BRIEF TO THE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

SENATE OF CANADA
41st Parliament, 1st Session

Safe Streets and Communities Act

Bill C-10

Presented by the Canadian Criminal Justice Association

January 15, 2012

Background of Canadian Criminal Justice Association

The Canadian Criminal Justice Association (CCJA) welcomes the opportunity to present this brief to the Standing Committee on Legal and Constitutional Affairs regarding Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts.*

The CCJA is one of the longest serving non-governmental organizations of professionals and individuals interested in criminal justice issues in Canada, having begun its work in 1919 and having testified before this committee on numerous occasions. Our association consists of nearly 800 members and publishes the **Canadian Journal of Criminology and Criminal Justice, the Justice Report, the Justice Directory of Services**, and the **Directory of Services for Victims of Crime**. We also organize the "Canadian Congress on Criminal Justice" every two years.

The members of the Association agree with the amendments proposed to the Victims of Terrorism Act, as well the change in wording under the Criminal Records Act to replace the word "pardon" with "record suspension". However, the CCJA has concerns about a number of other changes proposed in C-10. We outline them here and look forward to your questions and comments.

History & Relevant Issues Pertaining to the Legislation

The CCJA has grave concerns about the potential for unintended negative consequences that would result from the passing of the "Safe Streets and Communities Act". We would suggest that this legislation in fact does little to improve the long term safety of Canada's streets and communities and that several of the amendments it contains may in fact create the conditions that will lead to increased criminal activity.

The CCJA has historically adhered to a number of principles and approaches to crime prevention in Canada. We have always endorsed the notion of social development and crime prevention as being integrally linked to successful crime reduction programs. The use of long-term confinement, hence, has always been considered a last resort compared to programs that positively affect social development (See Waller, 2006, for example). Prisons are, indeed, a measure of our failures and not of our successes.

Second, CCJA has always argued that the current criminal justice system devotes too much of its scarce resources to the operation of prisons and reformatories. We have long supported greater development of community penalties and alternative sanctions in the community context, and a greater balance between the use of incarceration and community supervision. Canada is already among those western nations with the highest rates of incarceration – which is arguably a costly and less effective means of dealing with many types of crime. In this time of declining crime rates, and economic troubles, increased spending on prisons does not make good economic or criminological sense.

Third, our Association has historically favored the maintenance of small, treatment-intensive institutions over large, American-style penitentiaries. We have yet to be convinced by any available evidence that the large, warehouse-style prisons of our neighbors to the South produce much of anything except high recidivism rates (see, for example, research by the research directorate of the Solicitor General, Gendreau et al., 1999). Ironically perhaps, the state of Texas has recently reversed many of its expensive and ineffective "get tough on crime" policies in favour of a more tempered focus on community sentencing and rehabilitation which is not only less costly, but has seen a reduction in their crime rates.

Given the array of changes being proposed in C-10, it is difficult to give each its due attention and consideration in this brief format. Therefore, we will briefly touch here on our most pressing concerns; the CCJA has previously prepared briefs on most of the proposed changes that appear in C-10 and these comments will be appended for further consideration and review. In addition, we would be pleased to appear in person before the committee to discuss these matters further. We have several constructive changes that the committee may wish to consider as a means of improving the likely outcomes of this legislation – the reasons for each are discussed in more detail below:

1. Include a clarifying statement in the new section 171 (provision of sexually explicit material offence) to exempt sexually explicit materials provided for the purpose of sexual education in an educational setting.
2. Reject the proposed addition of section 161(1)(d) – a condition which prohibits the use of the internet or digital network except under conditions approved by the court.
3. Retain the use of conditional sentences under section 742.1 in cases where the judge is satisfied that public safety is not jeopardized by a community-based sentence.
4. Reject the proposed mandatory minimum penalties (*Controlled Drugs and Substances Act),* which have been found in other jurisdictions to be both costly and

ineffective. Alternatively, the committee may suggest the creation of *presumptive* penalties for drug offences.

5. Retain the current wait periods and criteria for obtaining a "record suspension" as statistics show the existing system to be effective.
6. Reject changes to the *International Transfer of Offenders Act* which prioritize ministerial opinion over expert research and judgment and may be found to be unconstitutional.
7. Effect changes to the YCJA that would ensure the capacity to deliver adequate mental health assessments and treatments for young offenders; a renewed focus on effective rehabilitation for our youngest offenders, rather than on deterrence – which is not supported by criminological research.

Part 1-Terrorism

This initial section aims to deter terrorism by establishing a right to sue perpetrators of terrorism and their supporters. It also amends the *State Immunity Act* to prevent a listed foreign state from claiming immunity from the jurisdiction of Canadian courts if its actions relate to support of terrorism.

While the CCJA is supportive of these proposed changes, we believe it unlikely that they will in fact have any deterrent effect on terrorist activity. These measures may provide a means for victims of terrorism to recover monetary losses and punitive damages from perpetrators and their supporters. Most of the time however, they will be unenforceable by many victims, due to the transnational nature of many terrorist actions and the foreseeable burden of legal costs posed by such formidable civil cases.

Part 2 – Amendments to the Criminal Code

Under section a) of this proposed legislation, mandatory minimum penalties will be increased or imposed, and maximum penalties increased, for certain sexual offences with respect to children. The CCJA has historically taken an oppositional position on the issue of mandatory minimum penalties. In sum, criminologists have noted the danger that mandatory minimum sentences could lead to prison over-crowding, increased violence and lack of access to rehabilitative programming that accompanies over-crowding. In addition, there is no research evidence to support the idea that longer sentences will deter crime; research conducted on behalf of the Government of Canada and the Ministry of Public Safety have indeed confirmed this conclusion. Mandatory minimum sentences remove discretion from judges who have lengthy experience in weighing the facts and circumstances of cases, while placing this discretion in the hands of crown attorneys, to determine whether or not to proceed with the charge. This shift in discretionary powers undermines the individualization of justice and may lead to a lack of proportionality in sentencing.

Section b) of this proposed legislation creates the new offences of "making sexually explicit material available to a child" and "agreeing or arranging to commit a sexual offence against a child" (child luring) via the use of telecommunication. The latter changes to section 172.1 are understood as bringing the existing law up to date with current, digitally mediated forms of communication. We are supportive of this change. We are not opposed, in principle to the creation of the new offence of "making sexually explicit material available to a child," and are certainly supportive of the spirit of this legislation in seeking to protect children from exposure to

sexually explicit material. We are however, concerned for the potential of miscarriage of justice that can result from this legislation in cases where sexually explicit material may be provided to children under the age of 18, 16, or 14 years for legitimate means (ie. for sexual education purposes). While the law does apply only in cases where material is provided "for the purpose of facilitating the commission of an offence…" ascertaining the "purpose" of providing the material may be problematic at times, and certainly would require legal investigation which may cause undue hardship and stigma to innocent persons. We suggest therefore that, in the interests of justice, an exclusionary clause be included to specifically protect teachers from false accusations by parents who may not agree with sexual education methods or curriculum.

Section c) concerns the expansion of the list of specified conditions that may be added to prohibition and recognizance orders to include prohibitions concerning contact with a person under the age of 16 and use of the Internet or any other digital network. While, again, the CCJA respects the spirit of these conditions, it is possible that they may in fact pose a barrier to an offender's successful reintegration insomuch as they are broad and blanket prohibitory statements. For example, prohibiting an offender from "using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court" bars that individual from using many current methods of communication, including a cellular phone, for legitimate purposes such as employment or education. In an era when telecommunication and internet usage are ubiquitous, the expectation that a judge will set out all of the conditions under which an offender might legitimately utilize technology is somewhat unreasonable. Our concern is that inadvertent violation of this blanket prohibition could cause parole to be revoked from offenders who are not intending to use technology for illicit purposes and who do not pose a risk to the public. In our opinion, the existing prohibition against the use of technology for contacting or communicating with persons under the age of 16 years is one which targets the specific behaviour of concern without posing an undue hardship and jeopardizing safe reintegration. We would therefore recommend the rejection of this proposed amendment.

Section e) of this proposed legislation posits to eliminate the reference, in section 742.1, to serious personal injury offences and to restrict the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years. The CCJA regards such change as problematic for a number of reasons outlined in briefs to Bill C-16 and Bill C-39, both of which are appended to this document for your consideration. Chiefly we are concerned with the question of over-crowding in our prisons and the cost of imposing a prison sentence where the judge is satisfied that "serving the sentence in the community would not endanger the safety of the community…" (section 742.1(b)). Given that there is no demonstrated deterrent effect for sentences of incarceration, the additional costs of imposing a prison sentence where it is unnecessary to ensure public safety would be a waste of resources.

The amendments to the Controlled Drugs and Substances Act which create mandatory minimum sentences for "serious" drug offences are, in the opinion of the CCJA unlikely to have a significant deterrent effect on the production and sale of illicit substances and are likely to create situations where the mandatory minimum sentence is disproportionate to the harm of the offence. Further, the use of mandatory minimum penalties (combined with the proposed restrictions on the use of conditional sentences) is likely to put a great deal of pressure on provincial correctional systems, which already face over-crowding and a lack of resources for rehabilitative measures. Further, mandatory minimum sentences allow no leniency for offenders who accept responsibility for their crime and plead guilty, thereby ensuring an increase in "not guilty" pleas and subsequent trials that are likely to pose a significant workflow problem for our court system. The back-logging of the court system also has implications for miscarriages of justice: According to

Juristat, the average time to dispose of a criminal case in Canadian courts is already 124 days (Thomas 2010). Under the Charter, Canadians charged with an offence are guaranteed the right to be "tried within a reasonable amount of time". Court backlogs due to increased numbers of trials risks creating a situation in which cases will be dropped because the system cannot process them within a "reasonable amount of time".

Rather than creating mandatory minimum penalties, the CCJA would like to respectfully suggest that an alternative may be to create a table of *presumptive* penalties. Presumptive penalties would be used in most circumstances, but allow judicial discretion for upward or downward adjustment, based on aggravating or mitigating factors. Any deviance from the presumptive sentence would be justified in writing by the sentencing judge, detailing the relevant factors considered, thereby satisfying the need for both judicial accountability to ensure sentencing consistency and discretion to ensure proportionality.

The CCJA wholly approves of and applauds the inclusion of the requirement to undertake a cost-benefit analysis of these measures, should Parliament proceed with the creation of these mandatory minimum penalties. The CCJA hopes that all efforts will be made to engage the appropriate criminological experts for this important task to accurately and objectively measure the outcome of mandatory minimum sentences for drug crime. Only through careful, well-designed research methodology can we understand the effects of our policies and design effective means of dealing with drug crime. We feel that this research is incredibly important and, in the interests of creating transparent and effective drug policy, we respectfully suggest that that the committee might consider delaying the implementation of these mandatory minimum provisions until after the appropriate research has been undertaken and a clear benefit has been demonstrated. There are other jurisdictions which currently use mandatory minimum sentences for drug crime (including many US states) whose experience could be studied; initial examination of these jurisdictions suggest that mandatory minimums are costly and do not have a positive effect on crime rates.

Part 3 – Amendments to the Corrections and Conditional Release Act and Criminal Records Act:

On the whole, the CCJA is not specifically opposed to many of the proposed changes in this section of Bill C-10 including the largely administrative changes to the CCRA. We agree that the term "record suspension" more accurately characterizes the nature of what we now call a "pardon" and certainly support the right of victims to appear and speak at parole hearings and to obtain information about the offender. We are opposed however, to extending the wait times for record suspensions. The Parole Board statistics show that the current wait times are clearly sufficient, given that almost 97% of those receiving record suspensions remain crime-free (see Ruddell and Winfree, 2006). There is no indication that longer wait times will benefit society or the offender and there is clear evidence that longer wait times will provide an additional barrier to ex-offenders who wish to seek employment and housing and are thus likely to negatively affect recidivism.

Further, the CCJA questions those proposed amendments that run counter to criminological theory and empirical evidence, including the blanket policy of making certain offences ineligible for a record suspension, as well as severely restricting the application of the International Transfer of offenders program. Reasons for our opposition are clearly stated in two briefs prepared and submitted in the last parliamentary session on Bill C-23 and Bill C-5, both of which are appended to this document for your consideration.

The CCJA is categorically opposed to the changes to the *International Transfer of Offenders Act* which prioritize ministerial opinion over objective reports of correctional and legal experts based

upon research and measured consideration of the individual circumstances and characteristics of offenders. Given that ministerial discretion has already encountered legal problems and that the Federal Court has over-ruled the minister's decision in the case of Arend Getkate, it is likely that, if passed, these changes will be found to be unconstitutional and over-turned by the courts.

Part 4 – Amendments to the sentencing and general principles of the Youth Criminal Justice Act:

The CCJA regards these changes as problematic for a number of reasons outlined in a brief that responded to Bill C-4: Sébastien's Law, during the last session of Parliament - it is appended to this document for your consideration. In short, the CCJA argues that the proposed changes would not effectively accomplish the stated goal of holding violent youth accountable nor would they accurately incorporate due consideration for the *protection of society* upon sentencing; we find that *denunciation, harsher sentencing, naming violent youth after sentencing* and other proposed measures are no more than apologetic and inadequate, and do not address the root causes of youth violence. We would encourage the government to look into more effective methods of crime prevention through social development. Any changes to the YCJA should not focus on deterrence and denunciation (which have been shown in criminological research to be ineffective in preventing crime), but should develop the capacity to treat and rehabilitate Canada's youngest and most vulnerable offenders. The youth criminal justice system is in dire need of resources to provide thorough mental health assessments and treatments for young offenders, in order to reduce recidivism.

Conclusion

In our estimation, this omnibus Bill C-10 before the House has a few merits – but many faults that must be amended. The bill, as it stands, is misleading in its claim to create "safe streets and communities". There is no provision in this legislation for the kinds of social development programs that have the greatest chance of reducing crime, nor are there provisions to improve the front-line criminal justice system's responsiveness to victims, in order to encourage increased reporting of victimization. The consequences of this legislation once implemented will, at a time of historic lows in criminal activity, move Canada in the wrong direction. Instead of contributing to the falling crime trend, this bill will needlessly burden our justice system by extending mandatory minimum sentences for drug, sex and violent crimes.

Bill C-10 presents again the discounted idea that stricter penalties are the best deterrent and that jails are the most effective tool of social change. The CCJA, a multidisciplinary organization that benefits from the work and research of criminologists, sociologists, lawyers and front line correctional and law enforcement professionals, in review of empirical evidence and much discussion, is united in opposing the "tough on crime" legislation being introduced, since it burdens the capacity of the justice system and does little to address the systemic causes of crime in society. This bill cements an erroneous policy, which promotes the idea that the problem with public safety in Canada is a lack of "tough" sentencing.

The entire world has been struggling with economic problems since 2008. The challenges continue as we see many countries and their economies on the verge of collapse. Canada has been fortunate in avoiding much of the angst of our neighbors and partners. Even our economy however, is fragile and this is no time to be hobbling it with billion dollar wasteful expenditures, particularly those that have very long life spans such as criminal justice policies.

Should the committee desire more information on any of these issues, or feel the need for further study, the CCJA would be happy to assist.

References Cited

Gendreau, P., C. Goggin, & F.T. Cullen. (1999). The Effects of Prison Sentences on Recidivism. Ottawa: Solicitor General Canada.

Ruddell, Rick and L.Thomas Winfree Jr. (2006). "Setting Aside Criminal Convictions in Canada: A Successful Approach to Offender Reintegration." *The Prison Journal*, 86 (452-469).

Thomas, Jennifer (2010). "Adult Criminal Court Statistics 2008/2009." *Juristat*, 30(2). Statistics Canada.

Waller, Irvin (2006). *Less Law – More Order*. Westport, CT: Praeger.

Appendices

Brief to the Standing Committee on Justice and Human Rights. Bill C-4: Sebastien's Law. September 1, 2010.

Brief to the Standing Committee on Justice and Human Rights. Bill C-5: An Act to Amend the International Transfer of Offenders Act. November 24, 2010.

Brief to the Standing Committee on Justice and Human Rights. Bill C-23: An Act to Amend the Criminal Records Act. June 9, 2010.

Brief to the Standing Committee on Justice and Legal Affairs. Bill C-39: An Act to Amend the Corrections and Conditional Release Act and the Criminal Code. June 17, 2010.

Brief to the Standing Committee on Justice and Human Rights. Bill C-54: An Act to Amend the Criminal Code (Sexual Offences Against Children). February 8, 2011.