Standing Senate Committee on Legal and Constitutional Affairs
Bill C-10

Brief: Dr. Lawrence Ellerby, February 21, 2012
Supplemental Comments

I again would like to thank the Senate Committee for the opportunity to offer my comments and respond to the thoughtful questions posed by the Senators in their effort to consider this Bill and determine what is best for the Canadian Public. This Bill contains some complex and thorny issues and the committee has a challenging task considering the many varied perspectives and weighting political agendas, emotional victim advocacy testimony, information from researchers and practitioners and the many other stakeholders who both support and have concerns about this bill.

I appreciate being able to offer some supplementary comments for clarification following my appearance.

1. During the questioning, Senator Chaput noted a theme in the recommendations I offered, that public policy should be evidence based and current research and ongoing empirical investigation should guide policy decisions. Perhaps the most disconcerting part of the proposed Bill amongst academics, researchers, and practitioners with expertise related to criminal behaviour and corrections, is that some of the proposed changes clearly neglect or disregard the established empirical evidence that challenges the efficacy of some of these policy changes. Findings to date have demonstrated:

    a. Mandatory minimums and longer sentences do not reduce recidivism and in this regard do not make communities safer,
    b. The financial costs are significant and the return on this investment in other jurisdictions has not been realized,
    c. There can be an inadvertent adverse impact on the process of criminal justice (negatively effecting how Crown Attorney's and Judges can function),
    d. Specific populations of individuals (offenders) will be particularly negatively effected (individuals with mental illness, Aboriginal offenders - who are already disproportionally represented in jails and prisons), and
    e. There can be an inadvertent adverse impact on victim/survivors of sexual abuse that can negatively impact the disclosure of sexual abuse, increase the likelihood of exposing victims to an adversarial trial process, and create the potential for fewer charges and convictions of offenders.

I would specifically refer the Senators to the following articles for further information in this regard:

- Tabachnick, J & Klein, A. (2011). A Reasoned Approach. Association for the Treatment of Sexual Abusers. www.atsa.com

- Cook, A. N., & Roesch, R. (2011, September 12). "Tough on Crime" Reforms: What Psychology Has to Say About the Recent and Proposed Justice Policy in Canada. Canadian Psychology/Psychologie canadienne. Advance online publication. doi: 10.1037/a0025045

- Dvoskin, J., Skeem, J. L. Novaco, R. W., & Douglas, K. (Eds.). (2011). Applying social science to reduce violent offending. New York, NY: Oxford University Press.

2. In Senator Lang's comments, he appropriately noted the seriousness of sexual abuse and identified the challenge of differentiating between offender types in terms of imposing a custodial sentence versus a community disposition, and believing that a consequence of a sentence of at least one year is justified for this crime. This is the heart of the challenge that many experts in the area of criminal behaviour and corrections have with this Bill. The position I have and many of my colleagues would share is not that individuals who commit sexual crimes should not receive a term of incarceration as part of the consequence; in very many cases this is indeed warranted. The concern is that the decision about if a person should receive a term of custody and the length of that term of custody (and if it should be a provincial or a federal sentence) should be determined through the court process, which is able to access information to advise this decision making. Such information would include: pre-sentence reports, psychological assessments, risk assessments, information specific to the offender's history of criminal behaviour and offence dynamics, and the victim's wishes and what is determined to be in the victim's best interest (by them, family members/care givers, therapists). Examples of how mandatory minimums are problematic from my own recent clinical experiences and observations provide a more clear illustration of this form of public policy is not optimal:

Example 1 - A developmentally delayed offender (low level of intellectual functioning) was charged with his first offence (no prior criminal history), an incident that involved touching two children, single incidents each, over their clothing. His charge carried a mandatory minimum and as a result he was incarcerated. In the community his risk was being appropriately managed. He had no access to his victims, he resided in a placement

with professional caregivers to attend to his needs and help manage his risk and other behaviours (due to his low intellectual ability and poor coping skills) and he was involved in specialized treatment for low functioning individuals with sexual behaviour problems and was doing well in treatment. Upon his incarceration all these resources and supports were lost. In custody he is a vulnerable person and likely to be taken advantage of or abused, easily influenced, and introduced to a negative peer group (that he would be susceptible to negative role modeling from). The likelihood of him receiving treatment is limited. There are few specialized treatment services for him given his intellectual disability and he is unlikely to be prioritized for treatment services as the nature of his offending will be assessed as low (treatment is prioritized based on risk and need). By being incarcerated he has lost a stable supported living placement and was removed from a community treatment program where he was doing well. It is yet to be determined if he will be able to secure these same resources upon release. In the community, his risk was being appropriately managed. Incarceration will not contribute to risk management and if he does not receive the same level of placement and treatment supports upon his release, his risk will be elevated.

Example 2 - An Aboriginal offender who committed a sexual offence against a relative went through a lengthy community healing process that involved him being in treatment, his victim being in treatment, other family members being in treatment and the family doing work that addressed the offending behaviour, the level of risk he presented, and the healing needs of the victim and family members. The treatment was culturally grounded and oriented and involved traditional processes of healing (e.g., sharing circles, Sweatlodge ceremonies, traditional teachings). The family, including the victim, wanted the offender to remain in the community. The victim and offender had worked on and re-established their relationship. Justice, from a community perspective, was viewed as having been achieved by the offender acknowledging, facing and addressing what he had done, making the required changes in his life, and altering how he engaged in his relationships with others in his family (his wife, his children, including the victim and other extended family and community members). The community belief is one of a restorative justice process (which they had successfully employed) and they advocate for alternatives to incarceration when appropriate. As a result of a mandatory minimum, the victim's whishes, the family's wishes and the community's wishes and belief system related to justice were denied and the offender was incarcerated. In custody he is not able to provide for his family, who are now suffering financially, his victim has struggled with this consequence of her disclosure (as she wanted him to admit and get help, not to go to jail) and the community has another example of having non-Aboriginal conceptualizations of justice forced on them.

Example 3 - A child made a disclosure of sexual abuse by her brother at school and it was reported to the child welfare agency. The parents did not view dealing with this disclosure through the criminal justice system as beneficial for either of their children. They saw, both, damage occurring to their son as a result of the potential to receive a criminal record and a period of incarceration, and further damage to their daughter, in having to make a statement and to risk seeing herself as responsible for her brother being incarcerated. As a result, the family blocked child welfare and police involvement and neither the victim, offender nor family received treatment.

3. Senator Frum queried if there are times when a child victim's position about what happens to their perpetrator should not be taken into account with decisions being made by others (presumably the adults or the law makers). This is a critical point and one, Senators and the government should be paying very careful and thoughtful attention to. Sexual abuse is a terrible crime that can have significant negative impact on victims and result in a wide range of trauma symptomatology. It is also, however, the case that the negative impact on victims can in some cases be exacerbated through factors such as how their disclosure is received, the investigative process, the court process and the sentencing decisions. For a number of victims, the belief that justice comes in the form of a guilty verdict and a reassuring sentence is false and even in cases where this is what victims are looking for, this may offer little value in terms of their own recovery and healing. Trauma is a very complex issue and I believe it is imperative if we are going to assert our policies are good for victims, to ensure we actually understand the developmental impact and the role of trauma in these cases. It is my position, and I believe the literature on victim trauma will support, that imposing a 5-year mandatory minimum for incest and to remove input into the sentencing process from victims, families, communities and criminal justice, mental health and child welfare professionals, will result in harm to children and contribute to further trauma and family disintegration.

4. In regards to the Senators who posed questions wanting to consider the best interest of victims of crime, it is important for them to know that while individual people may have specific opinions related to public policy, large victim organizations that understand dynamics of victim issues, legislation and the like do not support Mandatory Minimums and view such policies as harmful to victims. The premier national victim advocacy policy organization in the U.S., the National Alliance to End Sexual Abuse (NAESV), the policy umbrella organization of all U.S. state sexual assault coalitions and rape crisis centers has come out against mandatory minimum sentencing for sex offenders (http://naesv.org/?page_id=87). There statement is:

> *"Long mandatory minimum sentences can have a number of negative consequences that serve to decrease, rather than increase, public safety. For example, lengthy mandatory minimum sentences sometimes result in prosecutors not filing charges or filing charges for a lesser crime than a sex offense, as well as increased plea bargains down to a lesser crime. Similarly, judges or juries may be less inclined to convict a defendant on a sex offense because of the mandatory minimum sentence. Long mandatory minimum sentences can also keep victims who were assaulted by someone they know from reporting the crime. All of these possible negative consequences can result in fewer sex offenders being prosecuted and/or tracked, thus NAESV opposes mandatory minimum sentences."*

5. I was very encouraged to hear the many voices of support for treating offenders, both from a number of the Senators as well as from both survivors of sexual abuse and victim advocates who appeared when I was present. It is unfortunate that despite what appeared to be a clear recognition for the importance of treatment, an understanding of the realities of offenders returning to the community and the need to ensure this occurs in a safe way, issues specific to treatment are not a component of the bill. In fact, the discussion about having more people incarcerated and/or incarcerated for longer (perhaps with the perception that this will result in greater access to treatment) is occurring at the same time high quality sex offender treatment programming has been dismantled within Correctional Service of Canada, and there is a move to abandon specific interventions for sex offenders in place of generic programming that will not address the most significant treatment targets known to manage risk (e.g., deviant sexual interests, developmental experiences). Although much of the literature on what constitutes best practice in the treatment of offenders, and sex offenders in particular, comes from Canadian academics, researchers and practitioners (and is regarded and considered in countries throughout the world), we are moving to a system of intervention in Correctional Service of Canada where programs have replaced psychological treatment as the primary intervention and the most current program model is not consistent with the best practice principals. Additionally, there is no consistency across the country in terms of provincial corrections, in terms of the quality and availability of institution and community based treatment programs. The premise that these offenders will receive appropriate treatment to address their risk

should not be considered to be a given and in my recent experience dollars are being diverted away from treatment in anticipation and preparation for needing to manage larger populations (increasing bed spaces, staffing etc.).

I thank you for taking the time to consider this additional input. I would be pleased to provide any of the Senators with additional information should this be helpful.

Respectfully submitted,

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