Brief to the Standing Committee on Justice and Human Rights on Bill C-10

From Aboriginal Legal Services of Toronto

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We are very pleased to be appearing again before the Standing Committee on Justice and Human Rights. Since our last appearance before you was just a month ago, we will dispense with information on the background of our organization as we trust it is relatively fresh in your minds. We first want to thank the members of the Committee for its consideration of our submissions regarding Bill C-9.

We are here today to discuss Bill C-10, a bill that amends the *Criminal Code* to increase the length of minimum sentences for certain firearms offences and to add some new offences and new minimums. Prior to commenting specifically on these amendments, we feel it is important to address the disturbing trend of increasing reliance on minimum sentences in the *Criminal Code*.

This trend did not begin with the current government. Bill C-2, passed by the last Parliament added minimum sentences to eleven sexual offences. In some cases the minimum sentence was as low as 14 days.

It appears that often the only explanation for the imposition of a minimum sentence is to prevent judges from considering a conditional sentence. Minimum sentences of 14 or 90 days cannot seriously be justified for their ability to deter crime or to lead to a change in behaviour of offenders while incarcerated.

In our discussion before the Justice Committee last month we spoke about the ability judges have to craft conditional sentences that can address the root causes of offending behaviour without sacrificing community safety. In fact, a well crafted conditional sentence will lead to increased community safety. Unfortunately, increased reliance on minimum sentences means there is less opportunity for conditional sentences.

We would like to raise four specific concerns with respect to Bill C-10 and make one suggested amendment. Our concerns are: 1) the manner in which the Bill deals with hybrid offences is unconstitutional; 2) too many minimum sentences start with penitentiary terms; 3) there is no reason to believe that minimum sentences deter crime; and 4) the bill will increase Aboriginal over-representation. Our suggested amendment is that the bill allow for a judge to avoid the imposition of a minimum sentence in exceptional circumstances.

We will start with our concerns.

1) At our last appearance before the Committee, we noted that one of the problems with Bill C-9 was that it gave the Crown the ability to decide whether an offender could receive a conditional sentence based on whether the Crown proceeded summarily or by indictment. This problem is even more acute in Bill C-10.
A number of offences in Bill C-10 are hybrid offences. While there are no minimums if the Crown proceeds summarily, there are minimums if the Crown proceeds by indictment. In some cases these minimums start at three years imprisonment. For example, a first time offender charged with unauthorized possession of a prohibited or a restricted weapon that is loaded or near ammunition will, if the Crown proceeds summarily, have all sentencing options available. On the other hand, if the Crown, in its sole discretion, chooses to prosecute by indictment, the minimum sentence is 3 years

imprisonment. Such an arrangement places a great deal of unchecked power in the hands of the Crown. It also raises very serious concerns that the section violates the protection against cruel and unusual punishment found in the Charter of Rights and Freedoms. We will participate in any constitutional challenge to these provisions of Bill C-10.

2) We are also concerned by the increased number of minimum sentences that start at three years imprisonment. While there are some individuals who, for reasons of public safety, must be sentenced to penitentiary time, this bill casts the net too wide.

Members of this Committee should be under no illusion that a three year sentence will lead to positive changes in the lives of offenders. Information we have received from Correctional Services Canada in Ontario indicates that individuals sentenced in the two to three year range will receive no substantive programming at all in the penitentiary prior to their release.

This bill will result in some individuals with little or no prior involvement with the criminal justice system going directly to the penitentiary. Being incarcerated with the most dangerous offenders inCanada will give these people the opportunity to learn new skills, but not unfortunately the skills we would want them to learn. We have to be realistic about what happens to people when they go into the penitentiary, in most cases, they come out worse than when they went in.

3) At the heart of this bill is the belief that minimum sentences deter people from crime. Since much of this bill is concerned with increasing the minimum sentence for offences where minimums already exist, the assumption must be that higher minimum sentences deter people even more. The fundamental problem with this theory is that there is no evidence to support it.

Studies by the eminent British criminologists Andrew Ashworth and Andrew von Hirsch, both concluded that deterrence in the criminal justice system comes from the probability of detection rather than consideration of potential punishment.[i]

The penalty for first degree murder is life imprisonment with no parole for 25 years. Yet despite this most severe mandatory minimum sentence, gun violence and gun deaths were quite prominent last year. If a 25 year mandatory minimum did not deter the most serious of gun crimes, why should we expect shorter minimums would accomplish the task?

4) It must always be kept in mind that reliance on deterrence as a theory for punishment has a significant impact on Aboriginal people. As we noted last month, despite making up only 3% of the Canadian population, Aboriginal people comprise 22% of those in Canadian prisons. Aboriginal people know, better than anyone else, that doing the crime means doing the time – yet rates of Aboriginal over-incarceration continue to rise.

In large part this is because much of Aboriginal offending is not calculated organized crime, but rather an unthinking response to immediate pressures. Addictions, inter-personal violence, a sense of hopelessness and the legacy of government practices such as residential school and mass adoptions all play a large role in explaining why Aboriginal people commit crime. This is not to excuse the behaviour. But we need to understand that the threat of minimum sentences will do nothing to address the root causes of Aboriginal offending. It will merely lead to more and more Aboriginal people being sent to jail for longer and longer periods of time.

Why should Canadians care that our jails are becoming increasingly the preserve of Aboriginal people? After all, if Aboriginal people commit crimes why should they be exempt from jail – the most serious sanction the criminal justice system provides?

To answer these questions it is helpful to return to the decision of the Supreme Court of Canada in R v. Gladue. When discussing Aboriginal over-representation the Court said:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.

Aboriginal over-representation speaks to the failure of the criminal justice system to address the root causes of Aboriginal offending.

The result of s. 718.2(e) of Criminal Code and the Gladue decision has not been that Aboriginal people have stopped going to jail. Both s. 718.2(e) and Gladue speak of the need for restraint in the use of incarceration for everyone. In fact, it has been non-Aboriginal people who have been the primary beneficiaries of these initiatives. A study by Julian Roberts and Ron Melchers showed that from 1997 to 2001 the rate of Aboriginal incarceration rose by 3% while the rate of non-Aboriginal incarceration decreased by 27%.[ii] Similar results have been found in examining the impact of sentencing changes in the *Youth Criminal Justice Act*. Despite specific admonitions in legislation that judges need to look at alternatives for Aboriginal offenders, it is non-Aboriginal people who are seeing the greatest decline in incarceration rates.

Please rest assured that we are not urging that more non-Aboriginal people be jailed. But it is vital that you be aware that that the impact of moves to make the criminal justice

system more punitive will fall disproportionately on Aboriginal people. Jail has proven itself to be singularly incapable of resolving the social problems that are at the root of Aboriginal offending. More jail will be similarly ineffective.

These concerns lead us to our proposed amendment to the legislation. We suggest that the bill give judges an option to not impose a minimum sentence in exceptional circumstances. Such a provision would go a long way in meeting objections that the law is unconstitutional and would allow judges to consider other sentencing provisions, such as s. 718.2(e), in situations where to impose a minimum sentence would be clearly unjust in the circumstances.

For almost twenty years, royal commissions, judicial inquiries, parliamentary committees and decisions at all levels of courts in Canada have urged that the problem of Aboriginal over-representation be addressed. For every small step forward we confront great obstacles pushing us back. Sadly, Bill C-10 is another example of a serious step back.

We urge the Committee to move away from an increasing reliance on minimum sentences. If we are serious about wanting to make our communities safer then we need to do more than just lock people up. We need to ensure that there are programs in place in the community to address the root causes of criminal behaviour and we need to have programs in place in correctional facilities to do the same.

Endnotes

[i] Ashworth, A., Sentencing and Criminal Justice, (2d ed.), Butterworths, London, 1995, pp. 65-66

Von Hirsch, A., Bottoms, A., Burney, E., Wikstrom, P-O., Criminal Deterrence and Sentence Severity – An Analysis of Recent Research, Hart Publishing, Oxford, 1999, p. 5

[ii] Roberts, J. & Melchers, R., Incarceration of Aboriginal Offenders – 1978- 2001, Canadian Journal of Criminology and Criminal Justice, April 2003, 211, p. 226.