

Submission to the

**Standing Committee on Legal and Constitutional Affairs of the
Canadian Senate
40th Parliament, 3rd Session**

Regarding

Bill S-6: An Act to amend the Criminal Code and another Act (Serious Time for
the Most Serious Crime Act)

Submitted by:

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Bill S-6: The Unjustified Elimination of an Already Faint Hope

Executive Summary

The John Howard Society is a non-profit charity whose mission is to seek “effective, just and humane responses to the cause and consequences of crime.” Our 65 front line offices across Canada deliver evidence-based programs and services dedicated to prevent crime by safely returning and reintegrating prisoners to their communities and keeping at-risk people out of the criminal justice system.

The John Howard Society, like the Canadian government, prioritizes community safety when developing positions on and generating solutions to criminal justice policy issues. Where the Society diverges from the present government is in its assessment of the appropriate and effective means to achieving that end. The John Howard Society promotes effective, just and humane responses to crime, and it is our position that the repealing of the “faint hope clause”, as outlined in Bill S-6, is contrary to the evidence and even to the interests of the public. We feel it is important to counter the suggestions that Canada is too ‘soft’ on individuals convicted of murder; as this brief will show, Canada is in fact a world leader in the punitive treatment of those serving life sentences with parole. The Society opposes Bill S-6, and recommends that the committee reject it, for the following summarized reasons:

- It is *unnecessary*:
 - Canada is already a world leader in getting ‘tough’ on people who are convicted of murder. Eliminating the faint hope clause, which in practice only allows the release of a handful of low-risk, rehabilitated applicants who have already served *at minimum* 15 years of imprisonment, is unnecessary and will not improve community safety.
 - Compelling evidence on the opinions of ‘ordinary Canadians’ regarding the faint hope clause indicates overwhelming support for the current judicial review regime under s. 745.6, and as such underscores our position that the amendments proposed within Bill S-6 are unnecessary and in direct contradiction to the demonstrated interests of the Canadian public.
- It is *counterproductive*:
 - Prisoners serving life sentences generally have fewer risk factors than other incarcerated populations, and as such less likely to recidivate upon release.
 - Increasing terms of incarceration may actually increase the likelihood of recidivism. It is both counterproductive and counterintuitive to eliminate the faint hope clause for prisoners who are demonstrably low-risk, particularly as it potentially increases their likelihood of re-offending once released back into the community.

- Canadians may question the logic behind spending additional millions of their taxpayer dollars on amendments that will not make them safer and will divert funds away from more effective and inexpensive alternatives to imprisonment.

History and Background on Section 745.6

“If passed without amendment, [Bill S-6] may represent the first step towards more repressive amendments to the murder sentencing provisions”

– Julian Roberts¹

Section 745.6 of the *Criminal Code*, which allows most prisoners sentenced to life imprisonment for high treason or murder to apply for a review of their parole eligibility after serving at least 15 years of their sentence, was created in 1976 as a result of the substitution of mandatory long-term imprisonment for capital punishment. At the time of these amendments, murder was redefined as either first-degree or second-degree, with parole eligibility for the former being set at a minimum 25 years, and 10 years for the latter. Section 745.6, colloquially referred to as the ‘faint hope clause’, was added as an incentive to prisoners serving life imprisonment sentences to make efforts to rehabilitate themselves, which would have the consequence of improving working conditions for prison staff.² If a prisoner took exceptional rehabilitative measures and was considered low-risk, it was thought that it may be contrary to the public interest to keep him incarcerated.³

In addition, s. 745.6 was Parliament’s recognition that people sentenced for murder serve significantly longer terms of custody in Canada compared to other countries.⁴ This point merits emphasis and elaboration. In an international comparison of the average time served in custody by an individual on a life sentence *with* parole for first degree murder, Canada averages well above other Western democracies:

¹ Roberts, Julian V. (2009). “‘Faint Hope’ in the Firing Line: Repeal of Section 745.6?” Canadian Journal of Criminology and Criminal Justice 51.4: 537-545.

² Parliamentary Information and Research Service. (2009). “Bill C-36: An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act.” Parliament of Canada.

http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c36&source=library_prb&Parl=40&Ses=2#a3

³ Stein, Karin and Dan Antonowicz. (2001). “Section 745.6 – The ‘Faint Hope Clause’” Research and Statistics Division, Department of Justice.

⁴ Ibid.

Australia	14.8 years	United States	18.5 years
Belgium	12.7 years		
England	14.4 years		
New Zealand	11 years		
Scotland	11.2 years	Canada	28.4 years

Data taken from Correctional Service of Canada⁵

It was in large part the awareness of Canada's relatively high imprisonment rate *vis-à-vis* other western nations that underpinned the entrenchment of the sentencing principle of restraint in Bill C-41— a bill encompassing a significant array of sentencing reforms as well as a codification of common law sentencing jurisprudence — in 1996.⁶ Here again, Parliament recognized that Canada's increasing reliance on prisons bore significant economic and human costs, and as such created a principle to restrict the use of imprisonment as a sentencing tool for judges.⁷

Given Parliament's historical acknowledgment of the negative consequences of lengthy imprisonment, and that s. 745.6 can contribute to reducing the harms and costs flowing from long-term imprisonment for low-risk prisoners in exceptional circumstances, Bill S-6 represents a departure from Canada's traditional emphasis on restraint and rehabilitation.

The Operation of Section 745.6

Applying for a judicial review under section 745.6 is a very onerous process for eligible prisoners, as one might expect of a review process for convicted murderers. Successfully securing an earlier parole eligibility date and ultimately being granted parole is even more difficult. Furthermore, amendments made to section 745.6 in 1996 added several more stringent conditions that an applicant must satisfy: multiple murderers are no longer eligible to apply; the Chief Justice must determine whether the applicant has a "reasonable prospect" for success before empanelling a jury; and if an application makes it to the jury stage, the jury has to arrive at a unanimous decision⁸ approving that the parole eligibility period should be reduced.

As of 1996, in order to reduce one's parole eligibility period, one must successfully complete each of the following steps in the judicial review process:

⁵ Correctional Service of Canada. (1999). "Comparison of Time Served in Custody by Life Prisoners in Western Nations". Ottawa: Correctional Service of Canada.

⁶ Daubney, David and Gordon Parry. (1999). "An Overview of Bill C-41 (the Sentencing Reform Act)" in Roberts, Julian V. and David Cole, eds. *Making Sense of Sentencing*. Toronto: University of Toronto Press.

⁷ Roberts, Julian V., and Thomas Gabor. (2004) "Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration." *British Journal of Criminology* 44.1 92-112.

⁸ Note, the jury does not deliberate in the judicial review process; said differently, there is no need to render a unanimous verdict—there only has to be one juror that remains opposed to allowing an earlier eligibility date and the process comes to a halt.

- First, after serving a minimum of 15 years of imprisonment, the eligible applicant⁹ applies in writing to the appropriate Chief Justice in the province in which his/her conviction took place for a reduction in the number of years of imprisonment without eligibility for parole. The Justice then examines (a) the application; (b) any report provided by the Correctional Service of Canada or other correctional authorities; and (c) any other written evidence presented by the applicant or the Attorney General. The Justice then determines whether, on a balance of probabilities, the application has a reasonable prospect of success.¹⁰
- If the Justice determines that there is reasonable prospect of success, he/she designates a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application. The jury then hears the application, and uses the following criteria to determine whether the applicant's eligibility period for parole should be reduced:
 - (a) the character of the applicant;
 - (b) the applicant's conduct while serving the sentence;
 - (c) the nature of the offence for which the applicant was convicted;
 - (d) any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
 - (e) any other matters that the judge considers relevant in the circumstances.
- If the jury hearing the application unanimously determines, on the basis of the above criteria, that the applicant's number of years of imprisonment ought to be reduced, they then decide whether to:
 - (a) substitute a lesser number of years of imprisonment without eligibility for parole than the number then applicable; or
 - (b) terminate the ineligibility for parole.

The reduction of number of years without eligibility for parole must be determined by a two-thirds majority of the jury.

- The applicant can then apply to the National Parole Board for a standard parole hearing at the new parole eligibility date, or immediately, if the jury terminates the ineligibility for parole. The ultimate decision to grant or deny parole still rests with the National Parole Board, using its usual risk assessment criteria.

⁹ To be eligible, applicants must: (a) have been convicted of murder or high treason; (b) have been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and (c) have served at least fifteen years of their sentence. Again, they are not eligible if they are convicted for more than one murder charge (C.C.C; s. 745.6)

¹⁰ Criminal Code of Canada (s.745.6).

In addition to explicating the judicial review process, the purpose of highlighting the stages applicants must pass through under the s. 745.6 regime is to underline how rigorous and challenging being granted early parole actually is for prisoners convicted for murder. Indeed, contrary to some political messaging, the **vast majority of eligible prisoners serving terms of life imprisonment do not initiate the process of judicial review at all**. In other words, the vast majority of eligible prisoners do not even attempt the first stage of the process (the judicial screening). The onerous nature of the process likely accounts for the high rate of eligible prisoners self-selecting out of the process entirely. The data on releases to date under the judicial review clause, outlined in the following paragraphs, provide one of the many reasons why John Howard Society is in opposition to Bill S-6.

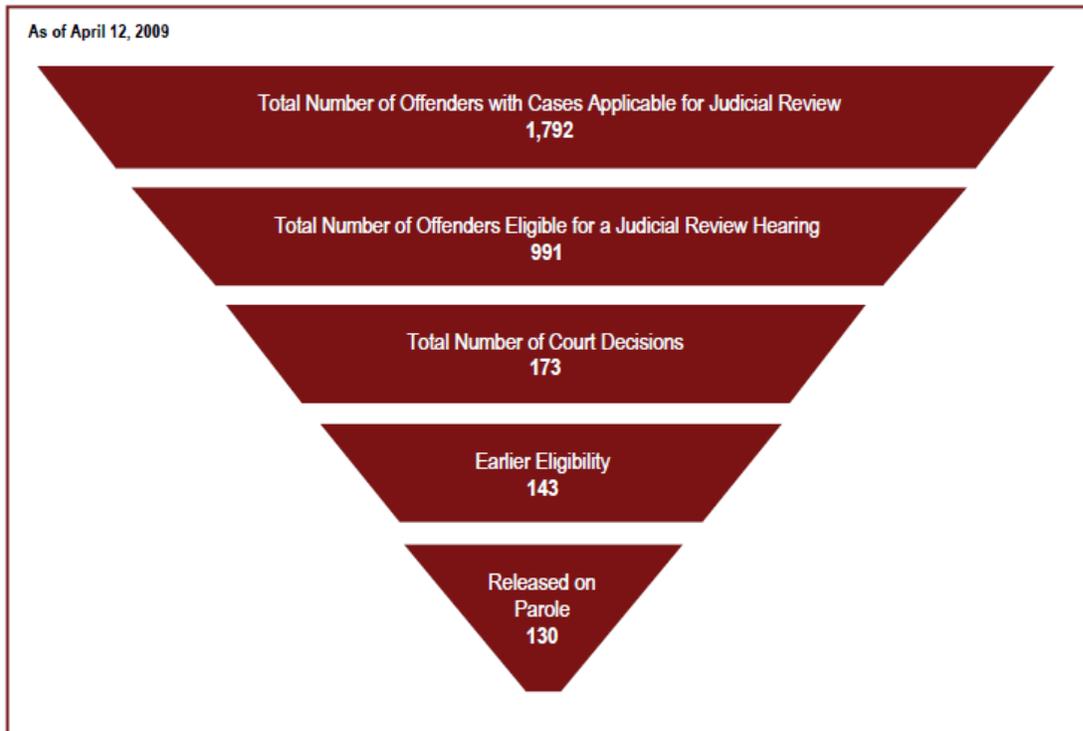
Bill S-6: Unnecessary

Since its inception, the faint hope clause has received perennial attention whenever an infamous individual applies for earlier parole eligibility. Every time these contentious applications under s. 745.6 come to the media's (and politicians') attention, demands for the repeal of the faint hope clause are made. When Clifford Olson made an application, for example, the media and public backlash was immediate and intense, although little attention was paid to the celerity of the rejection of his application by the empanelled jury.

The mechanisms of review in the faint hope clause process are stringent for good reason — to ensure that only low-risk, rehabilitated applicants succeed in progressing through the sequential stages to ensure both the safety of the community and confidence in the administration of justice.

A data chart taken from the 2009 *Corrections and Conditional Release Statistical Overview*¹¹ below provides a useful snapshot of the number of prisoners to date who applied for and successfully achieved a reduction in parole eligibility. These figures are cumulative:

¹¹ Correctional Service of Canada. (2009). *Corrections and Conditional Release Statistical Overview*. Ottawa: Correctional Service of Canada, Public Safety Canada.



Source: Correctional Service Canada.

Since the first judicial review hearing in 1987, only 173 prisoners have applied for a judicial review under s. 745.6 and received a completed hearing — out of the 991 total prisoners eligible for a judicial review hearing.¹² That averages to less than 1 in 5 eligible prisoners initiating the judicial review process. The concern that s. 745.6 is being overused or used improperly does not appear to be warranted.

As the data shows, of the 173 cases where juries have to determine whether or not a prisoner should be granted an earlier parole eligibility date, 143 (82.7%) are granted earlier eligibility. While this number appears high, it is important to re-emphasize that those prisoners who apply for judicial review are likely to be the most low-risk and well-behaved of the larger population of eligible prisoners. Said differently, only those with strong cases will apply to begin with — the percentage of applicants who are denied earlier eligibility, such as the Clifford Olson types, are likely the exception and are treated accordingly (rejected).

This data does not suggest that the faint hope clause is being abused, nor does it indicate that large volumes of prisoners convicted for murder are being released. Only 130 prisoners have actually been released on parole under s. 745.6 since 1987 — that averages to approximately 6 released prisoners per year who have *already served at least 15 years of imprisonment*.

The use of parole as an effective correctional tool appears to be disregarded or understated by the Bill in question, and we feel it is important to highlight the efficacy of this cost-saving practice.

¹² Eligible for a judicial review hearing implies that the prisoner has already served 15 years of his/her sentence.

The National Parole Board must consider a number of risk factors to make an assessment of an applicant's level of risk to the community before granting a release. Some of the factors assessed include:

- the offence;
- criminal history;
- social problems, such as alcohol or drug use and family violence;
- mental status, especially if it affects the likelihood of future crime;
- performance on earlier releases, if any;
- information about the offender's relationships and employment;
- psychological or psychiatric reports, in some cases;
- opinions from professionals and others such as police, judges, aboriginal elders, and other information that indicates whether release would present an undue risk to society;
- information from victims;
- institutional behaviour; and
- benefit derived from programs that the offender may have taken.¹³

A parole hearing is methodical and scrupulous to ensure that the applicant is well-suited for re-entry into the community. The theory underpinning the use of the conditional release option suggests that gradually releasing prisoners back into the community enhances public safety, and this premise is well-supported by outcome data collected by the Correctional Service of Canada¹⁴.

Of central concern to the public and the government is whether once released back into the community, the successful applicants commit more violent offences or homicides — an understandable worry. The data indicates that the s. 745.6 regime is operating effectively: almost none of the paroled s.745.6 applicants have had their parole revoked for committing a new offence. A fact sheet released by the Department of Justice Canada in 2001 shows that out of the 4 faint hope parolees who had their parole revoked for committing a new offence, 3 of the 4 were for a drug offence, and one was an armed robbery.¹⁵ While any degree of recidivism is not desirable, these numbers do not shake our confidence in the rigours of the judicial review process and conditional release practices, nor do they demand the drastic changes contained in Bill S-6.

The data outlined in this section reassure us that the justices and juries are applying this section appropriately, and suggest that the present bill is unnecessary and designed for symbolic purposes. Whether this bill is necessary to achieve the goal of restoring public confidence in the criminal justice system will be addressed next.

¹³ National Parole Board. (2009). "Parole: Contributing to Public Safety". <http://www.npb-cnbc.gc.ca/infocntr/parolec/pdec-eng.shtml#decision1>

¹⁴ Correctional Service of Canada. (1998). "Federal Trends and Outcomes in Conditional Release" in *Forum on Corrections Research*, Vol 10 (2).

¹⁵ Stein, Karin and Dan Antonowicz. (2001). "Section 745.6 – The 'Faint Hope Clause'" Research and Statistics Division, Department of Justice.

Is this what ‘Ordinary’ Canadians Want?

“Let me add that I understand the concern of ordinary Canadians that the faint-hope regime allows for lenient treatment of murderers. In this regard, I believe that most Canadians support these measures, which are aimed at protecting society by keeping violent or dangerous offenders in custody for longer periods. This bill will allow us to meet the concerns of Canadians that murderers do the time they have been given and stay longer in prison than they do now.”

– Honourable Rob Nicholson¹⁶

Politicians often cite the public’s appetite for punitiveness when proposing legislation aimed at ‘toughening’ current penal practices. While opinion polls asking broad questions about leniency in sentencing may garner results that appear to support the current Justice Minister’s contention that ordinary Canadians do not support the faint hope clause measures, the research evidence suggests otherwise.

Studies suggest that Canadians are often not presented with adequate information about the criminal justice system (including judicial review hearings) from the mass media - arguably the most common source of information on criminal justice matters for the public¹⁷. The following description of the operation of the faint hope clause from a local Toronto-based newspaper demonstrates this inadequacy clearly:

“[Repealing] the “faint-hope” clause, which allows murderers who are sentenced to life to apply for early parole after serving only 15 of the 25 years of their sentence, would give “greater peace of mind” to families of victims and give Canadians “greater confidence” in the justice system.”¹⁸

This description of how s. 745.6 functions is misleading at best: it implies that upon serving 15 years of custody, a murderer is automatically eligible for early parole — which as already noted above, is far from reality. The government’s political messaging around the faint hope clause is no less disingenuous. It would not be surprising then, based on information such as the above quote, that Canadians may express disapproval of the faint hope clause when asked.

In-depth studies on public opinion, however, indicate that when ordinary citizens are provided with the level of detail that judges receive during hearings or trials, they overwhelmingly support

¹⁶ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Meeting Minutes and Evidence*. 40th Parliament, 2nd Session, October 19, 2009 at 1540. Ottawa: Canadian Government Publishing.

¹⁷ Doob, Anthony and Julian Roberts. (1988). “Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys” in Walker, Nigel and Mike Hough, eds. *Public Attitudes to Sentencing: Surveys from Five Countries*. US: Gower.

¹⁸ April 20, 2010. Weese, Brynn. Feds want ‘faint-hope’ clause repealed. *The Toronto Sun*. <http://www.torontosun.com/news/canada/2010/04/20/13656916-qmi.html>

the decisions of the judges.¹⁹ That is, when members of the public truly understand how these mechanisms actually operate - and are not simply relying on the media's or a political party's brief framing of how they operate - they are much more willing to support them. Moreover, studies find that when provided with extensive background information about prisoners' life circumstances, the context of the crime and other relevant sentencing factors for serious crimes, ordinary citizens in some cases would even impose sentences that are *less* harsh than the actual court sentence given.²⁰

The findings of these public opinion studies appear to be reflected in the strongest indicator of Canadians' opinions on the faint hope clause available to date: the outcome data of the judicial review hearings.

The juries empanelled under s.745.6 are comprised of ordinary Canadians from the jurisdiction where the individual applying resides. The jurors are, therefore, in theory considering the earlier eligibility of parole for a prisoner who could be released *into their own community*. And yet the data is clear: these juries, after hearing the facts presented to them about the applicant, unanimously recommend 83% of the applications for a reduction in parole eligibility. What better gauge of the public's support for the faint-hope clause than their responses to actual applications under the very clause in question? This data suggests that ordinary Canadians, who are arguably not pre-disposed to feeling sympathy for convicted murderers, feel that justice is not necessarily being served by keeping the low-risk applicants who make it through the screening process imprisoned for the long-term.

As Roberts cogently argues, "No longer allowing the community to have a voice in the punishment of offenders convicted of the most serious crimes imaginable seems a curious way of promoting community input into criminal justice."²¹ Indeed, one of the explicitly stated purposes of Bill S-6 -to enhance public confidence in the criminal justice system - has been demonstrated to be misguided and unnecessary, which contributes to our opposition to its passage.

Victims of Crime

Since the protection of and respect for victims is another major factor underpinning Bill S-6, it is necessary for the John Howard Society to clarify its position on this issue. The Society fully acknowledges how traumatizing and life-altering the murder of a loved one is for victims, and in no way minimizes the suffering and need for reparation of the family and friends of the deceased.

¹⁹ Doob, Anthony and Julian Roberts. (1988). "Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys" in Walker, Nigel and Mike Hough, eds. *Public Attitudes to Sentencing: Surveys from Five Countries*. US: Gower.

²⁰ Lovegrove, Austin. (2007). Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community. *Criminal Law Review*, 769-781.

²¹ Roberts, Julian V. (2009). "'Faint Hope' in the Firing Line: Repeal of Section 745.6?." *Canadian Journal of Criminology and Criminal Justice* 51.4: 537-545; p 542.

The protection of victims and the safety of the community will not be improved with the passage of this Bill. The retroactive clauses in Bill S-6 seeking to greatly restrict the ability of eligible prisoners still subject to the s.745.6 regime to apply for a judicial review hearing from 5 times to only twice — once at the point of eligibility and again at the 20-year mark — is unnecessarily harsh and arbitrary. The government asserts that victims should not be compelled to re-live the experience of their loss every two years, as the present legislation potentially allows. However nowhere in the legislation does it stipulate that the victim(s) be compelled against their wills to testify. Similarly, if victims wish to submit evidence but do not want to face the applicant, they have the explicit option of submitting written testimony.

Accommodations such as those made for victims of sexual assault could arguably be applied here to mitigate the fears or challenges appearing in person could elicit for victims. All of these considerations can be made under the present law. The John Howard Society cannot support legislation that could further obstruct the exercising of due process rights in an environment where waiting times are already a significant concern.

Bill S-6: Counterproductive

Community and Institutional Safety

The literature on release outcomes of prisoners who are sentenced to long-term sentences (i.e. more than 10 years), such as those who serve sentences for first- and second- degree murder, indicates that these individuals have lower rates of reconviction than prisoners who serve shorter sentences. Those serving indeterminate sentences tend to have shorter criminal histories and are released at an older age than those serving short sentences.²²

A different but related body of literature on the effects of long-term incarceration suggests that “increasing the length of prison time served actually increases criminal behaviour among offenders.”²³ This criminogenic effect of incarceration is even more pronounced for low risk prisoners, who appear to be even more detrimentally affected by the experience of imprisonment.²⁴ Given that those serving long-term sentences are generally of a lower level of risk than other prisoner populations, it seems counterproductive and counterintuitive to eliminate the option of s.745.6 for prisoners who have demonstrated their efforts at rehabilitation while in

²² Stein, Karin. (2001). “The “*Faint Hope Clause*” (C.C.C. s.745.6): The judicial review process with special reference to the 1996 amendments”. Masters Abstracts International, vol. 40-05, at p. 21.

²³ Ibid, at p. 19.

²⁴ Gendreau, Paul, Goggin, Claire and Francis T. Cullen (1999). “The Effects of Prison Sentences on Recidivism User Report: 1999.” Department of the Solicitor General Canada.

prison. Keeping these prisoners incarcerated for long terms without any hope of earlier parole eligibility could in fact increase the risk of recidivism upon the eventual release of these individuals.

The above data on the effects of long-term imprisonment on low-risk prisoners should also be viewed in the larger context of what a life sentence means in Canadian law. Canadian prisoners convicted of life sentences for murder are literally under the supervision of corrections *for life*: even when paroled they are on an indefinite conditional release that could be revoked at any point following their exit from prison if they breach their conditions or commit a new offence.

The low-risk nature of this population, combined with the data on their low recidivism levels and the knowledge that s.745.6 applicants will be under supervision for the rest of their lives, calls into question the government's assertion that the current s.745.6 legislation endangers Canadians. Indeed, the amendments contained in this bill, which could potentially **increase the risk to ordinary Canadians**, again seem a curious way to achieve the government's goal of better protecting the safety of Canadian communities.

There is, also, the issue of what kind of working environment will result from this legislation. In addition to potentially increasing the risk of recidivism upon the eventual release of these prisoners, it removes one powerful incentive for their good behaviour while incarcerated.

It seems odd, to us, that the implications of the current 'tough on crime' political agenda – including this legislation – for the people who have to *work* inside our prisons is not being more thoroughly considered. Our prisons are already replete with people suffering from addictions and mental health disorders, understaffed and under-resourced in their therapeutic complement. Perhaps it is time to think past "getting tough" on prisoners and begin thinking a bit about the people who have to manage our correctional institutions.

Cost Effectiveness

Time spent in prison unnecessarily is no small matter. Not only can incarceration be damaging to the well-being and health of prisoners and aggravating to issues such as mental health concerns, it is also tremendously expensive. Ordinary Canadians may question why their government would opt to spend additional millions by eliminating the faint hope clause, when there will be no improvement to their safety or others' well-being.

It costs approximately \$101,000 a year to house one federal inmate in prison, while an individual on parole costs less than \$25,000 a year to supervise and maintain in the community²⁵. This substantial difference in costs is an unnecessary expenditure when a prisoner could be paroled with no appreciable risk to public safety. Moreover, it is also money that is not made available to less expensive and more effective criminal justice policy options, such as community corrections

²⁵ Correctional Service of Canada. (2009). Corrections and Conditional Release Statistical Overview. Ottawa: Correctional Service of Canada, Public Safety Canada.

and treatment, halfway houses and other programs geared toward successfully reintegrating former prisoners.

Conclusion and Recommendation

The John Howard Society of Canada's mission statement is "effective, just and humane responses to the causes and consequences of crime." There are three tests embodied in this statement for every piece of criminal justice policy or legislation: Is it Effective? is it Just? is it Humane?

Bill S-6 fails all three tests:

1. It is contrary to the evidence of what actually works to produce safer communities.
2. It is unjust because it hardens an already punitive regime without producing demonstrated benefits for public safety.
3. And it is inhumane because it increases the existing harms of incarceration without producing benefits for community safety or making the deterrent of a prison sentence more meaningful.

We recommend that the Committee reject this proposed legislation.

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