February 23, 2021

Via email: lcjc@sen.parl.gc.ca

The Honourable Mobina S.B. Jaffer
Chair,
Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A6

Dear Senator Jaffer:

Re: Bill C-3, An Act to amend the Judges Act and the Criminal Code

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section (CBA Section) and Judicial Issues Subcommittee about Bill C-3, *An Act to amend the Judges Act and the Criminal Code*, which was introduced on September 25, 2020.

The CBA is a national association of over 36,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of a balance of Crown and defence counsel from every part of Canada, lawyers who appear in criminal courts daily. The Judicial Issues Subcommittee addresses policy issues relating to judicial appointments, compensation, discipline and independence.

Bill C-3 is identical to Bill C-5 introduced in the last session of Parliament and resembles private members' Bill C-337 introduced in a previous session. The private members bill would have required all applicants for federal judicial appointments to obtain training in sexual assault law. The CBA Section commented on Bill C-337 in April 2017 and on Bill C-5 in March 2020 and our general comments remain applicable.

One change from the private members' Bill is that Bill C-3 would no longer specifically require all applicants to engage in sexual assault training *prior to being appointed*. It would instead require that to be eligible for appointment a person must undertake to complete training, including training by the Canadian Judicial Council. We see as an improvement over the earlier bill. However, it remains unclear how this would work in practice. Questions remain on whether an applicant's appointment would be suspended or reserved until the training was completed, who could administer recognized training and how could it be administered. It is also not obvious who would bear the cost, or what the parameters of the undertaking would be. If a person were appointed but then unable to complete the undertaking, would the judge be subject to disciplinary charges? Or, other sanctions?

The Bill would require applicants unlikely to ever confront sexual assault cases (e.g. applicants for the Tax Court of Canada) to undertake training they would never use. And as we previously emphasized, the bill would not address sexual assault awareness for judges in provincial and territorial courts where most sexual assault cases are heard.

We are also concerned about Bill C-3's impact on the independence of the judiciary. It is troubling for Parliament to attempt to make another, co-equal, branch of government subject to a particular type of education that it determines to be necessary. The Bill would require designated courses to be established, after consultation with specific groups, and a report to Parliament on the seminars offered, their contents and the number of attendees. Any legislation that may erode the independence of the judiciary must be carefully scrutinized. Moreover, the Canadian Judicial Council and National Judicial Institute already offer training on sexual assault awareness. These judge led institutions develop criminal law training for federally appointed judges focused on sexual assault trials, including social context education. We urge provincial and territorial judges to get appropriate training.

Bill C-3 aims to address a gap that does not exist in the federal judiciary while at the same time omits any proposals to address potential problems in provincial and territorial judiciaries, where almost all sexual assault cases are heard.

While the earlier private members' bill called for written reasons for decisions in sexual assault matters, the current Bill requires written reasons only if the reasons are not otherwise recorded. We appreciate that this change now allows for oral reasons. Still, the law already provides extensive guidance to trial judges on the need for reasons, and we see no need to legislate in this area.

We hope these observations are helpful.

Yours truly,

(original letter signed by Julie Terrien for Jody Berkes and Indra Maharaj)

Jody Berkes
Chair, Criminal Justice Section

Indra Maharaj
Member, Judicial Issues Subcommittee