Submission of
The John Howard Society of Canada

to

The Standing Senate Committee on Legal and Constitutional Affairs

on

Bill C-25, An Act to Amend the Criminal Code (limiting credit for time spent in pre-sentencing custody) also known as the "Truth in Sentencing Act"

"a non-solution to a complex and poorly understood problem"

John Howard

THE JOHN HOWARD SOCIETY OF CANADA
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Introduction

Senators, thank you for the opportunity to testify before you.

As you know, The John Howard Society has a long history of advocating for principles-based criminal justice legislation that accords with Canada's Charter of Rights and Freedoms and our international obligations on human rights and the humane treatment of prisoners. We are a non-profit charitable organization overseen by volunteer boards of directors. Our mission calls us to advocate for "effective, just and humane responses to the causes and consequences of crime" and our thousands of front-line workers deliver evidence-based services and programs across the country to enhance community safety and the prospects for successful reintegration of prisoners at the end of their sentences.

I have read through much of the testimony in consideration of this Bill – even watched a good part of it on CPAC – and I find myself in substantial agreement with the view that Bill C-25 will do nothing to enhance "truth in sentencing." Rather it will contribute to greater delays, exacerbate already existing injustices, and further erode judicial discretion, which is a bedrock value of our criminal justice system.

In matters such as these – where the expert *and* practitioner testimony is nearly unanimous – I implore you to take seriously Professor Manson's observation that,

> there is a serious problem of intelligibility … within the Canadian sentencing system … because we have no coherent and practicable basis in principle upon which to build an effective, fair, just and intelligible sentencing system. Our system has grown historically through a series of small, unintegrated, changes effected in response to particular perceived goals without any over-arching guidance from principle and empirical evidence.[1]

In this instance, as with the government's desire to introduce mandatory minimum sentences, the real target is not "truth in sentencing" – which is a contentious formulation imported from the United States – nor is it a desire to unclog the courts, since the expert evidence before this committee argues that it is more likely to have the opposite effect.

The real target of Bill C-25 is judicial discretion; and the consequence – as the Minister admitted in his testimony of Wednesday, 16 September – will be to grow the federal rate of incarceration. That has been the thrust – both in rhetoric and legislation – since the *Official Opposition Minority Report on the Corrections and Conditional Release Act* (2000) of the then Canadian Alliance. Much of what has issued from the government since coming to power, including the incoherent and unprincipled recommendations of the *Sampson Panel Report,* has been lifted from that document.[2]

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[1]Testimony of Professor Allan Manson, "Bill C-25: The Truth in Sentencing Act, or Let's be Truthful about Sentencing," Faculty of Law, Queen's University, September 17, 2009.

[2]Jim Gouk, M.P., "A Work In Progress: The Corrections and Conditional Release Act," (Ottawa: Public Works and Government Services, 2000).

Growing Canada's rate of incarceration by limiting judicial discretion is the probable outcome behind the provisions of the National Anti-Drug Strategy which advocates more and harsher punishment for drug users who traffic in order to subsidize their own consumption, and the also likely impetus driving the introduction of mandatory minimum sentences for "serious" drug crimes.

What unifies these various policy initiatives is that they are all contradicted by evidence of what works to improve public safety in common law jurisdictions with which Canada usually compares itself.

But they do grow the rate of incarceration.

The history and evidence in regard to mandatory minimum sentences, for example, is clear and easy to comprehend, since the experience of the United States has demonstrated beyond question that mandatory minimum sentences for drug-related crimes do not deter. Of course the "Great Incarcerator" to our south – where one per cent of the adult population is incarcerated[3] – has reached the limits of its experiment in hyper-incarceration. As you know, California – where mandatory minimum sentencing spawned a binge of prison building in the 1980s and 90s – now finds itself having to release thousands of offenders because it cannot afford to hold them through its current financial crisis.

> The introduction of mandatory minimum sentences for "serious" drug crimes can be expected to lead to a significantly increased trial rate and fewer guilty pleas. Are the provinces going to increase the capacity of the criminal justice system accordingly?

So that is the context in which Bill C-25 arrives for your consideration. Bill C-25 looks to me like a non-solution to a complex and poorly understood problem – and if passed into law it is like to exacerbate the problems of delay and remand crowding that it seeks to remedy.

The Remand Crisis and Bill C-25's Questionable Remedy

If the remand crisis – and everyone agrees that it's a crisis – is sufficient reason to justify "undermin[ing] Supreme Court rulings and remov[ing] proportionality, parity and equity"[4] from the sentencing system, then the Minister of Justice should be able to produce evidence that the intentional delay of guilty pleas on the strategy of running up time in pre-sentence custody is really at the heart of the crisis.

It's hard to connect the dots between limiting credit for pre-sentencing custody with Minister Nicholson's desire to "make our streets safer," since common sense would suggest that if you have to bring people into custody you have *already* failed to make our streets safer. The international evidence strongly endorses various methods of prevention

[3]Pew Center on the States, *One in 31: The Long Reach of American Corrections,* (Washington, DC: The Pew Charitable Trusts, March 2009).

[4]Testimony of Professor Allan Manson, "Bill C-25: The Truth in Sentencing Act, or Let's be Truthful about Sentencing," Faculty of Law, Queen's University, September 17, 2009.

where crime is concerned, but I was unable to find that word in the Minister's testimony. Indeed it has been my experience in preparing testimony for both chambers of Parliament that the Justice Minister is not much impressed by evidence of what actually works to improve public safety.

To be sure, there is a crisis in remand – and the Minister claims that Bill C-25 will remedy it by keeping people in prison longer and increasing public confidence in the rule of law. But as you have also heard from The Canadian Bar Association, the "main reason for the increase in remand times is [the] increasing complexity in criminal cases and the drying up of judicial and court resources."[5] Mr. Gottardi testified that many of the delays arise from the disclosure process, which is completely out of the hands of the defence – or the defendant – and often out of the hands of the Crown as well. That suggests the presence of multiple bottlenecks in the system – a view endorsed by Professors Manson and Weinrath. Minister Nicholson's claim that Bill C-25 will unclog the courts through the one remedy of limiting judicial discretion does not address the numerous other obstacles to speedy resolution of cases.

"Bill C-25 will unfairly disadvantage the vast majority of offenders who have spent time in pre-trial detention [because] it does not take into account the correctional legislation governing the ways in which prison sentences are actually served in Canada."
~ Professors Doob & Webster, Testimony, 17 Sept 09

But the bottom line is more problematic: as you have heard from numerous witnesses, we don't have good evidence on which to formulate a response to our remand crisis – and until we do we should not be passing legislation that might exacerbate that which we seek to repair.

Bill C-25's Unintended Consequences: Longer Delays, More Unfairness

Indeed, you have heard that the more likely consequence of Bill C-25 will be to "increase both the frequency and duration of judicial interim release hearings" which will have "substantial impacts on the workload in bail courts … and in preparation time for both Crown and defence."[6] Bail courts across Canada are already overburdened. Bill C-25 will require a significant addition of resources in order to achieve its objectives. But the issue of workload in bail courts, as you know, falls under provincial jurisdiction.

"It is essential that the implementation of sentences and the mechanisms of release from custody are consistent with the values and objectives of the sentencing system."
~ Testimony, Professor Manson, 17 Sept 2009

It's our view in The John Howard Society that Bill C-25 should be comprehended in its larger context – which I referenced above – because changes in one part of the sentencing system sometimes produce unintended consequences in another, and this reality has not drawn the attention that it warrants from the Minister of Justice.

[5]Testimony of Eric Gottardi, Secretary, National Criminal Justice Section, Canadian Bar Association, Sept 16, 2009.

[6]Testimony of Jamie Chaffe, President, Canadian Association of Crown Counsel, Sept 16, 2009.

What, for example, is likely to be the consequence of Bill C-25 for itinerant courts in the far north? If court resources in the south are strained, as you have heard, they are beyond broken in the far north. For these citizens, remand often means detention hundreds of miles from home and family where the dominant culture and language is completely different. It is reasonable to assume – given the limited resources of these courts and their infrequent sittings – that accused in the far north will spend more time in remand than a person charged with a similar offence from southern or urban Canada. We are talking about Aboriginal persons when we discuss the far north, which means that Bill C-25 could have the effect of deepening existing injustices against this already vulnerable and marginalized population.

You have heard testimony that this legislation could result in a 10 per cent increase in Canada's federal rate of incarceration. If current patterns hold, roughly 12 per cent, perhaps more, of new inmates will suffer from mental illness and substance abuse problems – all of which are typically exacerbated by a prison sentence. It's our view that before the Government of Canada embarks on a project to grow Canada's rate of incarceration, it should make a case – grounded in principle and evidence – that such a strategy will have the effect of reducing crime and improving public safety in a context in which crime has been declining for each of the last 26 years.

"Bill C-25's presumptive one-to-one system of credit for time served will automatically defeat its presumed purpose of ensuring that offenders who spend time in pre-trial detention serve the same total amount of time in custody as those who serve the same sentence but who are not detained prior to being sentenced." ~ Professors Doob & Webster, Testimony, 17 Sept 2009

Conclusion: Revive the Sentencing Commission of Canada

I'm going to close my submission by endorsing the recommendations of Professors Doob and Manson for the launch of a public discussion about Canada's sentencing structure and practices – indeed I'm going to call for the re-activation of the *Sentencing Commission of Canada*. I think that we should not make incremental changes with consequences we cannot foresee on the basis of no evidence, faulty logic or incoherent principle.

You have heard your expert witnesses testify that Canada's current sentencing system has broken down into incoherence and unfairness and that the constant accretion of incremental changes, like Bill C-25 which misrepresents the problem its seeks to remedy, has produced a disjointed and disorderly set of sentencing practices which result in clogged courts, overcrowded remand centres and persistent failures of fundamental justice.

I am reminded of the last days of the geo-centric cosmology codified by Ptolemy, the Greek astronomer and mathematician. You'll recall that Ptolemy's geo-centric cosmology was premised upon two unchallengeable principles:

1. That we were the centre of all creation, which required that every observable object rotated around the Earth; and,
2. That all objects that orbited the Earth did so in perfect circles, not ellipses.

This cosmology agreed – for many centuries – with the available technology of observation until, that is, the superior optics and advanced mathematics of Copernicus and his successor Galileo. But before it was overthrown – and I won't go into that story – it had acquired a complexity that was comprehensible only to those with command of advanced mathematics and physics. The principle that all heavenly objects must move in perfect circles – and the tenacious evidence that some did not – gave rise to a need to reconcile observation with principle and to the inclusion of what were called epicycles, or circles upon circles upon circles, in order to make observation agree with principle. These epicycles eventually became so numerous that as time went on the mathematics collapsed under the weight of contradictions between observation and the requirements of fundamental principles.

We find ourselves in a comparable situation today. Bill C-25 and other aspects of the government's "tough on crime" agenda is an epicycle arbitrarily added to save a criminal justice system that is breaking down under the burden of contradictory imperatives. The multiple shortcomings of Bill C-25 that have been examined in the course of these hearings lend urgency to Professor Doob's claim that

> "the most important thing [The Senate] could do is to grasp the opportunity to start a truly constructive process of reforming sentences in Canada."[7]

Thank you Senators.

[7]Professor Tony Doob, Testimony, 17 Sept 2009.