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ONTARIO FEDERATION OF INDIAN FRIENDSHIP CENTRES

O.F.I.F.C.

Submission to the Standing Senate Committee on Legal and Constitutional Affairs in Response to Bill C-10, *Safe Streets and Communities Act*

TABLE OF CONTENTS

OFIFC Submission to the Standing Senate Committee on
Legal and Constitutional Affairs on Bill C-10,
Safe Streets and Communities Act

Introduction

The Ontario Federation of Indian Friendship Centres (OFIFC) is a provincial Aboriginal organisation representing the collective interests of twenty-nine member Friendship Centres located in towns and cities throughout the province. Friendship Centres are not-for-profit corporations which are mandated to serve the needs of all Aboriginal people regardless of status and are the primary service delivery agents for Aboriginal people living in urban areas. The OFIFC administers a number of programs which are delivered by local Friendship Centres in areas such as health, family support, employment and training, and justice. Friendship Centres also design and deliver local initiatives in areas such as education, economic development, children's and youth initiatives, and cultural awareness.

The OFIFC's vision is "to improve the quality of life for Aboriginal people living in an urban environment by supporting self-determined activities which encourage equal access to, and participation in, Canadian Society and which respects Aboriginal cultural distinctiveness." As one of the largest urban Aboriginal organizations in Ontario, the OFIFC would like to provide our insight and commentary on Bill C-10, *Safe Streets and Communities Act* and the anticipated impacts that the legislation will have on Aboriginal offenders, victims, and their families.

The OFIFC expresses concern with the consolidation of 9 different and divergent crime bills that have received varying degrees of prior review by parliamentary committees into one omnibus bill. The OFIFC has monitored the expedited parliamentary review and consideration of Bill C-10 and cautions that the speed with which Bill C-10 has been promised to be passed, coupled with closure measures enacted to limit adequate debate on the core issues at stake, put the future of the Canadian justice system in jeopardy by drastically shifting the nation's approach to justice to a punitive system that disregards the underlying causes of criminality and continually decreasing crime rates. The Bill represents a significant shift from rehabilitative approaches and furthers the justice system's ongoing failure to adequately recognize and respond to the historical effects of colonialism that have given rise to the disproportionate number of Aboriginal people in conflict with the Canadian justice system today.

Not only have crime rates in Canada been on the decline, but it can be argued that Canada is already extremely "tough on crime" as it has one of the highest incarceration rates of young people in the world, double that of the United States[1]. In addition to decreasing national crime rates, recent research on "tough on crime" justice measures have found that such approaches are, in fact, not proven to increase public safety and that, alternatively, investments in prevention, early interventions, and rehabilitation are both more effective in crime reduction and more cost-effective.[2] Furthermore, researchers have cautioned the government that not only is Bill C-10 not supported by evidence-based research, but that it would most affect Aboriginal people, young people, and people with mental health issues.[3]

In representing the interests of 29 member Friendship Centres located in cities and towns across Ontario, the OFIFC is not able to support a number of fundamental changes to different Acts within Bill C-10, the *Safe Streets and Communities Act.* This review aims to provide a brief overview of the OFIFC's work in the area of justice, a survey of the current situation faced by Aboriginal people in conflict with the justice system, and a review of problematic elements of Part 2, Part 3, and Part 4 of Bill C-10. Each of these areas of Bill C-10 proposes a number of legislative amendments that, if passed as proposed, will have a negative impact on Aboriginal people involved with the justice system.

OFIFC's Approach to Programming and Focus on Justice

The OFIFC's wholistic approach to community-based programming offers urban Aboriginal peoples across Ontario the opportunity to engage in a range of culture-based programming that meet the needs of communities in the areas of health, education, employment and training, and justice, among others. In offering meaningful and culturally relevant programming that targets children and youth, the OFIFC has had success in providing preventative and interventionist programming at the earliest stages of young people's lives.

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[1] National Council of Welfare (Spring 2000). *Justice and the Poor*. (Volume 111). Accessed December 8, 2011: http://www.ncw.gc.ca/l.3bd.2t.1.3ls@-eng.jsp?lid=96

[2] Simon Fraser University News Online (November 17, 2011). Rethink tough-on-crime reforms, say researchers. Retrieved on November 29, 2011 from :http://www.sfu.ca/sfunews/stories/rethink-tough-on-crime-reforms-say-researchers.html

[3] Ibid.

In terms of interventionist programming, the OFIFC offers justice-focused programming that aims to support Aboriginal offenders in conflict with the law including the Aboriginal Combined Courtwork Programme, the Aboriginal Criminal Courtwork Programme, and the Aboriginal Family Courtwork Programme, all administered through the OFIFC's member Friendship Centres. In addition, a unique program that is delivered in five Centres in Ontario is the Aboriginal Community Justice Programme which was developed to address the overrepresentation of Aboriginal people in the justice system and meet the needs of Aboriginal people who have been through the court system. As a result of the Aboriginal Community Justice Programme's focus on culturally based pre- and post-charge diversion programming, the OFIFC has seen a measured increase in successful client diversions. As a testament to the significance of meeting the needs of an increasingly young and growing Aboriginal population, it is important to note that 66% of all of the OFIFC's Aboriginal Community Justice Programme clients in 2008-2009 were 25 years of age and younger.[4] These program statistics point to the positive impacts of culturally-relevant diversion programming in successfully reintegrating Aboriginal people involved with the justice system into their communities.

Aboriginal People and the Canadian Criminal Justice System

Aboriginal people in Canada are significantly overrepresented in the Canadian justice system. While Aboriginal adults made up 2.7% of the total Canadian adult population in 2006-2007, Aboriginal people accounted for 17% of federal offenders.[5] Furthermore, 19.6% of incarcerated offenders were Aboriginal and 12.9% of conditional release offenders were Aboriginal.[6] In Ontario, Aboriginal people make up 2% of the total population, but represent 9% of offenders in the provincial system.[7]

While national crime rates have been in decline, there remains a constant overrepresentation of Aboriginal offenders across the justice system. According to Statistics Canada, in 2007/08, Aboriginal offenders counted for 17% of adults admitted to remand, 18% of adults admitted to provincial and territorial custody, 16% of adults

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[4] OFIFC. 2011. *Aboriginal Community Justice Programme – Focus on Success.* Retrieved from: http://www.ofifc.org/programmes/Aboriginal_Community_Justice_Programme.php#

[5] Mann, Michelle M. (2010) Incarceration and the Aboriginal Offender: Potential Impacts of the Tackling Violent Crime Act and the Corrections Review Panel Recommendations. Aboriginal Policy Research: Exploring the Urban Landscape (Volume VIII) 233.

[6] Ibid.

[7] Government of Ontario. 2011. *Aboriginal Justice Strategy*. Retrieved on November 29, 2011 from: http://www.attorneygeneral.jus.gov.on.ca/english/aboriginal_justice_strategy/reduce_overrepresentation.asp

admitted to probation and 19% of adults admitted to a conditional sentence.[8] The same trends exist when looking at the rate of Aboriginal youth justice involvement despite provisions within the Youth Criminal Justice Act (YCJA) intended to respond to Aboriginal over-representation in the justice system. According to the 2006 Census, 6% of all youth 12 to 17 years old in Canada self-identified as Aboriginal ,but in 2008/09 Aboriginal youth accounted for 27% of youth admitted to remand, 36% of youth admitted to sentenced custody and 24% of youth admitted to probation, a grossly disproportionate representation.

In 2004, the Department of Justice released *A One-Day Snapshot of Aboriginal Youth in Custody Across Canada* and found that Aboriginal youth were approximately eight times more likely to be in custody than non-Aboriginal youth.[9] The Snapshot suggested that the high proportion was likely due to the high rates of poverty, substance abuse and victimization that is prevalent among Aboriginal communities. The research also indicated the possibility of discrimination within the youth criminal justice system. On Snapshot day,June 4, 2003, the typical Aboriginal youth inmate was a 16-17 year old male, in custody for break and enter, theft, orserious assault.[10]

No group has been touched by Canada's youth incarceration addiction more than Aboriginal peoples; Canada's colonial legacy continues to have a dramatic effect which is evident in the numbers of incarcerated Aboriginal youth. Research has concluded that "in addition to demographics and historical issues, Aboriginals are overrepresented largely as a result to their low socio-economic status - the more socially and economically marginalized the groups, the higher involvement in the criminal justice system."[11] Chronic and pervasive poverty has a direct influence on the interaction between Aboriginal people and the justice system.
An omnibus crime bill that experts have warned will run the risk of increasing these alarming statistics[12]combined with the socio economic realities faced by Aboriginal

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[8] Perreault, Samuel. (2009). The incarceration of Aboriginal people in adult correctional services. *Juristat*. Retrieved December 9, 2011 from: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.htm#a5
[9] Department of Justice. (2004). A One-Day Snapshot of Aboriginal Youth in Custody Across Canada : Phase II. Retrieved December 9, 2011 from: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2004/yj2-jj2/p3.html
[10] Department of Justice. (2004). Backgrounder: A One-Day Snapshot of Aboriginal Youth in Custody Across Canada : Phase II. Retrieved December 9, 2011 from: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2004/doc_31302.html
[11] Latimer, J. & Foss L. (2005). The Sentencing of Aboriginal and Non-Aboriginal Youth under the Young Offenders Act: A Multivariate Analysis. *Canadian Journal of Criminology and Criminal Justice*. (47.3) 482.
[12] Simon Fraser University News Online (November 17, 2011). Rethink tough-on-crime reforms, say researchers. Retrieved on November 29, 2011 from :http://www.sfu.ca/sfunews/stories/rethink-tough-on-crime-reforms-say-researchers.html

people due to the legacy of colonialism and the fast and growing youth contingent will only increase the widening justice gap between Aboriginal and non-Aboriginal people in Canada.

In 2000, the OFIFC released its report Urban Aboriginal Child Poverty: A Status Report on Aboriginal Children and their Families in Ontario. The report revealed the increasing difficulties urban Aboriginal families across Ontario were experiencing in securing the most basic necessities of survival such as obtaining enough money for food, clothing, housing, transportation, basic health care and recreation. The report candidly shared stories of the psychological effects that poverty was having on Aboriginal children and their families.

As a result, the OFIFC commissioned a follow-up report entitled "Child Hunger & Food Insecurity Among Urban Aboriginal Families (2003)". The study concluded that 79% of respondents indicated that they worried about running out of food, 35% of their children had gone hungry, 11% reported that their children had missed school because there was no food, and 7% reported that they had been involved with CAS because of food shortage. The study findings clearly demonstrated the reality that for many urban Aboriginal families food shortage is an immense issue that has contributed to negative outcomes.

In terms of violence, it is well documented that Aboriginal children and youth are exposed to higher rates of family violence and victimization than other groups. The Department of Justice issued *A Review of Research on Criminal Victimization and First Nations, Métis, and Inuit Peoples 1990 to 2001* which highlighted the effects of abuse on Aboriginal children and youth later in life. The review indicated that the link between exposure to abuse as a child or youth increases the risk of repeating the cycle in their own intimate relationships (abuse becomes normalized) – either as victim or victimizer. In addition, there is an increased risk of Aboriginal children and youth engaging in self-destructive behaviour (alcohol and substance abuse, self harm, high risk sexual behaviour) as a means for coping.[13] Aboriginal youth in carceral custody are more likely

[13] Department of Justice. (2006). A Review of Research on Criminal Victimization and First Nations, Métis, and Inuit Peoples 1990 to 2001. Retrieved on December 9, 2011 from: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_vic1/p1.html

to have a history of abuse than other groups and to have traded sexual favours for food, clothing, shelter, money, transportation, or drugs and alcohol.[14]

Violence and victimization have profound negative effects on the mental development and physical perception of a child or youth's healthy self outlook. The environment these children and youth grow up in is often times very stressful, leaving feelings of fear, helplessness and anxiety. It is reported that youth who experience or witness prolonged abuse often leave home at an early age. Many of these youth are homeless and are further exposed to serious health risks by engaging in prostitution, addictions, unprotected sexual activity and criminal and gang activity for survival.[15]

Intrinsically linked to the overrepresentation of Aboriginal children and youth in the justice system is the parallel overrepresentation of Aboriginal children and youth within the child welfare system, another system of racial institutionalization that continues the legacy of the Indian Residential School experience onto survivors' future generations. At this time, there are 27,000 children in governmental custody – this is three times the number at the height of Indian Residential Schools and more than any other time in Canada's history, including the 60s Scoop era.[16] Tragically, research indicates a strong correlation between a young person having been involved in the child welfare system and future criminal offending: 84% of adult offenders report spending time in foster care, 61% in group homes, and 24% having been adopted.[17]

In 2004 the OFIFC released a special report on children and youth and their experiences with justice related issues entitled "Undue Trials." Within the report the emerging themes of poverty, violence, and racism were at the crux of why Aboriginal children and youth experienced higher rates of involvement in justice related issues, including the cycle of "care to custody." Chronic crisis situations that are poverty related often bring Aboriginal children and youth into the child welfare system. Due to past trauma experienced, Aboriginal children and youth can become predisposed to behavioural problems contributing to involvement with the criminal justice system. The report identified that many Aboriginal youth involved in the criminal justice system also suffered from a

[14] McCreary Centre Society. (2005). Time Out II. Retrieved on December 9, 2011 from: http://www.mcs.bc.ca/pdf/time_out_2.pdf
[15] Health Canada. (2003). Health Effects of Family Violence Overview Paper. National Clearinghouse on Family Violence.
[16] Ball, Jessica. (2008). Promoting Equity and Dignity for Aboriginal Children in Canada. Institute for Research on Public Policy Choices. (14.7) 10.
[17] Government of Ontario. (2008). Aboriginal Justice Strategy Development Paper – Draft.

diagnosed/misdiagnosed/or undiagnosed cognitive disability, such as Fetal Alcohol Spectrum Disorder (FASD). The factors and circumstances which lead to Aboriginal youth overrepresentation in the criminal justice system are interwoven and complex and must be addressed together to make a substantive change in outcomes for Aboriginal youth.

The Urban Aboriginal Task Force report highlighted the need to understand the many interrelated challenges that urban Aboriginal children and youth face in Ontario including, "addictions, mental health and suicide are important challenges…[their] mental health needs are not being met."[18] With limited research and data in the area of children's mental health, it is suggested that 15 to 21 percent of children and youth are affected in Canada - with significantly higher rates for Aboriginal children and youth.[19] In Ontario, more than 500,000 children and youth are estimated to have at least one diagnosable mental-health disorder.[20]

As a state with fiduciary responsibilities to Aboriginal peoples, Canada has largely ignored the socio-economic disparities which affect Aboriginal peoples and which can be traced to the colonial legacy of the Canadian government and are thus directly related to ongoing discriminatory government policies and practices. Consequently, Aboriginal youth often experience conflict with the criminal justice system throughout their adult lives. The Federal Aboriginal Justice Strategy has recognized that Aboriginal youth remain at high-risk because of their continued exposure to low socio-economic conditions which is compounded by the continued experience of a loss of culture through removal into government care. The Ontario Aboriginal Justice Strategy is supposed to be articulating the perspectives of Aboriginal communities, analyzing current criminal justice service delivery, and identifying programs or initiatives to implement a more constructive approach. This is a positive direction that stands at odds with many of the amendments in Bill C-10.

We want to remind decision makers of the federal government's acknowledgment of the damage Indian Residential Schools have caused Aboriginal peoples and their cultures by apologizing to the survivors of this experience. It is important that we reflect on

[18] Urban Aboriginal Task Force Final Report. (2007). 133.
[19] Ministry of Children and Youth Services. (2006). A Shared Responsibility – Ontario's Policy Framework for Child and Youth Mental Health.
[20] Ibid.

contemporary conditions that have arisen out of the Indian Residential School experience in relation to the over-representation of Aboriginal youth in custody today:

> [P]laced in a historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.[21]

[21] Jackson, Michael. (1989). Locking Up Natives in Canada. University of British Colombia Law Review. (23.2) 216.

Review of Bill C-10, *Safe Streets and Communities Act*

PART 1

Enactment of the Justice for Victims of Terrorism Act and amendments to the State Immunity Act [Bill C-10, Part 1, Clauses 2–9 (formerly Bill S-7)]

- The OFIFC has not prepared comment on this section of the Bill.

PART 2

Amendments to the Criminal Code (sexual offences against children) [Bill C-10, Part 2, Clauses 10–31, 35–38, 49 and 51 (formerly Bill C-54)]

- The OFIFC has not prepared comment on this section of the Bill.

Amendments to the Controlled Drugs and Substances Act [Bill C-10, Part 2, Clauses 32–33, 39–48 and 50–51(formerly Bill S-10)]

The OFIFC believes Bill C-10's proposed amendments to the *Controlled Drugs and Substances Act* (CDSA) will see an increase in Aboriginal incarceration rates and consequently a step back and away from ensuring safe Aboriginal communities. According to the Centre for Addictions and Mental Health (CAMH), Aboriginal peoples are overrepresented in terms of substance use. The rate of illicit drug use among First Nations people is documented as double the rate of the greater Canadian population while the rates of prescription drug abuse continue to rise dramatically. In their submission to parliament on Bill C-15 in May 2009, CAMH stated that the overrepresentation of substance use among Aboriginal peoples requires "special efforts by government to address the social and economic determinants of addiction."[22] Bill C-10's amendments to the CDSA fail to recognize the aforementioned root causes of addiction, substance abuse, and drug-related criminal involvement and the OFIFC believes that it is only by seriously addressing these causes that meaningful

[22] CAMH Submission to Parliament on Bill C-15. (May 2009).

rehabilitation and improved outcomes for growing and youthful Aboriginal communities will occur.

Mandatory Minimum Sentences (Clauses 39 to 41)

Clauses 39 to 41 of Bill C-10 propose to amend sections 5 to 7 of the CDSA to provide mandatory minimum terms of imprisonment for drug trafficking offences. The minimum punishment of imprisonment for one year will be applied if aggravating factors apply, including: committing offences for a criminal organization; the use, or threat of the use of violence in the commission of an offence; an offender's previous conviction of a designated substance offence; or a term of imprisonment served for such an offence within the previous 10 years. A new section of the CDSA provides maximum punishment of imprisonment of five years less a day if the trafficking offence is for a small amount of cannabis or its derivatives.

Clause 40 of Bill C-10 provides a mandatory minimum punishment of imprisonment for one year for trafficking of a substance included in Schedule I of the CDSA that does not exceed one kilogram, or is listed in Schedule II. Furthermore, Bill C-10 includes a new section under 6(3)(a. 1) of the CDSA that will increase the mandatory minimum punishment of imprisonment to two years if the Schedule I substance exceeds one kilogram. An amendment to section 7(2)(a) of the CDSA which makes the production of a substance an indictable offence with a maximum punishment of imprisonment for life, will now include the production of cannabis.

Clause 41 of Bill C-10 provides a mandatory minimum punishment of imprisonment for two years, and maximum punishment of life imprisonment if the subject matter of the production offence is included in Schedule I. The mandatory minimum punishment is increased to three years if any health and safety factors apply in the offence including: if the offender uses real property belonging to a third party to commit the offence; if the production constitutes a security, health, or safety hazard to those under 18 years of age in the location where the offence is committed; if the production causes a public safety hazard in a residential area; or if the accused places or sets a trap to cause death or bodily harm to another person where the offence is committed. If the substance produced for the purpose of trafficking is listed in Schedule II, a new section 7(2)(a.1) will

impose a mandatory minimum punishment of imprisonment for one year. If any of the aforementioned listed health and safety factors apply, the mandatory minimum punishment of imprisonment would increase to 18 months. If the subject matter of the production offence is cannabis, section 7(2)(b) of the CDSA doubles the maximum possible imprisonment term from 7 to 14 years. Bill C-10 also introduces mandatory minimum punishments for the production of cannabis, depending upon the number of plants produced.

The OFIFC is concerned that the implementation of mandatory minimum sentences for non-violent drug offences will disproportionately affect Aboriginal offenders who are overrepresented as substance users and who experience higher rates of addiction.

British Columbia's Urban Health Research Initiative has studied Bill C-10's amendments to the CDSA and has cautioned that:

> The proportion of Aboriginal persons admitted into correctional facilities has more than doubled over the past 30 years, and Aboriginal adults now account for about 17% of adults admitted, despite making up only 3% of the general population.[23]

And that:

> Mandatory minimum sentences will likely lead to higher levels of incarceration and worsening drug-related harms experienced by these groups, while doing nothing to address the underlying causes of addiction.[24]

The sentencing reforms proposed in Bill C-10 are at odds with the consideration of the root causes of addictions. Furthermore, it is imperative that rehabilitative and restorative justice measures be more widely accessible to Aboriginal offenders.

<u>Report to Parliament (Clause 42)</u>

[23] Urban Health Research Initiative. (2011). Why Oppose Bill S-10 & Mandatory Minimum Sentences? Fact Sheet. Retrieved on November 29, 2011 from: http://uhri.cfenet.ubc.ca/images/Documents/s10-facts-eng.pdf
[24] Ibid.

Clause 42 of Bill C-10 includes a new section 8 of the CDSA that requires a comprehensive review of the CDSA to be undertaken by a committee designated by Parliament within five years, which will include a cost-benefit analysis of mandatory minimum sentences.

The OFIFC is concerned that a cost benefit estimate was not conducted in advance of the amendments proposed throughout Bill C-10, especially given the concerns raised by provinces and territories relating to the anticipated costs of higher incarceration rates. We urge the government to consider investments into crime prevention programming, methods that have been proven to be much more cost-effective to society over the long term than incarceration.[25] As it stands, the government's announcement of an estimated federal investment of $78.6 million over 5 years lacks transparency.[26] Not only has the government been remiss about disclosing the estimated costs to be downloaded on to the provinces and territories in order to expand prisons and house more inmates, but they have also remained silent on the cost to Canadian citizens as priorities are shifted and cuts are made to allow for the funding of Bill C-10. Ultimately it will be Aboriginal people who are not only disproportionately targeted by the implications of the crime bill, but also most significantly affected by any cuts to community-based programs and initiatives that support the health and the viability of communities.

Drug Treatment Courts and Treatment Programs (Clause 43)

Clause 43 of Bill C-10 would permit courts to suspend an addicted offender's sentence to allow them to take a drug treatment program. An offender's adequate participation and completion of a treatment program could result in a suspended or reduced sentence. The suspension of a sentence to allow for drug treatment is intended as a way for offenders to "deal with the addiction that motivates his or her criminal behavior."[27]

While this clause is a welcome step toward increasing the use and profile of rehabilitation within the justice system, the OFIFC encourages the development of

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[25] See: Simon Fraser University News Online (November 17, 2011). Rethink tough-on-crime reforms, say researchers. Retrieved on November 29, 2011 from :http://www.sfu.ca/sfunews/stories/rethink-tough-on-crime-reforms-say-researchers.html

[26] Fitzpatrick, Meagan. (2011, October). Crime bill to cost $78M over 5 years. *CBC News.* Retrieved on November 29, 2011 from: http://www.cbc.ca/news/canada/story/2011/10/06/pol-omnibus-crime-bill.html

[27] Barnett, Laura. et al. (2011). Legislative Summary of Bill C-10: Amendments to the Controlled Drugs and Substances Act [Bill C-10, Part 2, Clauses 32-33, 39-48 and 50-51 (Former Bill S-10)]. Legis Info. (Publication No. 41-1-C10-E). Retrieved on December 6, 2011 from: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c10-04&Parl=41&Ses=1&source=library_prb&Language=E#a13

culturally relevant drug treatment programming for Aboriginal offenders and programming developed to focus on the specific needs of women and youth. According to key findings from the Toronto Drug Treatment Court Project, women and young people under the age of 25 were more likely to drop out of their treatments early on, and it is recommended that programs should be developed that better respond to their needs.[28]

In order to meaningfully heal Aboriginal offenders for which addictions may be just one of many factors contributing to their criminal behavior, drug treatment programs will need to be wholistic in approach. For many Aboriginal offenders, addictions are a way to cope with the trauma of multi-generational abuse due to the legacy of residential schools, the high rates of involvement with the child welfare system, systemic racism, discrimination, and pervasive poverty. The OFIFC recommends that drug rehabilitation programs that are culturally relevant and that take into account the historical, societal, and economic factors which contribute to an offender's criminal involvement be offered to Aboriginal offenders. Furthermore, it is important to note that the federal Drug Treatment Court Program is currently only operating in six Canadian cities, shutting out offenders from cities, towns and communities across Canada. In Ontario the Drug Treatment Court Program is offered in Toronto and Ottawa, and therefore cannot effectively meet the needs of treating offenders in other communities.

Amendments to the Criminal Code (conditional sentencing) [Bill C-10, Part 2, Clauses 34 and 51 (formerly Bill C-16 and Bill C-42)]

Conditional sentences are sentences that can be served in the community for a term of less than two years so long as specific conditions are met. According to Statistics Canada, in 2007/08, Aboriginal adults accounted for 19% of adults admitted to a conditional sentence.[29] Bill C-10's amendments to section 742.1 of the Criminal Code regarding conditional sentences would ensure strict limitations to their use. The changes seek to put an end to the use of conditional sentences for indictable offences for which

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[28] Public Safety Canada. (2007). Toronto Drug Treatment Court project. Retrieved on December 6, 2011 from: http://www.publicsafety.gc.ca/prg/cp/bldngevd/2007-es-09-eng.aspx#a02

[29] Perreault, Samuel. (2009). The incarceration of Aboriginal people in adult correctional services. *Juristat*. Retrieved December 9, 2011 from: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.htm#a5

maximum terms of imprisonment are 14 years or life and for indictable offences that involve bodily harm, the trafficking or production of drugs, or the use of a weapon for which maximum terms of imprisonment are 10 years. While the government has marketed the limitations to conditional sentencing as an important mechanism for cracking down on violent offenders, the actual range of offences that would no longer be eligible for a conditional sentence under these proposed changes would span much more broadly to include non-violent offences for which alternative sentencing may be more appropriate and less restrictive.[30]

Replacement of Section 742.1 of the Criminal Code (Clause 34)

Bill C-10 proposes the replacement of section 742.1 of the Criminal Code which would remove the reference to serious personal injury offences and which emphasizes the maximum term of imprisonment applicable to Criminal Code offences.

Clause 34 of Bill C-10 includes the addition of a specific list of offences that, when prosecuted by way of indictment, will not allow for conditional sentences. The list is as follows:

- prison breach
- criminal harassment
- sexual assault
- kidnapping
- trafficking in persons - material benefit
- abduction of person under the age of 14 years
- motor vehicle theft
- theft over $5,000
- breaking and entering a place other than a dwelling-house
- being unlawfully in a dwelling-house
- arson for fraudulent purpose

Through the restriction of conditional sentencing and the mandating of minimum sentences for the above indictable offences, the OFIFC is concerned that the rates of incarceration will rise for Aboriginal offenders and that the appropriateness of sentences will be compromised. According to Gabor and Crutcher, in their study of mandatory minimum sentences, they note this approach to sentencing does “not appear to promote equity in sentencing as they seem to be applied disproportionately to low-level offenders

[30] Canadian Bar Association. (2011, October) Submission on Bill C-10. 17.

and those from minority groups."[31] Furthermore, they note that it is women and Aboriginal peoples who may suffer most from mandatory minimum sentences.[32] While the researchers distinguish between female offenders and Aboriginal offenders, we know that of the overall population of incarcerated female offenders, Aboriginal females are represented at a higher proportion than Aboriginal males are within the population of incarcerated male offenders.[33]

There remain unanswered questions regarding how Bill C-10's proposed changes to section 742.1 of the Criminal Code conflict with sub-section 718.2(e) and the Supreme Court of Canada's 1999 *Gladue* decision, which should be used as guiding principles for judicial consideration when sentencing Aboriginal offenders. Sub-section 718.2(e) of the Criminal Code and the *Gladue* decision provide judges with tools for a more wholistic approach to sentencing procedures that take into account the personal backgrounds including the social and economic histories of Aboriginal offenders. Sub-section 718.2(e) states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." These tools, used along with conditional sentencing provisions, ensure that judges can work toward addressing the overrepresentation of Aboriginal peoples in the justice system as was intended by the Supreme Court of Canada.[34] In addition to these tools, Gladue Courts and caseworkers have also been established to provide Aboriginal accused with added supports.

It is already an alarming issue that after over a decade since *Gladue*, there is an increasing awareness that sub-section 718.2(e) is not being used to its full advantage to ensure that responsive and restorative sentencing decisions acknowledge the historic and current circumstances of Aboriginal offenders.[35] The implementation of limitations to conditional sentencing through Bill C-10's amendments to section 742.1 of the Criminal Code, and in some cases, the removal of any possibility of conditional sentencing, will

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[31] Gabor, T & Crutcher, N. (2002). Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures. Department of Justice, Research and Statistics Division.
[32] Ibid.
[33] Perreault, Samuel. (2009). The incarceration of Aboriginal people in adult correctional services. *Juristat*. Retrieved December 9, 2011 from: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.htm#a5
[34] Roach, Kent. (2009). One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal. *Criminal Law Quarterly*. (54). 470.
[35] Roach, Kent. (2009). One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal. *Criminal Law Quarterly*. (54). 470.

contribute to a further denial of the rights of Aboriginal offenders and ensure that the disproportionate rate of incarceration of Aboriginal peoples is further exacerbated.

PART 3

Amendments to the Corrections and conditional release Act [Bill C-10, Part 3, Clauses 52–107 and 147 (formerly Bill C-39)]

Amendments to the *Corrections and Conditional Release Act* (CCRA) found in clauses 52-107 and 147 of Bill C-10 propose to increase the accountability of offenders, restrict conditional releases, and consider victims throughout sentencing. The amendments propose a drastic reorientation of the national corrections system toward an increase in the use of incarceration under the guise of increasing public safety. Aboriginal inmates, who account for a disproportionate amount of incarcerated offenders, will be disproportionately targeted under this legislation.

Purpose and Principles (Clause 54)

Section 3 of the current CCRA states that the purpose of the correctional system is to contribute to maintaining a just society by carrying out sentences through the safe and humane custody and supervision of offenders. This section also currently states that the correctional system must provide programming in penitentiaries and communities to ensure that rehabilitation promotes the reintegration of offenders into the community. By including these two stated purposes, the CCRA provides a balanced mandate of maintaining justice and preparing inmates for healthy reintegration into society.

Section 4 of the CCRA outlines the principles guiding its purpose including the protection of society to be the paramount consideration of the correctional system. Bill C-10 aims to put greater emphasis on this principle by repositioning it on its own as a fundamental purpose of the correctional system in new section 3.1 of the CCRA, above the maintenance of just society and the rehabilitation and reintegration of offenders into communities.

Further changes to clause 54 of Bill C-10 propose the removal from Section 4 of the CCRA the principal that the Correctional Service of Canada (CSC) "use the least restrictive measures consistent with the protection of the public, staff members and offenders" to replace it with a statement that states that the measures "are limited to what is necessary and proportionate to attain the purposes of this Act." Bill C-10 will also remove from Section 4 the principle that "offenders retain the right and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as consequence of the sentence" and replace it with the principal of rights and privileges that are "lawfully" removed or restricted. Mental health has now also been added to the principles, which means that the CSC must be responsive to the needs of persons requiring mental health care.

The OFIFC is concerned that the amendment to Bill C-10's Clause 54, the Purpose and Principles of the CCRA seek to drastically shift the policy direction of the Correctional Service of Canada to designate the purported protection of society as the paramount purpose of the corrections process. This change in direction represents a fundamental shift in direction for the Canadian corrections system to a reliance on longer prison terms for inmates for the sake of the alleged increased protection of society and the accountability of offenders. The Canadian Criminal Justice Association, in its June 2010 submission on Bill C-39, *Ending Early Release for Criminals and Increasing Offender Accountability Act* (the previous incarnation of this section of Bill C-10), stated that:

> the protection of society can best be accomplished by a correctional system that emphasizes reparation and rehabilitation as a means of reintegrating inmates back into society. While the 'protection of society' is understood to be the objective, complementary language about reintegration and rehabilitation is required if we are ultimately going to make Canadian communities safer.[36]

The downgrading in importance of the maintenance of a just society and the provision of rehabilitation as the fundamental purposes of the CCRA to instead enshrine the "protection of society" on its own in new section 3.1 runs the risk of this new section being interpreted as the prime purpose of the CCRA. This amendment stands to allow

[36]Canadian Criminal Justice Association. (2010). Brief to the Standing Committee on Justice and Legal Affairs on Bill C-30, *Ending Early Release for Criminals and Increasing Offender Accountability Act.*

for little consideration of the previous balanced purposes of the CCRA and, if interpreted independently, could contribute to longer prison terms and rising incarceration rates that could be argued to be the best method of "protection of society." The OFIFC cannot support the aforementioned amendments that would change the fundamental principles of the CCRA and which propose what appears to be a furtive attempt to change the direction of the CCRA, putting offenders at risk of harsher and longer sentences with little regard for rehabilitation and healing.

The OFIFC is conditionally supportive of the amendment to add consideration for the needs of offenders with mental health issues to the principles of the *Corrections and conditional release Act*. This amendment will require the CSC to be responsive to the needs of persons requiring mental health care, of which a high number are Aboriginal. It is suggested that 40% to 60% of youth (male and female) within the youth justice system have mental health needs ranging from mild to severe. While it is promising to have this provision included within the principles of the Act, it is important to note that these statistics point to an alarming gap in supports for people with mental health issues before they ever become involved with the criminal justice system. Once offenders do become involved in the criminal justice system, a large proportion of Aboriginal offenders with mental health conditions have never been diagnosed. The OFIFC recommends that increased supports be provided for Aboriginal people with mental health issues at an early age.

Correctional Plan (Clause 55)

Amendments to the CCRA in clause 55 of Bill C-10 that seek to increase offender accountability will require that an offender's participation in meeting their correctional plan goals will be taken into account when deciding on conditional releases or other privileges. The correctional plan is developed with a correctional officer and aimed at fostering rehabilitation and reintegration into the community. The CSC will encourage offenders to actively participate to fulfill the objectives of their correctional plans and will take into account offenders' progress.

The OFIFC is concerned with this amendment as the current administration of correctional plans is not effectively meeting the needs of offenders, especially those of Aboriginal inmates. To base the conditions of allotting rights and privileges on the

adherence to inadequate correctional plans will do very little to contribute to meaningfully rehabilitating offenders and protecting the public. An offender's conditional plan should be an effective method of rehabilitation and reintegration into the community that emphasizes values of restorative justice, provides supports to offenders with substance abuse or mental health issues, incorporates culturally appropriate supports, and assists with goal-setting. Unfortunately, the Canadian Bar Association states that:

> the reality is that correctional plans are more like an assembly line, mass produced product made from standardised parts. Any fifty correctional plans will broadly fit into just a few distinct types, and the same sets of programs are identified for many prisoners.[37]

In the experience of Aboriginal offenders, who are over-classified in maximum security, there is a severe shortage of Aboriginal-specific programming. Aboriginal offenders are often at a disadvantage as they cannot fulfill their correctional plans by transferring to lower-security institutions where Aboriginal programming is more widely available.[38] While there are currently culturally-relevant supports for Aboriginal offenders in prisons, their consistency and availability vary widely across the country from institution to institution. Furthermore, neither the CSC's Strategic Plan nor the Commissioners Directive 702 on Aboriginal Corrections clearly define a strategic direction to ensure Aboriginal offenders have access to appropriate services, and "[i]n general, CSC policies are weak on program performance indicators, reporting and accountabilities."[39] It is problematic that the CSC are proposing to move in the direction of increasing the accountability of offenders when their own internal policies lack in basic accountability measures.

To hold offenders to account and use their degree of adherence to the correctional plan as a measurement for their allotment of rights and privileges under this current system of correctional plan administration would translate to a system where inmates receive benefits if they follow flawed and ill-prescribed plans. It is questionable whether adherence to mass produced correctional plans will contribute to an increase in public

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[37] Canadian Bar Association. (2011, October) Submission on Bill C-10. 47.
[38] Mann, Michelle M. (2009). Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections. Office of the Correctional Investigator. Retrieved on December 6, 2011 from: http://www.oci-bec.gc.ca/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf
[39] Ibid.

safety, or any type of meaningful accountability for offenders. For Aboriginal offenders, the absence of readily available culturally appropriate services remains a serious gap in rehabilitation programming and will make it impossible for Aboriginal offenders to complete meaningful correctional plans, and thus, receive the associated proposed privileges that adherence will warrant.

Definitions, Disclosure of Information to Victims, Parole Board of Canada Hearings and Victim Statements (Clauses 52, 57, 96 and 98)

Bill C-10 allows for victims of crime to be considered more meaningfully at different levels of the criminal justice system. The Bill allows for a victim's attendance at parole hearings and to increase the information that the CSC and the Parole Board of Canada can disclose to them. The Bill also broadens the definition of "victim" to include those who, in law or in fact, have custody or who are responsible for the care and support of a dependant of the primary victim, if that person is deceased, ill, or otherwise incapacitated. Clause 57 of Bill C-10 increases the information shared with victims about an offender. Victims will now be privy to information regarding the name of the penitentiary, the reason for the offender's transfer to another penitentiary, and the name and location of that penitentiary. The victim can also be notified if an offender is moving to a minimum security institution along with the name and location of that institution, and the reasons for the transfer. Additionally, a victim can receive information of an offender's participation in programs designed to meet his or her needs and their integration into the community as well as any serious disciplinary offence the offender has committed. Under clause 96, the victim and persons who were harmed or suffered a loss due to an of the offender (as per section 142(3) of the CCRA) will now be allowed to present statements at Parole Board of Canada hearings that may include their concerns regarding the release of an offender.

It is an essential element of restorative justice approaches to involve all parties involved in an offence including offenders, victims, and the greater community. The OFIFC believes that greater participation of victims in the criminal justice system in conjunction with appropriate rehabilitative supports for both the offender and victim are important methods of restoring balance when crimes are committed against persons. The OFIFC would caution, though, that the objective of including victims' involvement throughout the

criminal justice system should recognize the tenets of restorative justice which mean: "restoring victims, restoring offenders and restoring communities. These objectives take priority over punishment."[40]

Aboriginal peoples are not only overrepresented as offenders, but also as victims. In 2009, 37% of Aboriginal people reported instances of victimization compared with 26% of non-Aboriginal people.[41] Keeping in mind that only approximately 1 in 3 violent offences get reported for both Aboriginal and non-Aboriginal victims, this figure should be considered conservative. Furthermore, 67% of violent crimes involving Aboriginal victims were more likely to be related to illicit drug use or alcohol than violent incidents involving non-Aboriginal victims (52%).[42] These statistics point to the need for effective, culturally-relevant supports for offenders and victims that deal with the underlying issues of substance use, criminality, and victimization, as opposed to creating opportunities for vindictive, sensational acts by victims in a manner utterly divorced from any restorative related involvement with the offender.

Parole Reviews (Clauses 78 and 79)

Clauses 78 and 79 of Bill C-10 increase the wait times for new parole applications after they are originally denied or cancelled. New applications for day parole or full parole may not be made until one year after the date of the Parole Board of Canada's (PBC) decision, or until any earlier time that the regulations prescribe or the PBC determines.

These amendments, deemed measures to increase offender accountability and protect society, will translate to longer incarceration times for offenders, and an effectively longer time before offenders can begin their reintegration into a community and a stable second chance at life outside of prison. According to Welsh and Ogloff, Aboriginal offenders experience lower instances of parole release and consequently, longer incarceration rates. In 1996/1997, only 34% of Aboriginal offenders were granted full parole release compared with 41% for non-Aboriginal offenders.[43] Once Aboriginal offenders are granted full parole, it is, on average, later in their sentence than non-

[40] Hughes, P. & Mossman, M. J. (2009). Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses, and Restorative Justice Initaitives. Department of Justice. 77.
[41] Perreault, Samuel. (2009). Violent victimization of Aboriginal people in the Canadian provinces. *Juristat*. Retrieved December 9, 2011 from: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.htm#a5
[42] Ibid.
[43] Welsh, A. & Ogloff, J.R.P. (2000). Full parole and the aboriginal experience: accounting for the racial discrepancies in release rates. *Canadian Journal of Criminology*. (24.4)

Aboriginal offenders. Double the number of Aboriginal offenders granted full parole have served between six months and a year more than their original parole eligibility date than non-Aboriginal offenders. With the amendments to wait times proposed under clauses 78 and 79 of Bill C-10, Aboriginal offenders' will face yet another element poised to lengthen their incarceration rates.

Suspension, Termination, Revocation and Inoperativeness of Parole, Statutory Release or Long-Term Supervision and Power to Arrest Without a Warrant (Clauses 89 and 92)

Clause 89 of the bill amends the CCRA to provide for an automatic suspension of parole where the offender receives an additional sentence or a conditional sentence. This Clause also provides increased authority to the PBC for decision making. Clause 92 of Bill C-10 authorizes a peace officer to arrest a conditionally released offender for a breach of conditions without a warrant. These measures to increase the accountability of offenders are in addition to clause 64 which allows the Correctional Service of Canada (CSC) the power to have an offender wear a monitoring device when being released on special conditions.

The OFIFC is concerned by the increased authority given to security officers and the PBC for decision making. A December 2006 Juristat study that looked at the outcomes of probation and conditional sentencing supervision in five provinces found that "Aboriginal persons had higher rates of breach of a period of community supervision compared to non-Aboriginal persons in both Saskatchewan (32% versus 16%) and Alberta (52% versus 33%)."[44] The rates reported for breach of probation in the study are extraordinarily high for Aboriginal offenders. These trends indicate the failing of the CSC in providing the necessary supports for Aboriginal offenders throughout their involvement with the justice system which lead to high rates of recidivism. The changes in clauses 89 and 92 of the CCRA will disproportionately target Aboriginal offenders and further confound the situation.

Amendments to the Criminal Records Act (pardons) [Bill C-10, Part 3, Clauses 108–134, 137–146, 148–165, and the schedule (formerly Bill C-23B)]

[44] Johnson, Sara. (2006). Outcomes of Probation and Conditional Sentence Supervision: An Analysis of Newfoundland and Labrador, Nova Scotia, New Brunswick, Saskatchewan and Alberta, 2003/2004 to 2004/2005. *Juristat.* (26.7.)

Amendments to the *Criminal Records Act* (CRA) in Bill C-10 provide for greater decision making authority of the National Parole Board (NPB) of Canada, which, in addition to having the authority to grant or to refuse to grant record suspensions (previously "pardons"), will allow the NPB the authority to order, refuse to order, and revoke record suspensions.

Record Suspensions (Clause 115)

Clause 115 of Bill C-10 proposes amending the CRA to increase the ineligibility period to submit applications for a record suspension from three to five years for summary conviction offences and from five to ten years for indictable offences. Furthermore, Bill C-10 introduces a "three strikes" rule that makes offenders convicted of more than three indictable offences ineligible for a record suspension.

The OFIFC is concerned about Bill C-10's proposal to increase the ineligibility period for record suspensions as well as the proposed change in language from "pardons" to "record suspension." As noted by the St. Leonard's Society of Canada in their submission to the House of Commons on Bill C-10 in October 2011, "record suspension implies that the individual carries forever the stigma of conviction, regardless of the fact that s/he has fulfilled all requirements under our laws."[45] The St. Leonard's Society further explained that such a stigma could seriously impact a person's chances of finding employment, housing, and reintegrating into society.[46] Not only will the change in terminology adversely affect offenders, the increase in wait times for record suspensions will create a pool of former offenders stuck in limbo for longer, or in some instances, forever, after serving their sentences. The increase in the wait times for record suspensions will further extend the time it will take for offenders to reintegrate and contribute to their communities.

Amendments to the International Transfer of Offenders Act [Bill C-10, Part 3, Clauses 135–136 (formerly Bill C-5)]

- The OFIFC has not prepared comment on this section of the Bill.

PART 4

[45] St. Leonard's Society of Canada. (2011, October). Submission to the House of Commons on Bill C-10.
[46] Ibid.

Amendments to the Youth Criminal Justice Act [Bill C-10, Part 4, Clauses 167–204 (formerly Bill C-4)]

The intent and purpose of the *Youth Criminal Justice Act* (YCJA) has been for the prevention of crime by addressing underlying reasons for young people's behaviours, rehabilitating and reintegrating young offenders into society, and ensuring that consequences for offences are meaningful.[47] While the YCJA has been largely successful in reducing youth crime rates, Aboriginal youth remain disproportionately overrepresented. Bill C-10's amendments to the YCJA propose to shift the intent and purpose of the YCJA, expand sentencing principles to be more punitive, and narrow the presumption against incarceration.

Basic Principles of the Youth Criminal Justice Act (168)

Clause 168 of Bill C-10 proposes to shift the intent and purpose of the YCJA from one that is focused on rehabilitation to one that is focused on deterrence and retribution. The amendment to paragraph 3 (1)(a) of the Act repositions the YCJA's purpose to be that of "protecting the public" by holding young offenders to account through sentences that match "the seriousness of the offence and the degree of responsibility of the young person" first and foremost.[48] The previous acknowledgement of the YCJA's duty to address the underlying reasons for youth criminality is repealed in Bill C-10, which reorients the overall purpose of the YCJA away from addressing youth criminal involvement through rehabilitative and restorative methods to instead focus on holding youth involved in the criminal justice system to account.

The OFIFC would argue that the original purpose of the YCJA was far more focused on the long-term protection of the public and in line with an understanding of the root causes of Aboriginal youth involvement in the criminal justice system than the amendments to the principal of the Act offered in Bill C-10 that promise to shift all blame to the young offender.[49]

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[47]Youth Criminal Justice Act (S.C. 2002, c. 1)
[48]Bill C-10, *Safe Streets and Communities Act.*
[49]Grondin, Rachel. (2010). Modifications to the Youth Criminal Justice Act. University of Ottawa, Interdisciplinary Research Laboratory on the Rights of the Child, Civil Law Section website. Retrieved on November 29, 2011 from: http://www.droitcivil.uottawa.ca/en/lride/opinions/opinions.html

Clause 168 of Bill C-10 further amends section 3(1)(b) of the YCJA to provide that the youth criminal justice system is based on the principle of diminished moral culpability of young persons. This amendment recognizes the vulnerability of young people, and their diminished ability to exercise sound moral judgment.

The OFIFC is supportive of this amendment, as we agree that from a moral and intellectual perspective, youth lack foresight and the ability to apply proper judgment that typically comes with adulthood. Such an understanding leaves open the door for a restorative approach to dealing with youth criminality.

Detention Prior to Sentencing (Clause 169)

Clause 169 of Bill C-10 amends section 29(2) of the YCJA which lists circumstances under which a young person should be detained until sentencing. The amendments expand the justifications for the use of detention of young persons prior to sentencing which include the charge of "serious offence" and an amendment that has been added since the previous incarnation of amendments to the YCJA in Bill C-4, that a young person's history "indicates a pattern of either outstanding charges or findings or guilt." This newer amendment provides a broader justification for pre-sentencing detention with the consideration of outstanding charges. Clause 169 of Bill C-10 lists all reasons justifying the detention of young persons prior to sentencing. This clause provides that the pre-sentencing detention of young persons is prohibited, except where the young person is charged with a "serious offence" and where the judge or justices be satisfied on a balance of probabilities that no set of conditions of release would: reduce the likelihood that the young person will not appear in court; reduce adequate public protection; and reduce confidence in the administration of justice.

Clause 167(3) of the bill defines "serious offence" as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more." This definition includes a number of Criminal Code convictions including murder, impaired driving, assault, sexual assault, theft over $5,000, breaking and entering, and fraud, all of which are punishable by a maximum prison term of five years or more. The use of "serious offence," as opposed to "violent offence," allows Bill C-10 to include offences against property and the person to be considered when determining pre-sentencing detention. These amendments will allow courts to apply pre-sentencing

detention to young persons charged with offences against property that result in maximum terms of imprisonment of at least five years. This broadening of circumstances required for pre-sentencing detention gravely increases the chances of young people with outstanding charges, or those charged with non-violent offences against property to be detained prior to sentencing.

The OFIFC remains concerned with the proposed amendments because of the high representation of Aboriginal youth that will potentially be targeted under these new amendments. The OFIFC currently delivers the Aboriginal Courtworker Program at fourteen Friendship Centres across Ontario. Aboriginal Court Worker programme statistics for 2009/10 reveal 745 Aboriginal youth (54% males and 46% females) charged with 2,703 offences received court worker services while involved with the Ontario Court system.[50] About 32% of these offences were for administration of justice offences, 14% for serious offences, 10% for violent offences and 14% for property offences. Pre-trial detention for Aboriginal Youth increased in the year of enacting the YCJA "there was a slight increase (+3%) in the number of Aboriginal youth admissions and a decrease for Non-Aboriginal youth (-17%)."[51] Juristat's Youth Custody and Community Services in Canada 2004/05 reported that one in five admissions to correctional services was an Aboriginal youth, which represented 22 percent of all admissions to remand (pre-trial detention). Of additional concern, the female Aboriginal youth population represents 30 to 38 percent of the total population in remand.[52]

We are reminded that the Supreme Court of Canada called the over-incarceration of Aboriginal people "a crisis in the Canadian justice system."[53] Jonathan Rudin aptly illustrates "if the over-incarceration of Aboriginal adults is a crisis, one struggles to find a word to describe the magnitude of the problem regarding Aboriginal youth."[54] He further highlights that the continued over-representation of Aboriginal youth is particularly distressing because the YCJA was specifically designed to address the problem of courts over using custodial sentencing.[55] The YCJA considers the wording of s. 718.2(e)

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[50] OFIFC data collection currently does not track Court Case outcomes.
[51] Statistics Canada, Juristat – Canadian Centre for Justice Statistics (2006). Victimization and offending among the Aboriginal population in Canada. (26.3) 14.
[52] Statistics Canada, Juristat – Canadian Centre for Justice Statistics. (2007). Youth Custody and Community Services in Canada, 2004/2005. (27.2) 6-7.
[53] *Gladue* para. 64
[54] Rudin, Jonathan. (2007). Incarceration of Aboriginal Youth in Ontario 2004 – 2006 – The Crisis Continues. *Criminal Law Quarterly*. (53.2) 260-272.
[55] Ibid.

of the *Criminal Code*[56] (the section that was the focus of attention in *Gladue)* to s. 38(2)(d). Section 50(1) was also amended to explicitly incorporate the provisions of s. 718.2(e). The YCJA, declaration of principles further refers to the needs of Aboriginal youth.[57]

For Aboriginal youth, as for adults, these provisions are applied inconsistently and in some cases not at all, underlining once again the manner in which the full range of tools to deal with over-representation in jails has not been utilized. Clearly, in spite of clear direction in the YCJA to decrease reliance on carceral approaches there is an on-going failure to decrease the over-representation of Aboriginal youth in custody and pre-trial detention. Amendments to pre-sentencing detention requirements will only increase these incarceration rates.

Sentencing Principles: Denunciation and Deterrence (Clause 172)

Clause 172 of Bill C-10 adds two additional sentencing principals to section 38(a) of the YCJA. The current sentencing principles state that a youth justice court must impose sentences proportionate to the seriousness of the offence and to the degree of responsibility of the young person for that offence and afford the best chances for rehabilitation and reintegration into society. In addition to these principles, the sentence must also be the least restrictive sentence and not greater than the punishment appropriate for an adult. Bill C-10 adds two objectives to these principles: "to denounce unlawful conduct" and "to deter the young person from committing offences."

The OFIFC is concerned with this particular amendment in light of current research which supports the understanding that concepts of deterrence and denunciation generally are inappropriate in the context of dealing with youth.[58] Utilizing deterrence and denunciation as a response to youth who exhibit criminal behaviour fails to address the root causes of criminal behaviour. The fundamental question one must ask in

[56] Section 718.2(e) reads: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. Section 38(2)(d) reads: all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons."

[57] The Declaration of Principle in s. 3(1)(c)(iv) states:
within the limits of fair and proportional accountability, the measures taken against young persons who commit offences should respect gender, ethnic cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.

[58] Department of Justice Canada. (2003). *A Question of Deterrence*. Just Research, Research and Statistics Division. (10) 5. Retrieved from: http://www.justice.gc.ca/eng/pi/rs/rep-rap/jr/jr10/jr10.pdf

seeking to address youth crime is "why is it happening?" It quickly becomes apparent that deep alienation, hopelessness, anger, resentment, lack of belonging and neglect go to the core of youth criminal behaviour. Therefore, adequate solutions must be crafted in response. This is no truer than in the case of Aboriginal youth who make up roughly a quarter of the youth incarcerated population in Canada, while comprising only 5% of the total youth population.[59]

The majority of youth crime is committed because of impulsive actions, increased risk-taking behavior and the inability to connect actions to consequences. Aboriginal youth who have low socio-economic status, combined with high rates of mental health issues such as Fetal Alcohol Spectrum Disorder (which may or may not be diagnosed) result in heightened predisposition to be impulsive and take risks with the inability to connect actions to consequences. The addition of deterrence and denunciation to sentencing principles will only serve to maintain the currently high levels of Aboriginal youth representation in the justice system, rather than craft solutions which address root causes with meaningful and wholistic approaches.

Neglecting the root causes of youth criminal behaviour by enshrining deterrence and denunciation in the YCJA is an authoritarian response seeking to impose conformity of behaviour. Deterrence and denunciation essentially says to Aboriginal youth who are already at the margins of society that they are disposable, that justice system and society have given up hope and choose to lock them up and throw away the key.

Solutions must be sought that give youth, particularly marginalized Aboriginal youth, a stake in adopting behaviours that are positive and constructive. Wherein it becomes obvious to them and others that they play an important, contributive role in their community and that they do have a stake in supporting it, rather than destroying it.

Keeping a Police Record of Extrajudicial Measures (Clause 190)

Sections 4 to 12 of the YCJA provide for measures that police officers and the Crown may take instead of instituting legal proceedings, referred to as extrajudicial measures. Extrajudicial measures should be used in appropriate cases and where the police and

[59]The Correctional Investigator Canada. (2006). Annual Report of the Office of the Correctional Investigator 2005-2006. 17. Retrieved from: http://www.oci-bec.gc.ca/reports/pdf/AR200506_e.pdf

the Crown believe the young person committed an offence. Under current legislation, a police department may create a file that includes measures taken with the young person such as police notes, fingerprints, and victim statements. Clause 190 of Bill C-10 will require that police keep a record of extrajudicial measures taken in dealing with young persons. If the young person is convicted of the offence, under Clause 190, the police force will be required to forward the file to the Royal Canadian Mounted Police to keep a criminal history on the offender.

The YCJA has had success in diverting young offenders from the court system using extrajudicial sanctions. According to the CBA's Submission on Bill C-10, the tough on crime amendments to the YCJA ignore the measurable successes that the YCJA has achieved in reducing youth court caseloads and reducing youth in custody.[60] Unfortunately this success has not been felt by the Aboriginal youth demographic involved in the criminal justice system. In Ontario, Aboriginal youth represented only approximately 2.2 percent of the total extrajudicial sanctions.[61] Canada and Ontario need to increase support in terms of resources to alternatives to custody and to make courts aware of these alternatives, otherwise, the crisis of over-representation of Aboriginal youth in custody will never be effectively addressed.[62] Increasing the application of extrajudicial measures in sentencing Aboriginal youth can assist the Aboriginal community and society in the short- and long-term by addressing root causes of Aboriginal youth criminal behaviour in a meaningful and wholistic manner.
The distribution of community resources to implement extrajudicial measures must be understood broadly to reflect the notion that the best approach to Aboriginal youth criminal behaviour is preventive and that prevention is best undertaken in a multi-faceted, wholistic manner. Therefore, community resources such as Friendship Centres, must be properly funded in order to continue offering an alternative to criminal behaviour for youth, whether that is in direct services, cultural programming, or as a drop in centre for youth to stay off the street and out of trouble.

The OFIFC is concerned with Bill C-10's amendments to sections 4 to 12 of the YCJA because of their potential to undermine the purpose of extrajudicial measures. Police and courts may prefer to charge the young person rather than impose an extrajudicial

[60] Canadian Bar Association. (2011, October). Submission on Bill C-10, Safe Streets and Communities Act. 8.
[61] Youth Criminal Justice Act. (2003). Extrajudicial Measures Framework for Youth in Ontario. 5.
[62] Rudin, Jonathan. Incarceration of Aboriginal Youth in Ontario 2004 – 2006 – The Crisis Continues. Forthcoming in *Criminal Law Quarterly*.

sanction. Given the fact that Aboriginal youth are under-represented in extrajudicial sanctions and over-represented in the court system (particularly for breaches); clause 190 has the potential to further penalize Aboriginal youth. Further, it should be clarified if this amendment will include increases in the use and supports of extrajudicial measures and if it will be used for evaluation purposes, such as holding the police and crown accountable in terms of performance based on the success and delivery of extrajudicial measures for the young person. Extrajudicial measures must continue to address root causes of criminal behaviour in a wholistic and long-lasting way that will decrease Aboriginal youth involvement in the justice system.

The OFIFC delivers the Aboriginal Community Justice Program at five Friendship Centres sites that cover seven regions across Ontario. According to the Aboriginal Community Justice Programme statistics 2009/10, there were approximately 75 youth diverted to one of our five Extrajudicial Sanction programmes. Comparing these statistics to the Aboriginal Courtworker programme's in terms of services to Aboriginal youth, these figures translate into 10% of the Aboriginal youth (745) who were provided court work services were diverted to an Aboriginal Community Justice Programmes under an Extrajudicial Sanction. The overall compliance rate of the Aboriginal Community Justice Programme is 82%, which in our view is both highly successful and culturally appropriate. The Aboriginal Community Justice programme has seen an increase in youth participating in the last few years; however, these figures remain relatively low when compared to mainstream statistics.

Custodial Sentences Specific to Young Persons (Clause 173)

Section 42 of the YCJA offers a range of sentences to be considered as alternatives to custody for all offences except murder. Such options include community service, restitution, compensation, or placement in an intensive program of support, and supervision. Under the current YCJA, a court can only impose a carceral sentence in the case of a violent offence, if there is failure to comply with two or more non-custodial sentences, in exceptional cases where aggravating circumstances warrant a custodial sentence, and in the case of an indictable offence for which an adult would be liable to imprisonment of over two years and has several findings of guilt under the YCJA or Young Offenders Act (YOA). Clause 173 of Bill C-10 adds a fifth case that would warrant a custodial sentence: when a youth commits an indictable offence for which an adult

would be liable for imprisonment for a term of more than two years and has had a number of extrajudicial sanctions under the YCJA or YOA. Extrajudicial sanctions differ from extrajudicial measures in that they require the young person to formally acknowledge responsibility for the offence. Failure to comply with extrajudicial sanctions can result in judicial proceedings, and the information that a youth offender has had an extrajudicial sanction may be used as evidence in court (though their admission of guilt cannot be used as evidence).

The OFIFC strongly disagrees with this particular amendment for the same reasons we oppose the police keeping a record of extrajudicial measures. This specific amendment reaffirms our concerns that Aboriginal youth will continue to be over-represented, despite existing provisions in the YCJA that were crafted to specifically address Aboriginal youth over-representation.

We continue to argue for approaches that are preventative, focusing on rehabilitation and reintegration, rather than punitive custodial sentencing. To further elaborate on custodial sentences, when a custodial sentence is the best option, there remains a clear need to provide incarcerated Aboriginal youth with increased guidance and support, framed and delivered in a culturally appropriate manner. Absence of positive contact with Aboriginal culture is a major contributing factor to Aboriginal youth justice involvement. In R. v. W.S.C. the Saskatchewan Provincial Court stated:

> [d]espite the shift in emphasis in the YCJA away from using the justice system to address social problems, the thinking and the resources have not yet shifted and we continue to be confronted with requests to 'do something' for the child for whom there are no other options. We all fear the gap that is left between the justice and social support systems will not serve children and families, nor society well. However, if the justice system continues to fill that void, it is not likely to be filled by the social support system either.[63]

Resources should be directed to the youth carceral system to include the addition of an Aboriginal Youth Inmate and Post-Release Program which could incorporate traditional cultural teachings and values to encourage healthy lifestyle choices, foster responsible decision making and influence critical thinking. In addition, it would also increase the skills, knowledge, attitudes and values of youth to influence positive personal choices by

[63] Department of Justice. (2003). Pre-Trial Detention Under the Youth Criminal Justice Act: A Consultation Paper and R. v. W.S.C., [2003] S.J. No.810 (Sask. Prov. Ct.).

creating awareness of consequences that negative behaviours attract.

An Aboriginal Youth Inmate and Post-Release Program can provide a pro-active response to the rising levels of homelessness, substance abuse, gang activity and criminality among Aboriginal youth after they are released from custody. Custodial sentences will only be effective if an intensive pro-active approach to Aboriginal youth programming is aimed at increasing quality of life while reducing the negative socio-economic factors that contribute to the cyclical over-representation of Aboriginal youth within the criminal justice system.

Application of Adult Sentences to Young Persons (Clauses 176 and 183)

Under the current YCJA there is a presumption that the following cases will bring with them adult sentences: if a young person (14 or older) is guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years; or if a young person (14 or older) is guilty of murder, attempted murder, manslaughter, aggravated assault or a third serious offence involving violence. This presumption can be rebutted if the court can be persuaded that the length of a youth sentence would be sufficient to hold the young person to account for such an offence.

Bill C-10 repeals this presumption and allows a youth court to impose an adult sentence only when a young person (aged 14 or older) is guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years. Under clause 176 of Bill C-10, the Crown may ask a youth court to impose an adult sentence for such an offence. In cases where the young person is at least 14 years and the offence is deemed a “serious violent offence,” that is, murder, attempted murder, manslaughter, or aggravated sexual assault, the Crown will be required to determine if an application to impose an adult sentence should be filed. If the Crown decides not to file the application, he or she will be required to inform the court of this.

According to Bill C-10 amendments, the onus of proof would lie with the Crown prosecutor to convince the court that the presumption of diminished moral culpability is rebutted and that a youth sentence would not be a sufficient length to hold the young person accountable for their offending behaviour.

The imposition to apply an automatic adult sentence for a youth convicted of a

presumptive offence diminishes the degree to which the Courts consider mitigating factors in youth sentencing, such as age, maturity, mental health and criminal background. It is imperative that the courts continue to consider these factors in order to meet the YCJA sentencing principles of rehabilitating and reintegrating youth into society.

The OFIFC is concerned with this amendment because the application of adult sentences to young persons should always be carefully considered and undertaken as a last option because they are young persons. Again, we argue that Aboriginal youth continue to be over-represented within the carceral system and as such, sentencing should always consider existing provisions which refer to the needs of Aboriginal peoples.

In unique cases where an adult sentence would best serve the young person, resources should be adequate to deliver intensive programming aimed at rehabilitation and reintegration of the young person into the community. Such programmes as the Aboriginal Youth Inmate and Post-Release Program, as previously mentioned, would serve this purpose.

Place of Detention (Clause 186)

Clause 186 of Bill C-10 replaces 76(2) of the YCJA to prohibit the possibility that a young person under the age of 18 might serve his or her sentence at an adult correctional facility and ensure that young persons under the age of 18 will always serve sentences in youth custody facilities.

The OFIFC is supportive of the amendment under clause 186 and agree that when a youth is best served by a custodial sentence that this sentence is carried out in a separate youth facility equipped to effectively provide treatment and rehabilitation in order to reintegrate the youth into the community as a functional, contributing member of society. As mentioned in the above sections, the creation of an Aboriginal Youth Inmate and Post-Release Program would ideally serve the Aboriginal youth while in custody and assist in the transition to the community.

Publication of the Names of Young Persons (Clause 185 and 189)

Clause 185 and 189 of Bill C-10 would amend the publication ban regime in the YCJA

with the possibility of publishing information on the identity of a young person where the court has dismissed an application that was filed to impose an adult sentence on a young person and has instead imposed a young offender sentence for a "violent offence" within the meaning of clause 2(3) of the bill.

At present, publication of a young person's identity is only allowed when an adult sentence is imposed, under section 110 which allows the judge to order an identity publication temporarily (if a dangerous youth escapes and must be captured), or the young person asks for their identity to be published, under section 100(6). With the expansion of "violent offence" under clause 167(3), the court would have to consider publication in relation to any and all "violent offences".

The OFIFC remains concerned with this particular amendment as we are reminded that the original intent of the YCJA publication ban was to minimize stigma and allow for the focus on rehabilitation of the young person. This amendment would allow for greater breadth to remove the publication ban and therefore focus would move towards more punitive considerations.

With the high rate of Aboriginal youth involved in the criminal justice system combined with the expansion of "violent" and "serious" offences under clause 167(3), it remains our concern that Aboriginal youth will continue to be stigmatized by the greater public as criminals. This negative perception will undoubtedly lead to further racism, discrimination and stereotyping of a marginalized population. Unfortunately, we know all too well that these feelings become internalized, reinforcing the negative belief that there is no successful future to participate productively in Canadian society.

PART 5

Amendments to the Immigration and Refugee Protection Act (vulnerable foreign workers) [Bill C-10, Part 5, Clauses 205–208 (formerly Bill C-56)]

- The OFIFC has not prepared comment on this section of the Bill.

Considerations:

The Senate of Canada should repeal the mandatory minimum sentencing reforms and the limitations to conditional sentencing proposed in Bill C-10.

Bill C-10 proposes mandating the use of minimum sentences and limitations to conditional sentences for a range of offences including those that are non-violent and could be better addressed through alternative sentences. The OFIFC is concerned that these amendments will cause the rates of incarceration to rise even more disproportionately for Aboriginal offenders and that the appropriateness of sentences will be compromised. The OFIFC is therefore recommending that the amendments proposing mandatory minimum sentences and limitations to conditional sentencing are repealed. The government has marketed the mandating of mandatory minimum sentences as a tool to better protect the public, but the judiciary already has a range of tools to penalize serious, violent offenders, and mandating minimum sentences for a broad range of less serious crimes will effectively limit judicial discretion by restricting the application of the most appropriate sentences in these instances. Researchers have studied mandatory minimum sentences and have found that in most instances they are applied disproportionately to the lowest-level offenders.[64]

There remain unanswered questions regarding how Bill C-10's proposed changes to section 742.1 of the Criminal Code conflict with sub-section 718.2(e) and the Supreme Court of Canada's 1999 *Gladue* decision, which should be used as guiding principles for judicial consideration when sentencing Aboriginal offenders. Sub-section 718.2(e) of the Criminal Code and the *Gladue* decision provide judges with tools for a more wholistic approach to sentencing procedures that take into account the personal backgrounds including the social and economic histories of Aboriginal offenders. Sub-section 718.2(e) states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." These tools, used along with

[64] Gabor, T & Crutcher, N. (2002). Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures. Department of Justice, Research and Statistics Division.

conditional sentencing provisions, ensure that judges can work toward addressing the overrepresentation of Aboriginal peoples in the justice system as was intended by the Supreme Court of Canada.[65] In a recent letter distributed to all members of parliament, the Kenora Lawyers Sentencing Group stressed the importance of conditional sentencing provisions for cases involving Aboriginal offenders calling them the "lifeblood of *Gladue*."[66]

The OFIFC echoes these concerns and fundamentally disagrees with Bill C-10's limiting of the judiciary's discretion which will ultimately serve to ignore the particular circumstances of cases involving Aboriginal accused and drive the rising rates of overrepresentation of Aboriginal peoples in the justice system even more dramatically. It is important for judges to be able to use discretion when sentencing Aboriginal offenders so as to deliver the most appropriate and least restrictive sentences. In some cases, having offenders serve their sentences in a community with requirements for restorative justice programming can result in much more strenuous commitments than those of jail sentences.[67] It is important that the judiciary has a number of sentencing options and the freedom to use discretion in delivering the most appropriate, proportionate sentence that takes into account an offender's circumstances and applies the principles of *Gladue.*

The Government of Canada should make significant investments in preventative programming for Aboriginal peoples.

With the importance drawn to offenders with mental health issues within Bill C-10's amendments to the *Corrections and Conditional Release Act* (Part 3, Clause 54), it is important to note that Aboriginal youth involved with the criminal justice system have higher rates of mental health issues. It remains imperative that when sentencing Aboriginal youth offenders, the courts take into consideration all provisions that refer to the needs of Aboriginal youth and consider the possibility of a mental health issue, whether diagnosed or not.

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[65] Roach, Kent. (2009). One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal.*Criminal Law Quarterly.* (54) 470.

[66] Kirby, Peter. (December 6, 2011). Crime bill cuts concessions to aboriginal circumstance. Winnipeg Free Press Online Edition. Retrieved on December 15, 2011 from: http://www.winnipegfreepress.com/opinion/westview/135086603.html?viewAllComments=y

[67] Canadian Bar Association. (October 2011). Submission of the Canadian Bar Association on Bill C-10.

In terms of mental health specific programming, the OFIFC has identified that there continues to be a gap in children and youth mental health programming. Indeed, there is a sense of urgency for much needed early prevention and identification for children and youth prevention and intervention support initiatives. Of significant concern is the lack of access to diagnostic services for FASD. The prevalence of FASD in high-risk demographic groups (such as Aboriginal populations) may be as high as 1 in 5. With diagnosis and proper supports in place for a young person living with FASD can greatly improve their outcome in later life. Unfortunately, too often Aboriginal children and youth suffer the consequences of undiagnosed FASD resulting in detrimental outcomes with the educational and criminal justice systems.

It is suggested that 40% to 60% of youth (male and female) within the youth justice system have mental health needs ranging from mild to severe. In 2008/09 13.6% of admissions to secure youth facilities were noted to have an existing mental health issue. In custody and detention, 47% of youth under supervision had mental health needs noted in their Risk Need Assessment. Further, at the Roy McMurty Youth Centre, 90% of female admissions had mental health alerts.

The Justice Policy Research and Statistics released Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper (2003) which revealed that little study had been conducted on FASD, nor was there adequate diagnosis support available in youth criminal facilities. The paper recommended that the government invest in research on FASD as it is currently misleading. In Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles (2005) research was conducted on the mental health profiles of Canadian incarcerated youth. The research revealed that Aboriginal youth incarcerated across Canada had the highest rates of comorbidity - reported substance abuse and suspected FASD.

Federal and provincial governments should have as key priorities sustainable and long-term investments in urban Aboriginal specific programming.

Aboriginal peoples account for the fastest growing segment of the Canadian population, and a group that is becoming increasingly urban. The majority of Aboriginal peoples across Canada now live in urban areas and in Ontario alone, approximately 80% of Aboriginal people live off reserve with 60% living in urban settings.[68] A very unique characteristic of the Aboriginal demographic across Canada is how young it is compared to the aging trend seen in the non-Aboriginal population. Reading these statistics in light of the rate of the overrepresentation of Aboriginal people in the justice system calls for a serious investment in urban Aboriginal specific services and programming that support Aboriginal people throughout all stages of their lives to offer preventative programming, education and training supports, as well as services that promote health and wellbeing.

While an increase in culturally relevant preventative programming at the early stages of life is essential to promote healthy choices for Aboriginal children and youth, it is important to also provide supports to Aboriginal offenders who will be reintegrating into urban settings. According to a study entitled "A Needs Assessment of Federal Aboriginal Women Offenders," the majority of Aboriginal women offenders come from urban centres and will return to urban centres after their involvement with the criminal justice system. Researchers suggest that "tailored programs and services will need to be accessible in urban centres."[69] Not only do availability and access need to be considered when implementing urban Aboriginal programming, but the sustainability of programming must be a key element of its development. Meaningful change in the rates of overrepresentation of Aboriginal people within the justice system will only be effected through a reprioritizing of investments and a focus on factors that will reduce criminality.

In the Department of Justice's most recent evaluation of the federal Aboriginal Justice Strategy (released in October 2010), the themes of insufficient

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[68] AANDC Fact Sheet (2010). Urban Aboriginal People. Retrieved on December 12, 2011 from: http://www.aadnc-aandc.gc.ca/eng/1100100014298

[69] Bell, Amey. Trevethan, S. & Allegri, N. (2004). A Needs Assessment of Federal Aboriginal Women Offenders. Correctional Service of Canada. Research Branch. Retrieved on December 8, 2011 from: http://www.csc-scc.gc.ca/text/rsrch/reports/r156/r156_e.pdf

investments and the need for increased access to culturally relevant programming for Aboriginal offenders is reported throughout. Aboriginal Justice Strategy funding recipients and staff from the Aboriginal Justice Directorate who manage the Aboriginal Justice Strategy are cited as advocating for programming that goes beyond intervention to also invest in preventative programming that addresses the root causes of high crime rates.[70] Funding sustainability is also stressed as reflected in the conclusion of the October 2010 evaluation:

> There is a widely held view among stakeholders that multi-year agreements with communities would reduce uncertainty and funding inconsistency at the program level. Many respondents also recommended that the AJS should receive permanent funding, as opposed to the current renewal-based structure.[71]

The evaluation ultimately recommends that multi-year funding agreements should continue to be implemented at the federal and provincial levels. In addition to sustainable, long-term investments in interventionist programming, the OFIFC is urging the federal and provincial governments to invest in urban Aboriginal specific programming that will address the root causes of criminality and are tailored to the needs of urban Aboriginal peoples.

Conclusion

The OFIFC strongly urges against the passing into law of a number of amendments in Bill C-10 that propose an overall move towards a punitive system unsupported by crime rate trends or decades of research. The tough on crime approach that will mandate minimum sentences, limitations to conditional sentences, reforms to the Youth Criminal Justice Act away from rehabilitation and reintegration, and harsher penalties for drug-related offences will not only carry an exorbitant price tag, but also come with an unacceptable social cost. It will be Aboriginal offenders, those most disproportionately represented in prisons and at every stage of the justice system in Canada, who will be most affected by this draconian legislation.

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[70] Evaluation Division, Office of Strategic Planning and Performance Management. (2010). Aboriginal Justice Strategy Mid Term Evaluation Final Report. Department of Justice. 24. Retrieved on December 15, 2011 from: http://www.justice.gc.ca/eng/pi/eval/rep-rap/10/ajs-sja/ajs_mt_e.pdf

[71] Ibid. 33.

The OFIFC recommends that the amendments that provide for mandatory minimum sentences and limitations to conditional sentences for non violent crimes be repealed. To take this recommendation further, any changes to sentencing provisions will need to explicitly recognize the unique circumstances of Aboriginal offenders by upholding sub-section 718.2(e) of the Criminal Code and *Gladue*, with a renewed focus on the root causes of criminality and the needs of the growing number of incarcerated Aboriginal offenders.

The OFIFC does agree that the justice system requires a reorientation, but that the focus needs to be toward restorative practices that take into account the interests of the offender, the victim, and the larger community in a way that promotes healing and rehabilitative principles. Provisions exist for the courts to consider the unique situation of Aboriginal offenders. We reaffirm that this needs to occur consistently on all Aboriginal offences. Furthermore, there remains a dire need for investments to be made into preventative programming for Aboriginal people beginning at a very young age. The application of specific resources to address Aboriginal youth incarceration and address root causes of criminal behaviour would be a much needed and appropriate next step.

Going one step further, the *Annual Report of the Office of the Correctional Investigator (2008/09)* reported that "once Aboriginal people are inside a federal penitentiary, their outcomes lag significantly behind those of non-Aboriginal offenders on nearly every indicator."[72] Although there is no report on the provincial situation, it remains most likely that the same can be said for provincial Aboriginal offenders serving custodial sentences. Recommendation 12 from the Report suggests that "the minister of public safety immediately direct that CSC appoint a deputy commissioner for Aboriginal corrections."[73] It would be prudent for the federal and provincial governments to appoint such an office for both adult and youth Aboriginal corrections.

The majority of the proposed amendments in Bill C-10 are unacceptable, particularly those that serve to further increase a demographic that is over-represented at all levels of the criminal justice system despite existing provisions designed to decrease

[72] Sapers, Howard. (2009). Annual Report of the Office of the Correctional Investigator 2008/09. The Correctional Investigator of Canada. Retrieved on December 6, 2011 from: http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20082009-eng.aspx#2.6
[73] Ibid.

representation and consider their unique position. It is hoped that our submission will give rise to serious consideration of our concerns and that the opportunities to decrease Aboriginal representation in the criminal justice system are made a priority and acted upon.

Recommendations

It is recommended that:

1. The Senate of Canada should repeal the mandatory minimum sentencing reforms and the limitations to conditional sentencing proposed in Bill C-10.

2. The Senate of Canada should repeal proposed amendments in Bill C-10 to section 742.1 of the *Criminal Code* recognizing that they seriously conflict with sub-section 718.2(e) and the Supreme Court of Canada's 1999 *Gladue* decision.

3. The Senate of Canada should repeal the proposed changes in Bill C-10 to the pardons process to ensure that the opportunity for individuals who have served time for their offences are not faced with further delay in their full reintegration into society.

4. The Senate of Canada should repeal the proposed amendments in Bill C-10 to the Controlled Drugs and Substances Act which would disproportionately target Aboriginal peoples who are overrepresented in terms of substance use and lack access to treatment services.

5. The Senate of Canada should repeal amendments in Bill C-10 to the Youth Criminal Justice Act that expand the justifications for pre-sentencing detention as this expansion will serve to lock up a higher proportion of Aboriginal youth before they are sentenced.

6. The Senate of Canada should repeal amendments in Bill C-10 to the Youth Criminal Justice Act that will allow for the publication of the names of young persons and instead retain the original intent of the Youth Criminal Justice Act publication ban which was to minimize stigma and allow for the focus on rehabilitation of the young person.

7. The Senate of Canada should repeal amendments in Bill C-10 to the Youth Criminal Justice Act that require that police must keep a record of all extrajudicial measures used when conducting an investigation of a young person as well as the requirement of filing the record with the Royal Canadian Mounted Police to keep a criminal history on the young person.

8. The Correctional Service of Canada should make culturally appropriate rehabilitation programming available to all Aboriginal offenders to make it possible for Aboriginal offenders to complete meaningful correctional plans.

9. The Government of Canada should make significant investments beyond interventionist programming to provide culturally relevant preventative programming for Aboriginal peoples that will affect the root causes of high crime rates.

10. Federal and provincial governments should mandate the early identification, assessment and diagnosis of mental health issues for children and youth including an increase in access to diagnostic services for FASD.

11. Federal and provincial governments should have as key priorities sustainable and long-term investments in urban Aboriginal specific programming focused on children and youth, education and training supports, as well as services that promote health and wellbeing.

12. Federal and provincial governments should ensure that culturally appropriate programming is available to Aboriginal offenders reintegrating into urban settings.

13. Federal and provincial governments should implement multi-year funding agreements with Aboriginal organizations in order to achieve long-term program goals and serve communities in a sustainable manner.