April 14, 2020

VIA EMAIL: JUST@parl.gc.ca

Standing Committee on Justice and Human Rights
c/o Marc-Olivier Girard, Clerk of the Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Dear Standing Committee Chair, Vice-Chairs, and Members:

RE: Bill C-5, *An Act to amend the Judges Act and the Criminal Code*

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. As courtroom advocates, members of The Advocates' Society believe that a strong, vibrant, and independent judiciary is fundamental to our Canadian justice system and essential to upholding our country's democratic values and the rule of law.

By letter dated October 19, 2017, The Advocates' Society ("TAS") made representations to the Standing Senate Committee on Legal and Constitutional Affairs on the predecessor to Bill C-5, Bill C-337. That letter is attached for your reference. TAS is pleased to note that several of the concerns we raised in that letter have been addressed in Bill C-5.

However, judicial independence and the rule of law are of fundamental concern to members of TAS and to Canadian society as a whole. There is a perception among many of our members that both of these principles are being eroded in Canada, and elsewhere. In this current context, TAS has closely reviewed the terms of Bill C-5 and wishes to make its position known.

First, TAS unquestionably supports the desirability of improved, timely, and socially adapted judicial training on a wide variety of issues, including sexual assault.

That being said, as noted in our letter of October 2017, Canadian judicial education, as developed and administered by the Canadian Judicial Council (the "CJC") and the National Judicial Institute, is seen as a model for the world. A legislative requirement for legal education and training of the judiciary in one area, with special direction as to the groups that should be consulted in developing such programs, is of concern and should be resisted.

This concern is amplified as a result of section 62.1 of Bill C-5 requiring the CJC to report to the Minister of Justice of Canada regarding a) the content of the seminars on matters related to sexual assault law and

b) the number of judges that attended, and that this report then be tabled in the House of Commons and the Senate. The cumulative effect of this legislated scheme has the potential to politicize both judicial education and the judiciary as well as erode judicial independence, which requires that judicial education remain under the control and supervision of the judiciary and free from outside influence.

Rather than legislating a mandatory process, TAS believes that if the government feels it must act at all, it would be preferable to strike a committee of the federal and provincial Ministers of Justice to consult on the content of ongoing judicial education and to make recommendations to the CJC to consider and incorporate as it sees fit.

In sum, TAS believes that judicial independence is preserved and enhanced when ultimate responsibility for judicial education rests with the judiciary. The independence of the Canadian judiciary is too important a principle to allow it to be undermined or diminished in any sense, no matter how laudable the objectives of the legislation might be.

The Advocates' Society has recently published a statement on judicial independence, entitled *Judicial Independence: Defending an Honoured Principle in a New Age*, which the Committee may find relevant in its consideration of this issue. A copy is linked below.

Thank you for the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,

Scott Maidment
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Attachments/Links:

1. Letter from The Advocates' Society to the Standing Senate Committee on Legal and Constitutional Affairs, dated October 19, 2017
2. *Judicial Independence: Defending an Honoured Principle in a New Age*

Members of The Advocates' Society's Task Force:

Andrea L. Burke, *Davies Ward Phillips & Vineberg LLP*
Scott C. Hutchison, *Henein Hutchison LLP*
Lisa Jørgensen, *Ruby Shiller & Enenajor Barristers*
Doug Mitchell, *IMK S.e.n.c.r.l.*
William Thompson, *Addario Law Group*

October 19, 2017

VIA E-MAIL: keli.hogan@sen.parl.gc.ca

Standing Senate Committee on Legal and Constitutional Affairs
c/o Keli Hogan, Committee Clerk
Senate of Canada
Ottawa, ON K1A 0A6

Dear Standing Committee Chair and Members:

RE: Bill C-337: *An Act to amend the Judges Act and the Criminal Code (sexual assault)*

The Advocates' Society has reviewed with interest Bill C-337: *An Act to amend the Judges Act and the Criminal Code (sexual assault)* (the "Bill"). We understand the Bill will shortly be considered by the Standing Senate Committee on Legal and Constitutional Affairs. The Society believes that certain amendments to the Bill are necessary in order to preserve the independence of the judiciary. We are therefore writing to provide the Committee with comments on the Bill and to propose specific amendments for the Committee's consideration.

The Advocates' Society, founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Society endorses a robust approach to judicial education and training. We also believe that training in the area of sexual assault law is a matter of importance to Canadians. We acknowledge the recent instances in which it appears that a judge's understanding of the law related to sexual assault has been inadequate. At the same time, we commend the great number of judges of the Canadian justice system, including those appointed by provinces and territories, who serve our country with the highest standards of competence and fairness on a daily basis.

The protection of Canadians' most cherished democratic rights, values and institutions requires that legislators adopt a carefully measured response where well-intentioned legislation may encroach upon the independence of the judicial branch. The Advocates' Society strongly believes that an independent judiciary is essential to maintaining Canada's constitutional democracy, to the effective functioning of Canada's system of justice, and to the protection of the individual rights of all Canadians.

The Advocates' Society therefore offers the following comments on Bill C-337:

Section 2(2) of the Bill proposes to amend the *Judges Act* so that no person is eligible to be appointed a judge of a superior court in any province unless the Commissioner for Federal Judicial Affairs is satisfied that the person has completed, prior to being appointed, "*recent and comprehensive education in sexual assault law that has been developed in consultation with sexual assault survivors, as well as with groups and organizations that support them, and that includes instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants",* as well as social context education.

The Advocates' Society is concerned that section 2(2) of the Bill, as currently drafted, will have unintended negative consequences. The first unintended consequence relates to the quality of training. Canadians are entitled to expect that any training of Canada's judges be of the highest quality. The number of applicants for judicial appointments is substantially larger than the number of appointments.[1] Applicants reside throughout Canada. The proposed requirement that all applicants for judicial office obtain such training before they are eligible for appointment will place a considerable strain on the training resources available. This will inevitably impair the quality of training that can be offered. Moreover, the Bill contains no measures to ensure the quality of the required pre-appointment training. It does not address who will provide that training, who will pay the cost of that training, or even the manner in which that training is to be conducted.

The second unintended consequence relates to confidentiality. The judicial application process is presently confidential. This is considered important for the recruitment of highly qualified candidates, who may not want clients, colleagues, employers or others to become aware that they have applied. A requirement that applicants for judicial office enroll in a form of specialized training designed for judicial applicants will necessarily undermine the confidentiality of the application process. The Bill provides no measure of assurance that such applicant training courses can be organized or delivered in a manner that will protect an individual applicant's confidentiality.

Moreover, section 2(2), even if implemented, would promise little or no additional benefit for Canadians. The Canadian Judicial Council (the "Council") already provides continuing education for judges in respect of matters related to sexual assault law.[2] This was noted in the Council's written submissions to the Standing House of Commons Committee on the Status of Women: "*CJC policies now provide that it is mandatory for newly appointed judges to attend a seminar designed for new judges, which includes education on sexual assault issues as part of the social context component of the program*" (emphasis in original). The Council has also recommended that judges undertake to comply with the Council's policies on judicial training. Given the policies and practices of the Council, this undertaking would appear sufficient to ensure that all judges participate in the requisite training in sexual assault law in a timely manner.[3]

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[1] The Minister of Justice has not made available to the public the ratio of applicants to appointments, but that data would illuminate the additional demand for training that the Bill would generate.

[2] The role of the Council in judicial training will be expressly noted in the amendments to the *Judges Act* made pursuant to Section 3 of the Bill. The Advocates' Society notes that as a practical matter, training for appointed judges is provided by the National Judicial Institute, which has a remarkable record of serving the educational needs of Canada's judiciary.

[3] Judges of the Superior Courts are necessarily generalists who handle a very wide range of matters, and such an undertaking would serve to enhance and maintain judicial excellence in all areas of the law.

The work of the Canadian Judicial Council and its partners (notably the National Judicial Institute) in judicial training has been exemplary. Their work in judicial education has been recognized internationally as a model for other nations that aspire to a highly competent and independent judiciary. We believe the Council is fully cognizant of its important responsibilities in the field of judicial education, and we expect that the Council will continue to be accountable for the quality and timeliness of judicial training in Canada. The Federal Government's decision to provide nearly $100,000 in new funding to the National Judicial Institute to develop training for judges that will focus on gender-based violence, including sexual assault and domestic violence, is a welcome development.

In view of the foregoing, the Society recommends that section 2(2) of the Bill be amended to permit the appointment of a person who has not yet completed the requisite training, provided the Commissioner is satisfied that the person will complete the requisite training within a reasonable time after appointment. Such an amendment would ameliorate the unintended consequences of section 2(2) by permitting the Commissioner to consider, among other things, the quality, content and timeliness of the training regime conducted by the Council for newly appointed judges, and any assurances provided by the Council regarding those matters. A proposed amended section 2(2) of the Bill (with proposed changes underlined) is attached hereto as Schedule A.

Section 4 of the Bill proposes that the Council provide a report to the Minister of Justice that includes details regarding seminars offered on sexual assault law. The most problematic aspect of Section 4 is the proposed addition of 62.1(1)(c) of the *Judges Act*. If enacted, section 62.1(1)(c) will require that the report identify the number of sexual assault cases heard by judges who have not participated in such a seminar. The Chief Justices or lead Administrative Judges of each Court are responsible for assessing the training needs of the judges of their respective Courts. Also, the assignment of judges to particular cases involves a number of considerations that are important to the proper administration of justice. The Society believes these considerations are properly left to the judicial branch in order to maintain public confidence in the administration of justice. The proposed section 62.1(1)(c) will effectively make administrative judges accountable to Parliament for their judicial assignment practices. The Society believes making judges accountable to Parliament constitutes a material encroachment upon the independence of the judiciary.

Moreover, the proposed section 62.1(1)(c) necessarily carries an implication that judicial assignment decisions and practices affect the quality of judicial decision-making, for which the judiciary would essentially be accountable to Parliament under that section. However, the quality of decision-making by trial judges and particularly the question of whether a judge has displayed a correct understanding and application of the law, is properly a matter for appellate review. It is not a suitable matter for any form of parliamentary or executive oversight.

Accordingly, if the Bill is to be passed into law, the Society recommends that Section 4 of the Bill be amended to delete the proposed enactment of section 62.1(1)(c) of the *Judges Act*.

Finally, the Society notes that a majority of sexual assault cases will continue to be tried before judges who are not federally appointed. Accordingly, unless these provisions are replicated in

the provincial and territorial statutes governing those judicial appointments, the objects underlying the Bill will not be achieved.

Thank you for the opportunity to make these submissions. I would be pleased to discuss them with you further. In addition, The Advocates' Society respectfully requests an opportunity to make oral submissions before the Standing Committee if public hearings are scheduled.

Yours very truly,

Sonia Bjorkquist
President

Appendix A

Proposed Amendment to Section 2(2) of the Bill:

2 (1) The portion of section 3 of the French version of the *Judges Act* before paragraph (a) is replaced by the following:

3 Peuvent seules être nommées juges d'une juridiction supérieure d'une province, si elles remplissent par ailleurs les conditions légales, les personnes qui, à la fois :

(2) Paragraphs 3(a) and (b) of the Act are replaced by the following:

(a) is a barrister or advocate of at least 10 years' standing at the bar of any province or has, for an aggregate of at least 10 years,

(i) been a barrister or advocate at the bar of any province, and

(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province; and

(b) has recently completed, or will complete within a reasonable time after appointment as a judge of a superior court**,** to the satisfaction of the *Commissioner* as defined in section 72:

(i) comprehensive education in sexual assault law that has been developed in consultation with sexual assault survivors, as well as with groups and organizations that support them, and that includes instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants, and

(ii) social context education.