

**Brief to the Standing Committee on Justice and Human Rights on Bill C-3 (Youth Criminal Justice Act) From Aboriginal Legal Services of Toronto**

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**Marian Jacko - Board Member; Jonathan Rudin - Program Director**

We are very pleased to be here today before the Standing Committee on Justice and Human Rights to discuss our perspective on this important piece of legislation. We would like to thank the Committee for this opportunity.

Aboriginal Legal Services of Toronto is a non-profit organization serving Canada's largest urban Aboriginal community. ALST operates a wide range of programs. Of particular relevance to our presentation to the Committee are three of our activities: our Young Offender Courtworker program; our Community Council Program; and our test-case litigation activities.

Our Aboriginal Young Offender Courtworker works with Aboriginal youth charged with all manner of offences under the Young Offenders Act. The Courtworker assists clients obtain counsel, explains the court process to accused persons and their families, and helps to set up sentencing alternatives and options for clients.

The Community Council is an adult criminal diversion program. The program has been hearing cases since 1992 and was the first urban Aboriginal diversion program in Canada. The program has dealt with over 800 cases since its inception. The Community Council is open to all Aboriginal offenders, regardless of the number of prior convictions and has taken on cases involving a wide range of criminal offences - from theft and mischief to arson and criminal negligence. While the Community Council does not currently deal with cases involving young offenders, we hope to begin taking on such cases in next few months.

Finally, our test-case litigation activities are part of the mandate of our legal clinic. ALST has appeared as an intervenor in the Supreme Court of Canada in a number

of cases - most relevant to our appearance here are our interventions in the *Williams*, *Gladue* and *Wells* cases.

Our major submission to the Committee today is to urge that section 718.2 (e) of the Criminal Code of Canada be added to section 38 of the proposed bill - the section that addresses restrictions to committal to custody.

Section 718.2(e) of the Criminal Code was part of Parliament's comprehensive sentencing reforms passed in 1996 as Bill C-41. The section states that when imposing a sentence: "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."

The section was considered by the Supreme Court of Canada in the landmark case of *R v. Gladue*. In their decision, the Court noted that Canada's incarceration rate of adult offenders was higher than almost all western democracies and was something that should not instill a sense of pride in Canadians. The Court then went on to address the over-incarceration of Aboriginal offenders in particular. The Court found that one of the purposes of section 718.2 (e) was to respond to this over-incarceration. While the Court stated that it would not be possible to address all of the causes of over-representation through sentencing reforms, they did note that alternatives to imprisonment were particularly necessary for Aboriginal offenders.

The Court spoke about the need for restorative justice approaches in sentencing and made it clear that such approaches should not be restricted to non-violent offences. The Court also made it clear that restorative justice approaches are not necessarily lighter forms of punishment and may be able to accomplish the goals of deterrence and denunciation better than jail sentences.

Why is there a need for section 718.2(e) to be placed in the Youth Criminal Justice Act? Section 139 of the Act states that the Criminal Code applies to all proceedings involving young offenders except where it is inconsistent or excluded by the Act. Given

the fact that the Act contains its own sentencing provisions, it would appear that judges are precluded from considering s. 718.2(e) in their sentencing deliberations even if they would want to do so. Thus, consideration of the realities of Aboriginal youth and the need to examine alternatives to incarceration in all cases are absent from the current bill.

This is a matter of great concern. Section 38 of the Act, which is entitled "restrictions on committal to custody" is actually much weaker than s. 718.2.(e). The section is written so broadly that there can be no expectation that Canada's over-reliance on incarceration of young people in general - already twice that of the United States - will be reduced at all. As with over-incarceration of adults, when we look at the numbers in some detail we find that Aboriginal youth are over-represented among young people sent to jail.

It is important that we understand the significance of this reality. One of the reasons that some people urge tougher sentencing provisions for young offenders and a greater reliance on jail as a response, is that they feel that only such measures will reduce adult criminality. When we look at the statistics involving Aboriginal people however, the flaws in this logic are clearly exposed.

For example, in Saskatchewan in 1992, 70% of the youth in custody were Aboriginal. In Manitoba in 1990, 64% of the population of the Manitoba Youth Centre and 74% of the population at the Agassiz Youth Centre were Aboriginal. And in Alberta, the Cawsey Report in 1991 estimated that the Aboriginal population in youth jails in the province would increase to 40% by 2011. The incarceration rate of Aboriginal youth has been increasing over time. If jailing young Aboriginal people was the answer to adult criminality, we would expect to find a decrease in adult Aboriginal jail admissions. But this has not occurred. Despite all the discussion and all the studies looking at the issue of over-representation, the number of Aboriginal offenders in jail keeps rising. Clearly, placing Aboriginal youth in young offender facilities in no way prevents occurrences of criminal behaviour when they become adults, it simply prepares them for life in adult correctional institutions.

Perpetuating a process that will lead to the incarceration of more and more Aboriginal youth and do nothing to address the causes of this criminality is, in itself, a crime. It is

important that the Youth Criminal Justice Act contain a provision that will explicitly require judges to look for alternatives to incarceration, particularly with regard to Aboriginal youth.

One of the reasons that this is such an important issue is that the Aboriginal population of Canada is significantly younger than average. Statistics Canada figures from the 1991 census showed over 56% of the Aboriginal population was under 25 - almost 37% were under 15. In contrast, only 35% of the overall Canadian population was under 25% - 21% under 15. In addition, almost half of Aboriginal youth lived in urban centres - a trend that is on the upswing. Aboriginal jail populations often rise faster than the Aboriginal population as a whole, it would be a tragedy if the Youth Criminal Justice Act perpetuated or even, hastened, this trend. It would be especially tragic as section 718.2(e) offers some hope that this trend might be reversed.

It might be said that s. 718.2(e) of the Criminal Code is not needed because the proposed Act has its own provisions to address this issue. For example section 3( c) (iv) of the Bill provides "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should respect gender, ethnic, cultural and linguistic differences and respond to the needs of young persons with special requirements." In addition, as previously noted, section 38 provides a direction as to restrictions on committal to custody.

As we have already discussed, section 38 should not be seen as providing any real restrictions on the jailing of young offenders. The section is written in such a way that the only people who can be assured of not receiving jail sentences are first offenders charged with minor, non-violent offences - people who already have no reason to worry about jail. As to section 3 ( c) (iv), it really says nothing more than what current judicial practice amounts to in any event. And reliance on this current practice has seen Canada incarcerate young people at an incredible rate, and particularly incarcerate Aboriginal young people.

Perhaps, section 3 ( c) (iv) is more than a restatement of current judicial practice. Perhaps it does herald a change in the way in which judges will sentence young offenders. Who knows? And no one will really know until the section has been the subject of judicial scrutiny. Many commentators have already noted that one of the biggest problems with the Youth Criminal Justice Act is that so much of it is written in vague terms that it will take years for the courts to determine what the various sections mean.

On the other hand, section 718.2 (e) has a definite meaning. The Supreme Court of Canada in *Gladue* gave a very clear meaning to the section - and subsequent decisions by the Court in cases such as *Proulx* and *Wells* have further settled the way in which the section is to be interpreted. Given the choice between uncertainty and certainty, should not the Act opt for certainty. If the purpose of section 38 is truly to place restrictions on committals to custody, should not youth court judges consider the same issues that judges in adult criminal courts consider?

There is another very important issue that must be raised. As we have made clear in our submission, it is our opinion that the provisions in the Youth Criminal Justice Act regarding sentencing, particularly the sentencing of Aboriginal youth, are markedly inferior to similar provisions in the Criminal Code of Canada. This leads to the absurd result that judges have more legal resources to avoid placing adult Aboriginal offenders in jail than they do Aboriginal young offenders. This result however is more than just absurd, it is a violation of the Canadian Charter of Rights and Freedoms.

Unless section 718.2(e) of the Criminal Code is placed in section 38 of the Youth Criminal Justice Act, adult Aboriginal offenders are receiving a benefit that their younger brothers and sisters are not able to receive. Aboriginal young offenders will be facing discrimination on the basis of age - a violation of section 15 of the Charter.

If section 718.2(e) of the Criminal Code is not placed in the Youth Criminal Justice Act then, following proclamation of Act, Aboriginal Legal Services of Toronto will appear at our first opportunity before a youth court judge preparing to sentence an Aboriginal

young offender and bring a section 15 Charter challenge to the sentencing hearing. We are confident that our application will be successful and that this challenge will survive appeals to higher courts. However this is not the preferable way in which to resolve this issue. A Charter challenge will take years to reach the Supreme Court and thus have an impact on the sentencing of all Aboriginal - and non-Aboriginal - youth in Canada. During the time it will take for an appeal to wend its way through the courts, thousands and thousands of young people will have been sentenced. We urge the Committee to amend the Bill now and preclude the necessity for a Charter challenge.

When important decisions are made in the Aboriginal community we are often reminded by the elders that we must think seven generations ahead. As Oren Lyons - Faithkeeper of the

Onandaga Nation - has said: "In our ways of life, in our government, with every decision we make, we always keep in mind, the seventh generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours - hopefully better. When we walk on Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.

We realize that it is often difficult for politicians who must run for re-election every four years to think 10 or 15 years down the line, much less seven generations. But the sad reality - the tragedy - of Aboriginal over-incarceration in this country can be at least be partially understood by the fact that decision-makers have often not looked at all on the impact of their decisions on Aboriginal communities.

We urge you to resist the pressures of those who have no real idea of the realities of youth crime in this country, those people who mistakenly believe that the answer to any infraction of the law is to lock people up, those who believe the problem with youth justice is that we have not been tough enough. Resist those pressures because bowing to them will result in the perpetuation of practices that do not work. Practices that lead to the continued over-incarceration of Aboriginal people. Practices that do nothing to change the behaviour of those who commit offences. Practices that, in their short-sightedness, do not increase community safety, but rather make communities more

dangerous, by placing Aboriginal young people into the revolving door of the prison system - a revolving door that with each revolution produces angrier people who commit more and more serious offences.

Placing section 718.2 (e) of the Criminal Code in section 38 of the Youth Criminal Justice Act will not, on its own, stop the revolving door totally nor will it immediately make our communities safer. But it will start us down that road, a road that we can look back on in a generation or two and say that when we had the chance, we took the steps necessary to make our world a better and safer place.

Thank you, miigwetch.

Endnotes.

1. R v. Gladue (1999) 133 C.C.C. (3d) 385 (Supreme Court of Canada)
  2. Gladue p. 406
  3. Gladue p. 415
  4. Linn, Patricia, Report of the Saskatchewan Indian Justice Review Committee (Regina, Saskatchewan Justice, 1992)
  5. McMahon, Tom, Aboriginal People and Discrimination in the Justice System: A Survey of Manitoba Inmates and Related Literature (Ottawa, University of Ottawa, LL.M. Thesis, 1992)
  6. Alberta Task Force, Report of the Task Force on the Criminal Justice System and Its Impact on Indian and Metis People in Alberta (Edmonton, Government of Alberta, 1990)
  7. R v. Proulx, January 31, 2000 (Supreme Court of Canada)
  8. R v. Wells, February 17, 2000 (Supreme Court of Canada)
  9. Brascoupe, S., "Aboriginal Peoples's Vision of the Future: Interweaving Traditional Knowledge and New Technologies" from Visions of the Heart: Canadian Aboriginal Issues (Harcourt Brace & Company, Toronto, 1996)
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