Assembly of First Nations

Submission:
Bill C-10 Safe Streets and Communities Act

November 22, 2011

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Introduction

The circumstances of First Nation offenders is somewhat different than most Canadians and are often related to substance abuse, intergenerational abuse arising from residential schools, the ‘‘Sixties Scoop,’’ low levels of education, lack of employment opportunities, poverty and family issues. The First Nation and Aboriginal offender population is younger, more susceptible to persuasion, related to substance abuse, increasingly gang affiliated and more frequently suffering fetal alcohol syndrome.

First Nation communities are more vulnerable to the devastating effects of alcohol and drugs because of geographic location and social isolation. The lack of economic opportunities, loss of culture, identity and language that resulted from historic policies of assimilation, among other factors all contribute to First Nation persons committing crimes. The AFN takes issue with the fact that government policy and the machinery of government has been utilized to attack and devalue First Nation culture, society and families for many generations, only to punish and lock-up First Nations for not obeying rules.

To put this fact in perspective, First Nation citizens were forcefully removed from their families and communities and sent to residential schools. Children as young as five were physically and sexually abused. They were verbally abused, marginalized and taught to hate themselves. After a period of time they were sent back to their communities, only to see their own children taken away. In their own communities, some abuse continued. Discrimination occurred outside their community and they were never given meaningful employment opportunities wherever they settled. Essentially their souls had been destroyed and the mistreatment continued all their lives. Yet despite a lifetime full of abuse, pain and discrimination, Canada, the police and the courts expect that First Nations peoples to function normally in accordance with non-indigenous values and standards. This is unrealistic as many of them have already lost everything and have nothing else to loose. Where they encounter problems, the solution is to re-institutionalize them and lock them away for another period of their lives. This is the intent and objective of Bill C-10.

Life in Aboriginal Canada continues to be hard and full of challenges. Problematic substance abuse is linked to high rates of poverty, family breakdown, unemployment and poor social and economic structures among First Nations people. Substance abuse and fetal alcohol syndrome resulting from maternal consumption of alcohol or solvents during pregnancy all contribute to crime. Offenders with Fetal Alcohol syndrome have impaired intellectual functioning and may have difficulties understanding cause-and effect relationships, consequences, reasoning and judgment. They may not understand that one action can lead to another. This element is especially troubling in how the courts and police respond to the circumstances of the offender.

All the above noted factors are acknowledged to contribute to First Nation involvement in the criminal justice system. This trend was noted in *R. v Gladue* where Justices Cory and Iacobucci stated:

> The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime. Para 65.

Parliament enacted Subsection 718.2(e) of the Criminal Code based on social problems, First Nation over-representation in criminal law and recognition of past harms to the First Nation population as a result of government policy. Subsection 718.2 (e) provides for restraint in imprisonment of Aboriginal offenders. In *R. v. Wells* (2001) 1 S.C.R. 207, the court ruled:

> "The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances."

The Commons Standing Committee may have heard about the potentially discriminatory nature of mandatory minimums for Aboriginal offenders and how they derogate from subsection 718.2(e) of the Criminal Code of Canada. There is a specific reference to mandatory minimums for offences involving substance abuse, organized crime, controlled substances and property offenses. Clearly, Bill C-10 will add to the growing institutionalized discrimination of First Nations people in criminal justice system.

Mandatory sentencing discounts the intent of Parliament to address unequal impact of the criminal justice system on Aboriginal peoples. As stated by Justice Knazan in *R. v. King*, "to apply mandatory sentencing to Aboriginal peoples defeats the ameliorative purpose of subsection 718.2(e) and the extent that the mandatory sentencing prevents a judge from using discretion in this context render such sentencing provisions unconstitutional and a violation of the offender's rights and is not saved by section 1 of the Canadian Charter of Rights and Freedoms." The decision of *R. v. Luc* applied a constitutional exemption on the defendant, thereby excluding him from the imposition of a mandatory sentence, as would have been required otherwise. Bill C-10 would remove these approaches for First Nation offenders.

Justice for Victims of Terrorism Act

The Justice for Victims of Terrorism Act introduces a tort-based remedy for holding terrorists and state sponsors of terrorist activity liable for their acts and omissions. The *Justice for Victims of Terrorism Act* creates a cause of action for victims of terrorism offences, set out in the *Criminal Code*. This would allow court awards against those responsible and supporting terrorism, or against a foreign state that finances terrorist activity or the carrying out of terrorist activity. A Bill C-10 preamble states that the main purpose of the proposed act is to impair the functioning of terrorist groups, to deter and prevent acts of terrorism against Canada and Canadians.

The *Justice for Victims of Terrorism Act* will amend the *State Immunity Act* to create a list of state sponsors of terrorism, and to end state immunity from listed states. It provides for federal enforcement of court judgments against sponsors of terrorism. Citizens can initiate claims against perpetuators, which may assist in:

i. deterring future acts of violence by financially impairing the terrorist groups;
ii. deter terrorism by causing terror sponsors to refrain from future financing;
iii. hold wrongdoers responsible and compensate victims;
iv. enable terrorist assets to be located and seized; and
v. prevent terror sponsors from accessing Canada's banking and financial system.

The AFN supports the ability of victims of terrorism to seek recourse for the harms they have suffered. Although a civil litigation model may not be entirely accessible to victims, given the procedural hurdles, discovery and high costs of initiating such litigation, compensation schemes that provide compensation to victims of terrorism is a step forward, especially if class actions are initiated.

AFN is concerned the Bill C-10 is solely focused on foreign nationals and listed states. These provisions would be much stronger and more balanced if the laws condemning acts of terror are made available to foreign nationals who are victims of terrorist acts by Canadian nationals and corporations as well. Canadian extractive companies have been implicated in controversies around the world. Resource and energy projects often pit Canadian companies and national governments against communities and indigenous groups who seek to protect their lands, rights and resources. Canadian firms are said to have used paramilitary security forces that have been implicated in blockading the free movement of community members, forcibly evicting indigenous peoples from their traditional lands and destroying houses. Some firms have been accused of crimes such as ethnic cleansing, enslavement, kidnapping and rape. In 2004, the Canadian Embassy in Washington submitted a diplomatic letter to the Federal District Court via the U.S. Department of State. The letter called the case "an infringement in the conduct of foreign relations by the Government of Canada" that would have a "chilling effect" on Canadian firms trying to use trade to support the peace process.

The AFN is of the view that these types of acts aimed to intimidate, scare, harm and abuse entire populations or communities in other parts of the world are forms of terrorism. Where these allegations are proven, foreign nationals should have the right under law to seek reparations from Canadian perpetrators as well. The AFN supports measures to compensate all people victimized in terrorist attacks and the backing of the federal government to support civil litigation against the persons, groups and states responsible for terrorist acts.

The AFN shares some concern that Canada's efforts to curb state immunity may be limited by the legislation of foreign states. The AFN is mindful of Canada's response to the *Helms-Burton Act* (1996) whereby Canada blocked attempts by the United States to restrict trade between Cuba and U.S.-owned subsidiaries based in Canada. Parliament passed counter-effective laws restricting the enforcement of judgments based on the *Act*. In essence, it permitted Canadian citizens to obtain Canadian courts judgment recouping any losses that they have suffered as a result of the American court judgments. In particular, the Canadian law provides that Canadian courts may restrict the production of records and other information sought to enforce the *Helms-Burton Act*. The *Act* directed Canadian courts not recognize foreign judgments based on the *Helms-Burton Act* or may reduce the amount of the judgments. If these measures were made available to Canadian nationals, it is entirely possible that those regimes targeted by Canadian laws to enact similar law thwarting the spirit and intent of Bill C-10.

Recommendations

1. Amend Bill C-10 to provide for payment of pensions to victims of terrorism based on the degree of injury.

2. Victims of terrorism receive all medical care required to treat their injuries, including hospitalization, medication, appliances, mobility devices, prostheses and psychotherapy, free of charge.

3. Amend Bill C-10 to include acts of terrorism by Canadian firm in other parts of the world.

4. Canada should adhere to UN directives in dealing with banks and those bankers controlling banks that are subject to UN resolutions.

Sentencing

In 1995, Parliament enacted section 718 of the Criminal Code in response to numerous studies and commissions on sentencing. With a goal in ensuring public safety, parliament sought to increase the effectiveness of sentencing as a deterrent and rehabilitative mechanism. Section 718 discouraged the use of incarceration as a sentencing tool unless the particular offense before them warranted a period of incarceration.

Section 718.2(d) of the Criminal Code states that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstance”, and section 718.2(e) of the Criminal Code similarly 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”.

In *R. v. M (C.A.)* the Supreme Court of Canada stated that "Parliament intended to vest trial judges with a wide ambit of authority to impose a sentence which is 'just and appropriate' under the circumstances and which adequately advances the core sentencing objectives of deterrence, denunciation, rehabilitation and the protection of society". The Supreme Court went on to summarize their position:

> A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly R. v. M. (C.A.) (1996), 46 C.R. (4th) 269 (S.C.C.). para 91.

Bill C-10 is inconsistent with both of these Criminal Code provisions. It proposes lengthier, punitive sentences which would not have otherwise been administered under the current legislation. Bill C-10 mandates prescribed minimum penalties for certain offences, thereby, limiting the discretion of judges. A mandatory sentence prevents judges from accessing the severity of the sentence to reflect the degree of the offence and culpability of the offender. Despite its political appeal, every empirical study on sentencing attests that longer periods of incarceration will not deter crime. Moreover, lengthier periods of incarceration may actually increase the likelihood of recidivism among offenders. Numerous Canadian studies, including those previously commissioned by Parliament, support these findings.

Bill C-10 proposes to limit the availability of conditional sentences for violent crimes and serious property crimes. Bill C-10 would eliminate the availability of conditional sentences for any crime that permits a maximum sentence of 14 years or more. Maximum sentences of 14 years or more is allowed for many *Criminal Code* offences, which can include conduct that is neither serious nor violent. Among other offences, conditional sentences will no longer be available for offenders convicted of fraud over $5000. These offenders are also often charged with theft over $5000. Many of these people are first time offenders who are employed, pay their taxes and are contributing members of society. The elimination of conditional sentences and its replacement with mandatory minimum sentence would leave judges with little discretion dealing with these cases. Bill C-10 would result in arbitrary and inflexible sentences that are unjust in many cases. In AFN's view, a conditional sentence for property offences is a more appropriate response than incarceration. For these reasons, the AFN recommends that these proposals not be enacted.

The Canadian Bar Association conducted a study where they analysed long prison sentences to punish offenders. Their study concluded that long periods of incarceration increased the chance that the offender will re-offend. Similar studies have acknowledged Canada's over-reliance on incarceration and argue for the development of alternative sanctions. All point to the fact that imprisonment is ineffective in controlling or deterring crime. AFN is of the view that public security is more jeopardized where one is locked up and then returned to the streets upon expiration of their sentence, unreformed and without conditions.

Many First Nations agree with these observations and have urged the federal and provincial governments to provide financial support to First Nation communities to develop crime prevention programs. Many First Nation communities support the use of sentencing circles and other alternative dispute resolution processes that are more holistic, promote healing and restore cohesiveness in the community when dealing with offenders. Many First Nations continue to encourage the use of alternatives sentencing process and deplore the use of imprisonment.

First Nations believe balanced sentencing tools are required to allow judges the necessary flexibility to issue appropriate sentences that best reflect the circumstances of each case. Each of the fundamental purposes and principles of sentencing in sections 718, 718.1 and 718.2 of the *Criminal Code* must be respected. One such sentencing principle is proportionality. Fairness requires an individualized, proportionate sentence, especially where First Nation offenders are concerned. This is why mandatory minimum sentences have been severely criticized by many First Nations, provincial governments and bar associations. In our view, incarcerating individuals does not promote public safety, would more likely lead to injustice and public disrespect for the law, and worsen gang recruitment.

From a First Nation perspective, Canadian courts have the ability to apply thoughtful reasoning and analysis before imposing sentences and the granting of a conditional sentence. While First Nation offenders are usually given harsher sentences by judges in a most unfair manner,

conditional sentences are made available to First Nation citizens on the rare occasion. Similarly, the recommendations of a First Nation community and victim participating in a sentencing circle would be useless for a judge who has to impose a mandatory minimum prison sentence. All positions and any involvement in the criminal justice system would be removed through Bill C-10.

Mandatory minimums will restrict the use of other flexible sentencing tools. In some cases, mandatory minimum prison sentences will lead to a greater harm because there are no safety valve provisions and sentences cannot be tailored to specific circumstances of an offender. For example, a Judge will have no discretion, other than jail, in sentencing First Nation offender for fraud. Factors such as this person having fetal alcohol syndrome, needs specialized services and is a single parent will be irrelevant in sentencing. This is a marked departure from today where a sentencing judge has discretion to impose a conditional sentence in such a particular case. Likewise, where the accused suffers from a mental illness, but remains criminally responsible, or those who have physical disabilities, judges will have no flexibility to impose a conditional sentence.

Recommendations

5. Amend Bill C-10 to eliminate mandatory minimum sentences or, in the alternative, provide for some legislative exception to allow Crown prosecutors and sentencing judges to depart from statutory sentencing limitations and mandatory minimums where there are exceptional circumstances or where it would be unjust not to do so.

6. Develop a safety valve provisions in the proposed Bill to allow disproportionately impact populations already over-represented in the justice system, notably the economically disadvantaged, Aboriginal people, members of visible minorities and the mentally ill other alternatives to sentencing that is based on rehabilitation and reintegration efforts.

7. Bill C-10 should focus on rehabilitation, supervision, support in the community, and reduce future criminal acts.

8. Permit the sentencing judge to consider the imposition of a conditional sentence order, notwithstanding the restrictions, in exceptional circumstances.

9. Create a separate exemption to permit the sentencing judge to consider alternatives to incarceration for First Nation offenders, the imposition of a conditional sentence order, without regard to any statutory limitations.

1. Controlled Drugs & Substances Act

The proposed amendments to the *Controlled Drugs and Substances Act* require courts to impose mandatory minimum sentences for a variety of drug related offences, either because of

the nature of the substance or offences, or because of the presence of a set of aggravating factors. These aggravating factors include previous convictions for similar offences, membership in a criminal organization, or where the offense occurred. There is no question that the imposition of these requirements will have a disproportionate and prejudicial effect on First Nations.

With respect to First Nation demographics, it is well established that the First Nation population is growing and that youth are the largest segment of our communities. There are tremendous challenges confronting our youth, including high dropout rates from schools, unemployment, and increasing exposure to street gangs. First Nation youth are at risk to become part of other statistical realities, including the growing drug abuse problem among First Nations people, the growing number of drug-related offences, theft offenses to support drug habits, and the continued growth of the First Nations and Aboriginal population within correctional facilities in Canada.

As identified above, the AFN opposes the use of mandatory minimum sentences as we believe that they:

- Do not advance the goal of deterrence, as longer periods of incarceration increase the probability that the offender will re-offend.
- Will result in the lengthy incarceration of less culpable offenders, the poor, or marginalized people.
- Will disproportionately impact on First Nations people who already grossly over-represented in penitentiaries, with harsher sentences.
- Will subvert principles of proportionality and individualization of sentences.

At present, First Nation citizens are already over-charged for a single criminal act. Bill C-10 imposes escalating mandatory minimum sentences for production of controlled substances, gang affiliation, presence of firearms, etc. In our view, it is unimaginable for someone responsible for a grow operation to receive a six-month mandatory minimum sentences, while some who happened to carry a weapon when selling drugs be subject to twice that sentence, or someone who sells drugs by a school receiving two years minimal incarceration. These provisions are too arbitrary. The proposed amendments are unclear whether the Crown is required to prove the element of *mens rea* of that component beyond a reasonable doubt when relying on aggravating factors in sentencing. These provisions may add strict liability principles to the offenses.

In addition, Bill C-10 prohibits all offenders who are found guilty of an offence with a statutory maximum of 14 years or more from receiving conditional sentences. The draft legislation would further limit conditional sentences for other offences that involves drug trafficking, the production of drugs and involves the use of a weapon in the commission of an offense. The proposed legislation also lists further offences when persons convicted would no longer be eligible to receive conditional sentences. Of particular note in this list are drug offences, which are not serious property or serious violent offences. The spectrum of offenders captured by the proposed drug offence portion of the Bill is wide-ranging from school kids to professionals who

may use drugs for recreational purposes. In essence, Bill C-10 would make ordinary people criminals.

Bill C-10 has the potential to impact many individuals who struggle with addiction. Drug addiction and trafficking are interconnected for many offenders commit property offences to fuel their drug addictions. At present, conditional sentences are often shaped to allow addicted offenders to receive counselling and treatment. The incarceration of addicts involved in trafficking fails to address their rehabilitation. While some reprieve is available to those offenders in counselling programs, the availability of these types of programs outside urban centres is practically non-existent. Thus, First Nation offenders will likely receive an outcome of incarceration because they cannot find room in a residential treatment facility, and no such programs exist in their community.

The mandatory minimum sentences proposed in Bill C-10 remove discretion from sentencing judges to effectively determine which sentence can best balance all fundamental objectives of sentencing. The judge has heard the particular circumstances of the offence and all relevant facts. As such, a judge is better able to craft a sentence that will balance all the goals of sentencing. The *Criminal Code* sets out principles of sentencing that require a judge, at the time of sentencing, to weigh all competing considerations. This approach enables a balanced sentence. Bill C-10 emphasis on deterrence over all other sentencing principles is misguided.

Other principles of sentencing must also be considered in determining an appropriate sentence. Section 718.2(e) of the *Criminal Code* requires that the particular situation of aboriginal offenders be considered at sentencing. If a less restrictive sanction would adequately protect society, or where the special circumstances of aboriginal offenders should be recognized, Bill C-10's escalated sentences and mandatory minimum sentences would limit these principles. The Supreme Court of Canada has recognized that incarceration should generally be used as a penal sanction of last resort, and that it may well be less appropriate or useful in the case of First Nation offenders. Under Bill C-10, local judges would have no option but to sentence First Nation offenders a mandatory minimum sentence in locations away from their communities.

2. Firearms

The application of mandatory minimums sentences for gun crimes will result in similar conclusions as those of basic mandatory minimum sentences. Attempts to reduce firearm offences in other jurisdictions through mandatory minimum sentences had no impact in reducing weapon offenses. The desire of the current government to scrap the long gun registry is based on the recognition of the failure to prevent the use of firearms in the commission of crimes.

Bill C-10 raises the mandatory minimum penalties for several firearm related offences in the *Criminal Code* which already have a current minimum term of imprisonment of one year, such as possession of a restricted firearm, possessing a firearm obtained through the commission of

an offence, and trafficking firearms. In addition, Bill C-10 sets mandatory minimum sentences for several firearm offences in the *Criminal Code* which already have a current minimum term of imprisonment of four years, such as the use of firearm in the commission of attempted murder, sexual assault, robbery, etc. Bill C-10 would increase the mandatory minimum penalties for these offences to five years for a first offence, seven years for a second offence, and 10 years for a third or subsequent offence.

Recommendations

10. Bill C-10 should not interfere with the application of section 718.2(e) of the *Criminal Code.* The particular situation of First Nations offenders and their marginalization and treatment by society should be considered at sentencing.

11. Bill C-10 should focus on drug reduction strategies that encourage rehabilitation.

12. The Bill C-10 would be would be better focused if large drug cartels are targeted. Strict sanctions on street level subordinates will not curtail the follow of illegal substances.

13. Arguably, controlled substances created from natural products are less harmful than their synthetic cousins. Bill C-10 should focus punishment towards those who manufacture and distribute synthetic drugs such as crystal meth.

14. Bill C-10 should not impact on a First Nations ability to hunt for sustenance purposes, or the exercise of their Aboriginal and/or Treaty Rights.

Post-Sentencing

1. Corrections and Conditional Release Act

The purpose of corrections as expressed in the *Corrections and Conditional Release Act* is to carry out sentences imposed by courts through the supervision of offenders and rehabilitating offenders for reintegration into the community. This is accomplished through the provision of programs while in a penitentiary, or in the community following release.

The concept of using incarceration as a last resort is one goal the AFN supports. The loss of freedom and liberty clearly is a violation of basic human rights, in our view. Imprisonment not only deprives one of their full potential as a human being, the forceful confinement to a small area weighs heavily on ones mental state, physical being and soul. With this in mind, correctional officers and the legislation governing their conduct should adhere to the safe and humane treatment of those incarcerated. All offenders should be rehabilitated and reintegrated into society at some point.

Restrictions placed on persons deprived of their liberty should be minimal and proportionate to the legitimate objective for which they are imposed. The Supreme Court has stated that three fundamental principles apply to persons deprived of their freedom:

i. the measures must be fair and not arbitrary;
ii. the means should impair the right in question as little as possible; and
iii. there must be proportionality between the negative effects of the limiting measure and the objective.

Bill C-10 threatens the second element, as the bill proposes that correctional officers be allowed to use “appropriate measures”. This is a subjective element and any outcome is left entirely to the discretion of correctional authorities. Section 4 (e) of the *Corrections and Conditional Release Act*, requires that correctional policies, programs and practices respect “gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups”. Bill C-10 provides little guidance for correctional officers in balancing appropriate measures with the requirement to respectful of First Nation differences.

The unfortunate reality is that First Nation citizens are frequently denied traditional practices and ceremonial rituals in prisons. Medicine bundles are frequently disrespected and treated inappropriately by correctional officials. The practice of traditional and cultural activities is viewed as privileges that must be earned and contingent on good behaviour. These privileges can be taken away for ‘bad’ behaviour or by challenging one’s authority.

The amendments Bill C-10 provides to the *Corrections and Conditional Release Act* sets out a new policy direction for Corrections Services Canada. The *Corrections and Conditional Release Act* currently embodies principles for the maintenance of a just, peaceful and safe society and the Act provides some guidance to correctional officers in carrying out their duties. Bill C-10's new policy direction gives considerable discretion to correctional officers and places safety as a paramount principle. Very little guidance is offered through Bill C-10 on how correctional officers are to exercise their new found discretionary powers.

For instance, disciplinary segregation can be imposed as a sanction after a prisoner has been found guilty of a serious disciplinary offence. It is the most severe form of punishment and is limited to a maximum of 30 days, but can be increased to a maximum of 45 days for multiple convictions. On the other hand, administrative segregation is used to separate a prisoner from the general population. It can be used whenever the correctional services or a warden has reasonable grounds to believe that the continued presence of the prisoner in the general population jeopardizes the security of the penitentiary or the safety of any person. Unlike disciplinary segregation, there are no legislative limits to the duration of administrative segregation although it is subject to periodic review. In practice, the time in administrative segregation can extend to months, even years.

The substantive change that Bill C-10 makes to disciplinary sanctions is it intensifies the harshness of segregation when imposed as a sanction for a serious offense by restricting visitation rights with family, friends and other persons from outside the penitentiary. Prisoners now sentenced to segregation can visit with family in the closed visit section of the visiting area where their contact is through glass and telephone. The Bill's amendment would authorize complete removal of any visitation rights.

It is recognized that a loved one's visit with a segregated prisoner has a positive impact on the prisoner's behaviour while in segregation, and the prisoner is then less likely to be confrontational with staff. Intensifying the harshness segregation will not improve conditions for correctional staff nor will it advance public safety. The AFN recommends that the proposed amendments to the disciplinary regime be rejected.

Recommendations

15. The goal of safety alone can be used to trump all other considerations, particularly where a correctional officer has complete unfettered discretion. The Bill should not include this amendment, as it distorts the necessary balancing of societal interests that is now properly contained in section 3.1.

16. The proposed amendments in section 4 of the Bill, such as lawfully removing rights of prisoners and meeting objectives of correctional plans, reflect insufficient attention to the relevant constitutional framework within which these important principles were drafted.

17. Correctional officers should use the least restrictive measures that are consistent with the protection of society, staff members and offenders. References to "limited only to what is necessary and proportionate to the purposes of this Act" should be removed from Bill C-10.

18. Unlike disciplinary segregation, there are no legislative limits to the duration of administrative segregation. In practice, the time in administrative segregation can extend to months, even years. Principles of fundamental justice, fairness and human rights call for including independent adjudication of segregation decisions in Bill C-10. The AFN recommends that Bill C-10 include a provision to require independent adjudication of segregation decisions.

19. Human rights are not something to "balance" against prison discipline and control. Rather, it is something through which prison discipline and control must be interpreted and exercised in a professional manner. Legitimate discipline and control is necessary, but can only be effective in holding offenders accountable, promoting positive change in the individual and protecting public safety if it is inherently moral and justifiable

2. Expanding Police Powers of Arrest

Bill C-10 adds a new section to the *Corrections and Conditional Release Act* to allow any peace officer to arrest an offender without warrant for a breach of a condition of their parole, statutory release or unescorted temporary absence. It is often argued that it is necessary to expand police powers over federal parolees who breach a condition of release, in the interests of public safety.

Giving police the same broad power of arrest as presently given to supervising parole officers and the Parole Board interferes with the Parole Board and CSC's authority to issue arrest warrants and manage parolees in the community. In the absence of criminal conduct, the current regime requires that the National Parole Board and CSC parole supervisors be consulted with in determining whether the breach has occurred and arrest would be warranted. The police simply do not have the case history files on offenders to make such a judgment, nor do they possess knowledge of the particular facts of an offender's release. The expansion of police powers of arrest could lead to ongoing harassment of some offenders and unnecessary detention.

Recommendations

20. The protection of human rights is an integral part of correctional legislation. The *Charter of Rights and Freedoms* applies to people who are on parole and they should be protected from arbitrary arrest and detention.

21. Promoting and respecting human and charter rights is a necessary condition for the exercise of correctional authority. Bill C-10 will result in an expansion of the practice of

imprisonment. The proposed amendments to the *Corrections and Conditional Release Act* will actually move Canada further from one of the fundamental respect for human rights to a system where draconian punishment is the norm.

3. Criminal Records Act Amendments

Bill C-10 seeks to amend the *Criminal Records Act* by replacing "pardons" with "record suspensions". The proposed amendments are designed to make it more difficult for most offenders to seek a record suspensions and preventing serious criminals from obtaining one. Restrictions to the record suspension are extended by increasing waiting periods for more offences and increasing the barriers to access to record suspensions. Eligibility periods for applications for a record suspension have been extended to five years for summary conviction offences and to ten years for those convicted by indictment. Persons convicted of sexual offences against minors and those who have been convicted of more than three indictable offences would be ineligible for a record suspension.

The AFN is concerned that the proposed legislation increases the waiting period for individuals seeking a pardon. Those offenders convicted of an indictable offence will have to wait ten years to apply for a record suspension. Similarly, those convicted of a summary offence will have to wait for five years before they can apply. The AFN is of the opinion that record suspensions should be made to those who have rehabilitated themselves at the earliest convenience. This would facilitate ones reintegration into society and increase the possibility of gaining meaningful employment.

Recommendation

22. The Parole Board should have authority to grant pardons for all offenders where appropriate.

23. Record suspensions are an integral component for rehabilitation and reintegration into society. A clean record will assist one in obtaining better employment opportunities, credit, etc.

24. Given the systemic discrimination of First Nations peoples in the criminal justice system, an expedited record suspension is required for First Nation peoples.

4. International Transfer of Offenders Act

The *International Transfer of Offenders Act* is domestic legislation that implements international treaties between Canada and other countries for the purpose of repatriating offenders to or from Canada. Canada has entered into bilateral treaties with countries such as the United States, European Union member states, Japan and others.

Under these agreements, offenders transferred to Canada continue to serve their sentences according to Canadian law. They are subject to Canadian prison and parole restrictions, including suspension and revocation of conditional release. They are subject to rehabilitative programs required by the Canadian Correctional Service or parole authorities.

The incarceration of First Nations individuals from Canada in other countries is a reality and it is unlikely that their treatment has any regard for Gladue realities, therefore, such individuals are probably facing hard time in such situations.

Under Bill C-10, the Minister is given considerable discretion in determining if an offender will be transferred to Canada. Mandatory considerations that currently *must* be applied in determining offender transfer requests are being replaced with optional criteria that the Minister *may* consider. The draft legislation will permit the Minister to consider any other factor believed to be relevant, some of which may be determinative in a particular case. The danger is that decisions will be arbitrary and possibly erroneous in cases where the truthfulness or accuracy of the information being relied on is faulty.

Where an offender's request to serve out his/her sentence in Canada is denied, such a person returning to Canada would not be subject to any post custody programs, and would arrive without any criminal record for offences abroad showing on the Canadian Police Information Centre data base. On the other hand, if the offender is allowed to return to Canada to serve out the remainder of their sentence, the transfer will be subject to ongoing assessments as any other offender sentenced to a federal prison in Canada. Once the transferred sentence is converted to a Canadian sentence, the person will be classified according to Canadian criteria and have a correctional plan to address reformation and rehabilitation goals. Finally, that person's eventual release and reintegration into Canadian society will be monitored through a form of conditional release.

Recommendations

25. First Nations individuals who have been convicted of crimes in other jurisdictions should be returned to Canada upon their request. This should be mandatory for young offenders who are imprisoned abroad.

26. Leaving a person in custody in another country does not contribute to any Canadian correctional purpose. Where requested, Canadians ought to be able to carry out their sentences in Canada and be offer programming aimed at reintegration and rehabilitation.

27. Absolute Ministerial discretion would allow for arbitrary and inconsistent refusals to transfer Canadian offenders back to Canada. Bill C-10 should contain provisions to guide the Minister in reviewing applications for transfer and allow for some oversight and/or review by the courts.

Youth Criminal Justice Act

Bill C-10 contains several amendments to the *Youth Criminal Justice Act*. The youth justice system is different from the adult justice system for a good reason. Young people under age 18 are developing into adults but are not yet mature adults. Young people do not have the same cognitive capabilities as adults. Bill C-10 adopts this through the concept of "diminished moral blameworthiness" and the inclusion of this principle is an important improvement in Section 3(1)(b). This is consistent with the *Convention on the Rights of the Child*. The *Youth Criminal Justice Act* sought the balance measures to deal with serious violent offenders and pursuing alternative measures for non-violent offenders.

According to the Canadian Centre for Justice Statistics, overall crime has been falling since the early 1990s and violent youth crime has remained stable for several years. Every province and territory has experienced reductions in youth court caseloads since the introduction of the *Young Offenders Act* and fewer youth cases are resulting in custodial sentences being imposed. The *Youth Criminal Justice Act* recognized that most youths come in contact with the law as a result of fairly minor and isolated incidents. It recognized the importance of not unnecessarily drawing those youths into the criminal justice system, but rather taking advantage of extra-judicial measures, such as warnings, cautions and referrals, mediation and family conferencing as appropriate sanctions.

Despite the recognition of the diminished moral blameworthiness, Bill C-10 is seen by many as step backward from the progress that came with the passage of the *Youth Criminal Justice Act*. Bill C-10 seeks to reduce reliance on extra judicial measures through expanding the applicable sentencing principles to make them more punitive, narrow, and favouring incarceration. The proposed amendments in Bill C-10 will have very serious consequences for young persons, resulting in more youths going to jail and going to jail for longer periods. The AFN believes that First Nation youth will be unfairly targeted by these changes.

Bill C-10 proposes the addition of "denunciation and deterrence" to section 38(2). There is little evidence that general deterrence is an effective sentencing principle when applied to adult offenders. One can assume the denunciation and deterrence would be even less effective for young persons. Nevertheless, the inclusion of deterrence as a sentencing principle provides sufficient instructions to a sentencing judges to impose a longer, harsher sentence on young offenders.

Bill C-10 will also allow for the stigmatization of young offenders, especially in isolated and remote communities. Section 20 of Bill C-10 would amend the publication ban regime in the Youth Criminal Justice Act to allow a court to lifting the ban in cases of violent offences. At present, publication of a young person's identity is only allowed where an adult sentence is imposed, or under section 110 for extenuating circumstances. Bill C-10 makes publication of a young offender's identity for anything from simple assault to other violent offenses.

Bill -10 also includes the definitions for two new offence "serious" offences and "violent" offences. "Serious" offences are defined as an indictable offence for which the maximum punishment is five years or more. "Violent" offences are offence which results in "bodily harm," and includes threats or attempts to commit such offences. Bill adopts the definition provided in *R. v. CD and CDK* where the SCC said that "violent" offence is any offence where the youth "causes, attempts to cause or threatens to cause" bodily harm. However, Bill C-10 would expand the definition of "violent" offences to include dangerous acts which was expressly rejected by the SCC in the same case.

The AFN believes that both definitions would expose too many youths to pre-trial detention and custodial sentences, when the focus of the Act has always been on meaningful consequences for the *most violent and habitual* offenders. The definition of a "serious offence" would capture failing to stop at the scene of an accident or Theft Over $5,000. Ironically, the definition is inconsistent with the sentencing limitations which would not permit a custodial sentence for a serious offence. Thus, youths could be remanded in custody for long periods for offences for which they could not ultimately be sentenced to a period of incarceration.

Recommendations

28. Bill C-10 should move towards a restorative and rehabilitative model of youth justice. The proposed punitive model will result in too many young people going to jail.

29. Incarceration should be used as a last resort and only apply not serious violent and habitual offenders.

30. First time offenders should continue to be diverted from custody and steered toward rehabilitation.

31. Pre-trial detention should only be used when required for a valid social purpose.

32. Government should focus on reducing poverty, providing quality education, youth programs, especially for First Nation youth. The unnecessary incarceration of young people is a mistake that society will have to pay for over a few generations.

Aboriginal Justice Strategy

First Nations have concerns with several aspects of the government's proposed omnibus crime bill, including mandatory minimum sentences and over reliance on incarceration. While the draft legislation applies to all offenders, our concern is based in the fact that First Nations people are already overrepresented in the criminal justice system. Current structures perpetuating systemic discrimination will likely intensify with the passage of Bill C-10.

As reported by past provincial inquiries, First Nations people are frequently confronted with:

- A greater probability of being charged, where non-aboriginal people receive a warning.
- A greater likelihood of appearing in court faced four or more charges, compared to non-Aboriginal persons.
- Receiving 25% more charges than non-aboriginal people.
- A greater likelihood of being denied bail.
- Spending approximately 1.5 times longer in pre-trial detention than non-aboriginal people.
- In the prairies, Aboriginal detained persons spent more than twice as long in pre-trial detention as non-Aboriginal persons.
- Spending more time in custody before release on bail, compared to non-Aboriginal people.
- Aboriginal youth in pre-trial detention are detained considerably longer, compared to non-Aboriginal youth.
- A greater chance of incarnation in sentencing, compared to non-aboriginal person.
- A 75% chance of receiving a "full sentence" compared to non-aboriginal offenders;

Bill C-10 will have a negative impact on First Nations people, whereby the mandatory minimum sentences remove the discretion of judges. First Nations is concerned that Bill C-10 will make already serious First Nation overrepresentation in criminal justice system much worse, by making certain provisions relating to Section 718.2 (3) ineffective or inoperative.

Crime Statistics

It has been reported that crime in Canada continued its downward trend in 2010. Nationally, the crime rate dropped 5% to its lowest level since 1973, while the crime severity index declined 6% to its lowest level since 1998. Scientific evidence illustrates that mandatory minimum sentences will not cut violent crime, reduce drug use or improve public safety. Mandatory minimum sentences neither prevent organized crime nor deter the use of illicit drugs.

First Nations believe that programs targeted at crime prevention and better education opportunities for First Nation youth would be more effective in combating crime.

Gladue

In R. v. Gladue, the Supreme Court of Canada instructed sentencing judges to consider other systemic issues faced by Indigenous offenders, including social and economic conditions and the legacy of dispossession and colonization faced by Indigenous peoples. The Supreme Court also established that Indigenous offenders should, in certain cases, be treated differently from other offenders. Section 718.2(e) directs sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to make an effort to achieve fit and appropriate sentence.

Unfortunately, in the decade that has since passed since Gladue, over representation of First Nation peoples in Canada's Prisons has increased, rather than decreased. Bill C-10 will further contribute to the overrepresentation of First Nation offenders.

Victims by Under-policing

First Nations people is some ways are under-policed in terms of situations where the police choose not to act even where there is evidence that crimes have been committed against First Nation people.

Statistics Canada's found that 35 percent of First Nation peoples had been the victim of at least one crime in a one year period as compared to 26 percent of non-native people. First Nations people were also likely to be victimized more often and experienced violent crime at a rate three times greater than national averages.

It is estimated that over 582 Indigenous women are currently missing across Canada. Canadian police and public officials have long been aware of a pattern of racist violence against Aboriginal women and have done little to prevent it. While attitudes towards missing Aboriginal women are changing, the number of missing women continues to increase. First Nations are concerned that Bill C-10 does not advance or compel new requirements for law enforcement officials to properly investigate crimes against First Nation peoples.

Bias in the Courts

First Nation victims are not afforded the same considerations and value as non-native people. Frequently, a First Nation victim is blamed for acts of violence against them, especially in cases of sexual assaults. In February of 2011, Manitoba Justice Dewer handed out a two-year conditional sentence to a non-native offender convicted of sexually assaulting an aboriginal woman, stating "she may have sent out mixed signals about her sexual intentions".

In other cases, non-native offenders are given lenient plea bargains where First Nations people are the victims of a crime. Take the recent death of Kyle Peters, a fifteen year old First Nation youth. The offender received a five month jail sentence for the young mans death. The Crown

dropped two charges, including criminal negligence causing death and dangerous driving causing death for a guilty plea of leaving the scene of an accident. Such a plea bargain would never be offered to a First Nation offender.

These examples are too common place in Canada. As with the long struggle to get official action on the 500 murdered and missing Aboriginal women in Canada, it appears that the lives of First Nation people are not as valuable and non-native people.

The Federal Aboriginal Justice Strategy

Some might suggest that the federal government's Aboriginal Justice Strategy may provide some lessening of Bill C-10's impact on First Nation citizens. The Aboriginal Justice Strategy was created in 1996 as part of the federal government's effort to address the treatment of Aboriginal people in the justice system. Various inquiries in every region across the country have had to examine situations where policing, corrections or the justice system itself has not served Aboriginal people well or treated them fairly. By 2012, an estimated $89 million will have been spent on the program.

The Aboriginal Justice Strategy focuses on capacity building in First Nation communities in order to reduce victimization, crime and incarceration rates through increased community involvement in the local administration of justice. The projects that exist across Canada are pilot projects. Many of them are diversion projects that are directed either at youth or adult Aboriginal offenders who come into contact with the justice system. These programs are restorative in nature.

The other models commonly adopted in First Nations' communities under the aboriginal justice strategy are community sentencing circles, mediation, and tribal courts. Diversion falls under Alternative Measures and is by far the most commonly used and understood by mainstream justice officials. Offenders are removed from the mainstream court systems into community processes that are culturally appropriate such as sweats, community work, and wilderness camps. Community sentencing generally involves elder advisory panels, sentencing initiatives, community circles, and other peacemaking processes. Mediation is used for non-criminal disputes and consists of the intervention of an impartial third part that facilitates resolution.

Dispositions used include counselling, formal apology, restitution, cultural activities, drug and alcohol counselling, volunteering orders, etc. The goal of many community initiatives is to address the root causes of anti-social behaviours through counselling rather than punishment. Strategies include a focus on enhancing the offender's relationships, assisting the offender to become aware about how the event affected others, and the facilitation of the establishment of paths for making amend

While the above diversion programs are positive, they are not used enough. Moreover, Bill C-10 will prohibit the use of diversion programs under the Aboriginal Justice Strategy. Finally, the Aboriginal Justice Strategy focuses primarily on indigenizing the enforcement of Canadian law in

First Nations' communities. Despite the Aboriginal Justice Strategy's objectives, it does not address the root cause of social dysfunctions and crime on reserves, which include alienation, colonization and the relationship between First Nations people and the Crown.

In fact, the Aboriginal Justice Strategy perpetuates what it aims to improve, First Nation disempowerment. Since the root of First Nations suffering is loss of their land base and cultural heritage, it is crucial that an appropriate justice system reflect and reinforce First Nation values, laws and worldviews. Secondly, in order to participate in the above noted processes, one is required to admit their guilt. It is much easier to admit to a crime one did not commit and be diverted to a restorative process, than profess one's innocence and end up in criminal court. Canada's Aboriginal Justice Strategy may facilitate on the processing of First Nations people in the Canadian legal system, and does not reflect the most significant cultural aspects of indigenous justice.

Conclusion

In regard to the tragic legacy of residential schools, the dislocation caused by the Sixties Scoop and the cultural and socio-economic marginalization, First Nations peoples find themselves in conflict with the law. Bill C-10's entire sentencing regime, and particularly this cumulative provision, means that a larger number of First Nations people will find themselves in mandatory custody for significant periods of time, notwithstanding their particular rehabilitative qualities.

The government's criminal justice initiatives, those recently passed into law and those proposed in this Omnibus Bill, will result in an expansion of the practice of imprisonment that is unprecedented in Canadian history. At this critical stage, the AFN believes that the proposed amendments the Corrections and Conditional Release Act will actually move Canada further away from the protection of human rights. In addition, Bill C-10's proposals will worsen Canada's well documented history of disproportionately incarcerating its Aboriginal people.

Treating First Nations people in the same manner as all other Canadians does not recognize the reality that First Nations people must overcome systemic discrimination, poverty and societal dysfunction to reach an acceptable level of wellbeing. A more thorough examination by Parliament of Bill C-10 would enable a fuller discussion about certain realities such as the measures required to address the disproportionate incarceration rates of First Nations people. It will enable a thorough examination of the full extent of drug crimes, effects of diversion programming for youth, benefits of programming to address recidivism and address the situation of women. Restorative justice program have real benefits for First Nation offenders, and the AFN encourages both the government and Parliament to continue and enhance existing programs and measures directed at First Nation offenders.

The AFN's critique of Bill C-10 has some consistent themes, and rests on several important tenets: a commitment to human rights; a strong belief in freedom of the person; principles of fairness, equality and procedural safeguards. In sum, the AFN believes that many of the positive reforms of the past 30 years, will be diminished with the passage of the Bill C-10.