it clear that conditions shall not be imposed to change an accused person's behaviour or to punish an accused person.

We have seen clients with addictions placed on conditions not to use the very substances to which they are addicted. For accused persons with severe addictions, substance use becomes nearly involuntary. Similarly, we have seen clients with mental health issues placed on conditions to seek treatment, often in cases where the mental illness has no nexus with the criminal charge. For those with severe mental health issues, navigating the social services systems and following such conditions is practically impossible and invites a breach of the terms. Without narrowing the language, Bill C-75 permits the imposition of these conditions to persist, criminalizing non-criminal human issues and resulting in small breaches clogging the system and the over-incarceration of individuals with mental health and addictions issues.

Unfortunately, we have also seen clients who are bullied by particular officers. We have seen police notes advocating that strict conditions should be imposed on accused persons or that they should be detained to "ensure that they learn their lesson" or are "held accountable for their actions". Given the presumption of innocence, such motivations and reasoning are completely inappropriate. While such attitudes are not held uniformly by police officers, they have been expressed against our clients and highlight the need to narrow the language of such a provision.

PART 2 - REVERSE ONUS AND JUDICIAL INTERIM RELEASE

Recommendation 2: Honour the principles of restraint and the presumption of innocence by narrowing the application of the reverse onus provision in the bail regime.

Reverse Onus - In Theory

Section 515(6) is an exception to the basic entitlement to bail in section 11(e) of the *Charter*. Instead of requiring the prosecution to show that pre-trial detention is justified, it requires the accused to show that pre-trial detention is not justified."

In the case of *R v Pearson*, the reverse onus provision was challenged for its constitutionality. It was determined that the reverse onus provision was constitutional because it was only to be used to deny bail in a "narrow set of circumstances" and "the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system".

Reverse Onus - In Practice

While the Supreme Court of Canada stated that the reverse onus provision was to deny bail only in a narrow set of circumstances for individuals charged under the *Controlled Drug and Substances Act*, in practice, section 515(6)(d) is applied broadly. The potential that 515(6)(d) could have an overly-broad application was considered in *Pearson* but it was determined that the "small fry" and "generous smoker" will normally have no difficulty justifying their release and obtaining bail". Unfortunately, that is often not the case in practice.

Recommendation 2.1: The circumstances where the reverse onus provision applies to individuals charged under the Controlled Drugs and Substances Act must be narrowed and specified

Amend section 515(6)(d) of the *Criminal Code* to read:

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

...

(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence where:

(i) the person committed the offence ~~for the benefit of, at the direction of or in association with~~ as part of a criminal organization, as defined in subsection 467.1(1) of the Criminal Code,

(ii) the person used or threatened to use violence in committing the offence,

(iii) the person carried, used or threatened to use a weapon in committing the offence, or

~~**(iv) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years,**~~

(v) the person committed the offence in a prison, as defined in section 2 of the Criminal Code, or on its grounds, or

(vi) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence;

As lawyers for marginalized individuals, our clients are often the "small fry". As individuals who experience poverty, homelessness, and abuse, they often find themselves selling small quantities of drugs because they have no other way to pay their dealer. They are a far cry from the dealers who are part of "well-organized networks" with the "capacity to finance major deals allows them to import large quantities of drugs, often even using legitimate businesses as a cover" as described in *Pearson*.

Those with severe addictions issues are "generous smokers", having developed such a tolerance to street drugs that the amounts that they require for personal use result in charges of possession for the purpose of trafficking under section 5(2), even when they had no intent to traffic.

We frequently see our clients, these "small fry" and "generous smokers," detained when a Justice of the Peace determined that they are unable to meet their onus. As the law currently exists, there are no factors to make sure that the "small fry" and "generous smoker" are not caught under 515(6)(d). While we do not support the mandatory minimum sentences which were established during the Conservative government, many of the factors that attract a mandatory minimum sentence could have a valid application in narrowing the scope of section 515(6)(d). Such constraints would ensure that reverse onus provisions apply as they were intended -- to attack organized crime at its roots, and not to detain our clients who are often themselves victims of the drug trade.

Recommendation 2.2: The reverse onus provision should only apply to situations where the accused person is out on bail for a straight indictable offence or a hybrid offence where the crown has elected to proceed by indictment

Amend section 6(a)(i) of the *Criminal Code* to read:

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469,

(i) that is alleged to have been committed while at large after being released in respect of another **straight** indictable offence **or hybrid offence where the crown has elected to proceed by indictment** pursuant to the provisions of this Part or section 679 or 680

As it reads currently, the reverse onus provision can apply to any accused person who commits a hybrid offence while on a release for another hybrid offence. The application of this can be exceptionally broad. For example, as lawyers for low-income clients, we often work with clients who are facing charges of Theft Under $5000 for items such as small amounts of food, clothing, and alcohol. If a client is charged with stealing a sandwich while on bail for stealing a jacket from a thrift store, she will be faced with a reverse

onus bail situation. This is because Theft Under $5000 is a hybrid offence, meaning that the crown may elect to proceed by indictment. We have seen our clients fail to meet their onus and be detained on administrative offences or purely property offences where no danger to the safety of the public was alleged.

In order to ensure that the reverse onus provision is not overly broad, it should be amended to include only those offences which, due to their seriousness, are listed only as indictable offences in the *Criminal Code* or where the Crown has elected to proceed by indictment.

Recommendation 2.3: The reverse onus provision should not be applied simply because the charges are deemed to be domestic in nature.

Strike the following provision from Bill C-75:

~~(6) Paragraph 515(6)(c) of the Act is replaced by the following:~~

~~(b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs,~~

As lawyers for vulnerable clients, we have seen how those who are experiencing domestic abuse can be charged with offences relating to intimate partner violence themselves. We have worked with clients whose abusive intimate partners have made allegations of domestic violence against them as a means of psychological control. We have seen women whose abusive and more powerful (often male) partners have made allegations against them as a form of retaliation for complaints made by the accused in the past.

While the proposed amendment is narrowed to include only situations where the accused has previously been convicted of an offence related to intimate partner violence, it is important here to highlight the prevalence of false guilty pleas. Those of us who are duty counsel lawyers have seen multiple vulnerable accused enter self-represented guilty pleas to charges they are not guilty of against our advice. This occurs for a multitude of reasons. Many individuals simply cannot afford a lawyer and would rather enter a false guilty plea than face an unknown and potentially more punitive sentence after trial. Accused individuals who are dependent on the complainant may feel persuaded to enter a false guilty plea with the knowledge that their bail condition that prohibits contact with the complainant will be lifted upon the entry of a guilty plea. Accused individuals whose self-esteem has been severely damaged due to years of abuse may plead guilty, under the belief that their defense will not be believed at trial.

Courts are already required to consider an accused person's criminal record, including past convictions for domestic assault, when making a determination about bail. Expanding the reverse onus provision is overly broad and inconsistent with the presumption of innocence. The burden should lie on the state to deny a person's liberty.

Reverse Onus - The Ladder Principle and *Antic*

Recommendation 2.4: When bail is granted in a reverse onus situation, conditions of release should only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention

Amend Bill C-75 to read:

Subsections 515(7) and (8) of the Act are replaced by the following:

If an accused to whom subsection (6) applies shows cause why their detention in custody is not justified, the justice shall make a release order under this section. If the accused was already at large on a release order, ~~**the new release order may include any additional conditions described in subsections (4) to (4.2) that the justice considers desirable**~~ **terms of release imposed under 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.**

As lawyers who are in the bail courts every day, we have seen how unnecessary and unreasonable bail conditions are imposed on our clients even while they still enjoy the presumption of innocence. The Supreme Court of Canada has recognized this issue recently in the case of *R v Antic* where, in laying out the principles and guidelines for bail, it held that conditions are "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". This principle should not be ignored simply because the accused, and not the Crown, has met her onus and demonstrated why she should be released. Language which allows a justice of the peace to impose any additional conditions she considers desirable deviates from this principle.

PART 3 - OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

Recommendation 3: If a peace officer has reasonable grounds to believe that a person has failed to comply with a release and that the failure did not cause a victim physical or emotional harm, property damage, or economic loss, the officer should not lay a charge

Administration of Justice Offences - In Theory

Currently the police are only presented with two options: ignore a failure to comply with a condition of release, or lay a criminal charge under section 145 of the Criminal Code. Bill C-75 creates a third option -- a regime to address administration of justice offences, such as failing to attend court or non-compliance with a bail condition.

Administration of Justice Offences - In Practice

Amend Bill C-75 to read:

214 Sections 496 and 497 of the Act are replaced by the following:

496 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 and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the peace officer ~~**may**~~ **shall take no action or** without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under section 523.1.

As Bill C-75 currently reads, it is left to police officers' discretion whether a criminal charge is laid or if the alleged breach is referred to a judicial referral hearing. We submit that police officers are not equipped to make this determination. The proposed regime places the onus on police services to train their officers to exercise restraint. This will require a cultural and attitudinal shift in the current policing environment. It is uncertain if the necessary training will be implemented to assist in this psychological shift.

In our experience as front-line criminal defence lawyers, these offences are often vigorously prosecuted and we expect that this practice will continue so long as officers are given the discretion to do so. The prosecution of these offences adds to the current culture of delay that plagues the criminal justice system.

By allowing officers the discretion whether to lay charges in these circumstances, we do little to fix the existing problems.

Many times it is the most vulnerable members of our society who are charged with administration of justice offences. For example, people who are homeless or those struggling with alcoholism are sometimes unable to abide by curfews or alcohol abstention conditions. In these situations, many bail conditions become penal in nature.

It is not uncommon for an accused person to be charged with several breaches before the underlying offence is dealt with. Often times it is the breach, and not the substantive offence, that leads to a criminal conviction.

The prosecution of breaches for bail conditions which do not result in emotional harm, property damage, or economic loss can cascade into wrongful convictions. When a person is charged with failing to comply with their bail, the prosecution often revokes their bail pursuant to section 524 of the Criminal Code, placing the onus on the accused to show why they should be released. Once detained, many accused persons find that they would spend longer in custody waiting for their trial than they would if they plead guilty and were sentenced. Consequently, some accused persons plead guilty to crimes they did not commit to minimize their time in custody. Sometimes, they plead guilty to charges that the prosecution would have abandoned before trial due to a lack of a reasonable prospect of conviction.

In order to avoid such grave consequences, offences which do not cause physical or emotional harm, property damage or economic loss must not be prosecuted. If there is no discernible harm to society or a victim, what utility is there criminalizing these acts?

In closing, we would like to sincerely thank the members of the Standing Committee on Justice and Human Rights for taking the time to consider our submissions on Bill C-75. It is our goal to provide the Committee with a perspective which we believe is unique, a legal analysis that is informed by thousands of hours of day-to-day experience working on behalf some of our most vulnerable and marginalized citizens. We hope that your deliberations will be informed by this perspective, and would greatly welcome any opportunity to provide clarity, answer questions, or contribute further to this important conversation.

ABOUT THE SOCIETY OF UNITED PROFESSIONALS

The Society of United Professionals is the union representing more than 350 lawyers employed by Legal Aid Ontario, as well as Ontario legal clinic staff and employees of the National Judicial Institute. Our LAO lawyers are on the frontlines of the criminal justice system, representing low-income Ontarians at key stages of the criminal justice process, including judicial interim release, summary legal advice, resolutions and sentencing.