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Chair

Mr. Anthony Housefather

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● (0850)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I call this meeting to order. This is the second meeting of the Standing Committee on Justice and Human Rights.

Today we have invited officials from the Department of Justice to give us an overview of the justice portfolio. I am very pleased to welcome Donald Piragoff, the senior assistant deputy minister in the policy sector, and Alyson MacLean, the acting director of the research and statistics division of the policy sector.

I understand you'll be giving us a 10-minute presentation. Then we're going to have some questions for you. I'd like to turn the floor over to you. Thank you so much for coming to the committee.

Mr. Donald Piragoff (Senior Assistant Deputy Minister, Policy Sector, Department of Justice): Thank you very much.

[*Translation*]

I am pleased to be here today to talk to the committee about trends in the criminal justice system.

I will start by discussing the federal, provincial and territorial partnership, as well as the pressure points within the criminal justice system.

The criminal justice system is a partnership between the federal government and the provinces and territories, in which each partner works in its respective areas of jurisdiction. The federal government is responsible for passing laws and regulations in criminal matters, while the provinces are generally responsible for the administration of justice, including the prosecution of most offences under the Criminal Code.

[*English*]

Co-operative federalism is an essential part of Canada's criminal justice system. Neither level of government can successfully carry out its mandate without the co-operation of the other. As indicated, the federal government is responsible for adopting the criminal law, including criminal procedure, and the provincial attorneys general are responsible for its administration, except in the territories where the federal attorney general is also the attorney general for those territories.

In addition, the federal government provides cost-sharing support to the provinces and territories to provide programming in the areas such as legal aid, aboriginal court workers, victims, and policing. Given these shared responsibilities, the federal, provincial, and territorial governments recognize the importance of collaboration in the discharge of their responsibilities.

There are a number of challenges that I would briefly note as common issues across the whole of the criminal justice system and with regard to which the federal, provincial, and territorial governments could work together to attain greater efficiency and effectiveness. For example, despite a consistent decrease in the crime rate, criminal justice system costs continue to rise.

Other areas of mutual interest include bail and remand sentencing, the changing correctional population, and the overrepresentation of vulnerable populations, especially indigenous persons and those with mental health and/or substance abuse issues.

We have provided a deck to the committee. The deck you have been given provides a great deal of statistical information on trends in the criminal justice system. I will not address each slide but will refer to some of the key trends raised in the slide, and I may actually jump around a little bit to follow certain issues rather than taking things slide by slide.

Let me first talk about the rising costs of the criminal justice system. In 2014, the police-reported crime rate was at its lowest since 1969. There has also been a decline in the rate of violent crime, which has been steadily decreasing since 2000. There are regional variations in the crime rates, with the highest crime rates in the north; that is, the territories as well as the northern parts of the provinces.

Statistics also indicate that many crimes are not reported. About two-thirds of crimes are not reported, as shown in the disparity between police-reported crime and victimization surveys. However, despite decreasing crime rates, the cost of the criminal justice system has been increasing over a 10-year period. All areas of criminal justice are seeing an increase, with policing seeing the greatest increase at 43%, followed by corrections at 32%, and the court system at 21%.

Costs have been increasing in both the federal and provincial shares of the criminal justice system.

● (0855)

Crime also has great societal costs. For example the total economic impact of spousal violence in Canada in 2009 was estimated at $7.4 billion. The total impact of violent victimization, for physical assault, sexual assault, robbery, criminal harassment, and homicide is estimated to be $12.7 billion.

I'd like to make a few comments about bail and remand because this is an area the provinces, the territories, and the federal government are examining currently. According to the United Nations globally one-quarter of persons in prison have not received a sentence or are awaiting trial. In Canada over the last decade more than half of those in provincial and territorial custody are in remand. They are not sentenced offenders. They have not had a trial. They are awaiting a trial. In 2013-14 there were over 11,000 persons in remand.

There has also been an increase in the number of days the accused are spending in remand in some jurisdictions, most notably in Nova Scotia, New Brunswick, and the Yukon. Recent statistics indicate that indigenous offenders are overrepresented among those in remand and this overrepresentation is increasing. While indigenous people represent only 4% of the Canadian population, indigenous offenders accounted for 24% of all admissions to remand, up from 19% in 2005-06. There is of course regional variation.

While we lack a full understanding of what is happening with respect to bail, an older study from Ontario found an increase in the number of days required to make a bail decision from about four days in 2001 to almost six days in 2007. The system is also experiencing delays with respect to case length, particularly for certain selected offences. One would expect that the decrease in crime rate and the decreases in the number of adults charged for criminal offences would lead to lower case processing times. However, case processing times for cases in provincial adult criminal court have remained relatively stable over the last decade. There has been an increase in case processing times for cases in the superior courts.

As indicated there is variation in case processing times with some offences, such as crimes against the person and impaired driving cases, taking longer than other types of offences. Cases in Quebec are also taking longer to process through the system compared to the rest of Canada. In a study conducted by Justice Canada, looking at closed cases from 2008 in five courts in four jurisdictions, it was found that 5% of cases required more than two years to be completed.

The study also found there were various factors related to the length of a case. Cases where legal representation was intermittent had the longest time to case completion at 298 days This compares to 189 days for cases with no legal representation and to 160 days when the accused had legal representation throughout the case. This shows that with counsel or with legal aid the court delays are reduced. Not surprisingly, guilty pleas were found to reduce case processing time. The median case length was 58 days with a guilty plea and 190 days where there was no guilty plea.

● (0900)

There are also specific types of offences that are prevalent in the system and are responsible for a significant amount of resources. Specifically, administration of justice offences, such as failure to appear or breaching probation, as well as impaired driving and theft, account for over 40% of the court case load. Administration of justice offences as a proportion of all criminal court cases has seen an increase, up from 21% in 2006 to 26% in 2013-14.

Here are some statistics on administration of justice offences. As indicated, there has been a 4% increase in the rate of administration of justice offences that resulted in charges from 2006 to 2014. Administration of justice offences are also more likely to result in a guilty plea or guilty decision when compared to the average for all other offences. The most recent statistics indicate that half of these offences also receive a custodial sentence, which is higher than the proportion of custodial sentences for crimes against property and crimes against the person.

In 2014, the highest rate of administration of justice offences were found in the Northwest Territories, the Yukon, Saskatchewan, and Nunavut. These jurisdictions also have higher rates of aboriginal people in the criminal justice system, and although there are no national statistics on this, some research has found that administration of justice offences are overrepresented among aboriginal people.

Just to explain what administration of justice offences are, they include offences of breach of a bail condition or breach of a probation order. Bail conditions can be specific to the offence but they can also be basically conditions of good behaviour: no drinking, keeping the peace, or a curfew to be home by a certain time. Breaches of some of these conditions, if they are charged as criminal offences, can result as a criminal offence even though drinking alcohol and coming in late aren't by themselves criminal offences; they elevate to criminal offences. People can get criminal records quite often, not because they've actually committed a crime such as theft, but they may be in the court for the first time for theft but then they have a whole host of other breaches for things like breaching curfew, drinking alcohol when they are supposed to abstain, etc., and they then end up getting a long list of criminal offences.

I'd like to then talk about sentencing and corrections, things that happen at the back end of the system.

Some of the statistics that I'll be speaking to are not found in the deck. We didn't really have much time. We only had notice, I think, as of Friday for this appearance, so we weren't able to put everything together in the deck before you.

The provincial-territorial correctional population has seen a decrease in the average number of offenders in custody and on probation, as I indicated earlier. More than half of those in provincial custody are there for remand, not serving a provincial sentence. For your benefit, provincial sentences are those that are less than two years. Any sentence of more than two years is served in a federal penitentiary. The majority of custodial sentences in the provincial system are fewer than six months, with the medium length of probation being around one year.

With respect to the federal correctional population, there has been a 14.6% increase in the average number of offenders serving a federal sentence over the last 10 years, with just under half serving a sentence of more than 5 years.

The federal custodial population is also getting older, with 23% of those in custody aged 50 or over compared to 19% in 2010.

● (0905)

Additionally, the number of women admitted to the federal jurisdiction has increased at a rate higher than that for men. In the last 10 years, there has been a 39% increase in the number of women under federal jurisdiction compared to a 12% increase for men.

I want to spend some time talking about vulnerable populations, because the criminal justice system is having a significant impact on these individuals. As I mentioned, there is an overrepresentation of vulnerable populations within the criminal justice system, most notably the indigenous population as well as persons with mental health or substance abuse problems.

Chronic offenders are a small number of offenders who account for a large number of reported offences in the system.

According to the most recent census information, nationally, just over 4% of the Canadian population is indigenous, yet indigenous people account for 20% to 25% of individuals across various points in the criminal justice system. These rates vary, of course, with significantly higher rates in western Canada and in the north where there are higher rates of indigenous population. While crime rates vary across the country, there are disproportionately high rates of crime in jurisdictions such as the territories, which have larger indigenous populations, with the highest crime rates occurring in the Northwest Territories.

Recent statistics indicate that indigenous offenders accounted for 24% of all admissions to remand, up from 19% in 2005-06. Additionally, the proportion of indigenous offenders admitted to provincial and territorial sentenced custody has increased over the last decade and is currently at about one-quarter of all adult males. The most recent statistics indicate that more than one-third of adult women admitted to provincial and territorial sentenced custody are indigenous.

I can indicate more with respect to the statistics, but you have them in front of you.

Given that a large number of the indigenous population compared to the non-indigenous population are young, and crime is definitely a youth-based phenomenon, it's expected that these rates could rise in the future.

In conclusion, I want to say something about modernizing the criminal justice system. There can be no doubt that society has evolved significantly in the last few decades. The issues we face today are significantly different from those faced by previous generations. The Prime Minister has mandated my minister to review changes to the criminal justice system and sentencing reforms over the past decade in order to modernize efforts to improve efficiency and effectiveness in the system. The Minister of Justice is mandated to take a hard look at the justice system specifically identifying what works and what doesn't.

The key to modernization is understanding that the current system seems to have more of an impact on certain populations than on others, in terms of both offenders and victims. Many offenders, whether indigenous or not, have some combination of mental and addiction problems.

What if Canadian society did a better job of treating mental illness and addictions at the front end? This could have a significant impact on the justice system at the back end. Many people feel that the justice system is the default system for society's social problems. The question is whether we can change the system. Can we better align it with the needs of offenders and victims? What if an offender's first interaction with the justice system didn't become the first in a series, for instance, of repetitive encounters with the justice system? What if the justice system triggered a mechanism up front that was designed to actually address the factors that inspired the criminal behaviour in the first place?

I think these are the fundamental questions before Parliament and before the provinces and territories.

In conclusion, the criminal justice system is one that incorporates many independent systems and many players. Actions by one level of government or actor within the criminal justice system have an impact on another level of government and on other actors.

● (0910)

[*Translation*]

It is important to examine the criminal justice system from this perspective when we study ways to ensure that the justice system is effective, efficient, and equitable and that it reflects modern realities.

[*English*]

Further, the criminal justice system, as I mentioned, is often used as a default responder to provide solutions to mental health challenges upstream. More can be done to address these social problems, and we're working with the provinces to look at innovative ways to address social problems in the justice system.

These are just a few of the highlights of current trends in the Canadian criminal justice system. Should the committee be interested in more detailed criminal justice trends and statistics, I'd invite you to speak to the Canadian Centre for Justice Statistics, which is part of Statistics Canada, to provide a presentation.

In addition, the “Corrections and Conditional Release Statistical Overview”, produced by the Department of Public Safety, is also available online. The latest version is 2014, and 2015 stats are to be published shortly.

Thank you.

[*Translation*]

The Chair: Thank you very much, Mr. Piragoff. It was a pleasure to hear you speak. Thanks for giving such a thorough presentation.

[*English*]

We're going to move to the first round of questions. The committee has adopted a process for questions. In the first round we're going to start with six minutes from the Conservatives, then we'll go to six minutes from the Liberals, six minutes from the NDP, and six minutes from the Liberals.

We're going to be starting off with Mr. Nicholson.

Go ahead, Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much.

Thank you, Mr. Piragoff and Ms. MacLean. I know, Mr. Piragoff, you've had a great career in the justice department, spanning several decades. Thank you very much for your insight today. It's much appreciated.

One of the interesting comments and things that you pointed out is that, yes, there have been increases in the expense within the criminal justice system—and certainly some of that, of course, is attributable to inflation over the last 10 years, so that would be expected in just about everything. But I think we can also make the case that, when we do spend money in the criminal justice system, it overall has a positive effect with respect to the administration of justice and indeed even the crime rate in terms of moving forward on those.

That being said, you made a couple of interesting points, one of them with respect to bail. I'm not quite sure why that has continued to increase, the times. There were those who made the case a number of years ago that, when the two for one credit.... While they were waiting for their trial or the disposition of their case, people would get a credit if they were being detained in provincial institutions or in custody. But with the removal of that as a main factor in terms of the overall sentencing, what other insight do you think you may be able to give to us about what's happening?

You made the very legitimate point that, if the individual pleads guilty, the disposition is actually fairly quick, and that makes sense, but I'm not quite sure why or what's happening within the system that it's taking so much longer for individuals to get bail, get released, or get their case heard. I think you pointed out Nova Scotia in particular and others. There has been a considerable increase over the last number of years. Do you have any thoughts on that?

● (0915)

Mr. Donald Piragoff: We don't have statistics, but we have a lot of anecdotal evidence from individuals in the system, indicating that they feel there's a reticence to actually make bail decisions.

Police officers are reluctant to release when they have the power to release, because they're afraid they'd be responsible if the person should offend while out on bail. The same thing happens even with crown attorneys, so they keep on pushing things up the line to the judge and let the judge make a decision, so they don't have to accept responsibility. That's one of the factors that a number of people in the system indicate.

With respect to times, there is some new data that we're looking at with respect to Ontario and Saskatchewan that seems to show that the majority of people in remand are actually out within a couple of weeks. Then it goes to the question of the credit. Quite often they're in for a couple of weeks. They plead guilty and their sentence is essentially time in custody and there's no further sentencing.

Again, that is sort of reflected in the statistics, which seem to show that most of the people who are in provincial custody are there for remand purposes and not custodial, either because there's a booming remand population or people do their remand time and their sentence is time spent already in remand and there's no further sentence custody, so sentence custody goes down proportionally.

Hon. Rob Nicholson: Can I get one comment from you with respect to impaired driving?

There have been increases over the years with respect to the penalties related to impaired driving. An individual who is convicted of impaired driving faces very serious consequences in the sense that they have a criminal record, and this could have grave consequences in their lives. I've heard from law enforcement agents that the cases are taking considerably longer than they did years ago.

Do you attribute this to the increase in penalties or do you think there are complications with respect to the production of documents? I've heard again and again that it's taking longer. Can you think of anything we might do? Might we revisit that whole area in the criminal justice system to either expedite it or make sure it works for everyone's benefit?

Thank you.

Mr. Donald Piragoff: There's no one reason. There's likely a combination of reasons.

If penalties go up of course they become more severe, and there's more of an inclination to want to fight the case. It's not so much the criminal penalties, it's more the provincial penalties that people want to fight because with the provincial penalties you lose your car. With the federal penalty you lose your licence or you pay a fine for the first time, but quite often at the provincial level you lose your licence for a long period of time.

There have also been changes in the processing procedures. Parliament enacted legislation a few years ago and the result was a significant amount of charter litigation with respect to those new laws. I indicated earlier that there has been a significant increase in trial delays in Quebec. Some of that may be attributable to the fact that many impaired driving cases were put on hold pending certain key appellate decisions working their way up through the Court of Appeal and the Supreme Court of Canada. People are raising a number of novel defences tied to the charter so there's a combination of factors with respect to what's driving impaired driving rates.

The other important thing about impaired driving and why there has been success in bringing down the rate over the years is that it has been a combination of things. It's not just the penalty. It's also the likelihood of conviction, and more importantly, the likelihood of apprehension. That's why those RIDE programs are really important. What stops people from drinking and driving most is a fear that tonight they may get caught because the RIDE program is out. Other times people are willing to take a chance.

● (0920)

The Chair: Thank you very much.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you so much.

Thank you for your presentation.

You mentioned—and I want to clarify this—that there has been a significant increase in federal prisoners but a significant decrease in crime.

Is that correct?

Mr. Donald Piragoff: The general crime rate has been going down over the years. Yes.

Mr. Chris Bittle: What's the cause?

Mr. Donald Piragoff: It would only be supposition on my part but there are a number of things. Mandatory minimum penalties have had the effect of moving people from provincial custody to federal institutions. Some of the sentences at the federal level may be longer. As indicated there has been an increase in the length of sentences as well. Whether that is attributable to mandatory minimum penalties or whether that is also attributable to judicial discretion, or a combination of both, it's really hard to say the reason for the increase.

Mr. Chris Bittle: I've practised in the civil context for the last 10 years and it's only anecdotal evidence on my part but back home in Niagara I've seen an increase in the time frame for civil matters—and I hear from my family law colleagues as well—to get to trial at the superior court level. Anecdotally it's because of increases to get to trial on criminal matters as they take precedence and priority because of charter issues and whatnot.

Is there any evidence or have you heard of any study of whether mandatory minimums are leading to less access to justice on the family or civil side of our justice system?

Mr. Donald Piragoff: I don't think you can say MMPs have a direct impact on the civil justice system. Clearly MMPs have an impact on the criminal justice system. As I said, people are going to fight the case more if there's a clearly set penalty that they know they have to try to avoid. That, then, of course, might increase trial length or the number of trials, and if people are in custody, then clearly there are charter issues that those people have priority to the trial systems and to court rooms and judges. Of course, if that means chief judges have to reassign judges from the civil side or the family side to the criminal side, clearly we would have an impact on the civil justice system.

Mr. Chris Bittle: Okay.

Colin, would you like to....

The Chair: We still have approximately three minutes and 15 seconds in the sequence, so go ahead, Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much for your presentation. You touched on the mental health aspect and obviously people having social problems with drug use addiction, that sort of thing. I'm wondering what we know about recidivism where mental health and drug courts are present. How many are there across the country? I know where I'm from in Nova Scotia, there is a drug court. I'm wondering if we know any of the statistics on how that impacts repeat offenders.

Mr. Donald Piragoff: We have statistics. I don't have them at my fingertips, but if you'd like I can provide them to the committee. There were six drug courts funded by the federal government as a pilot project. Some cities such as Calgary have their own drug court, which they fund themselves. There's not a uniformity of funding. The federal government has expanded the number of courts that it is co-funding with the provinces. The one in Nova Scotia, for example, is a new one that the federal government just started to co-fund this last year. I can provide the committee, if you like, with a copy of it.

The research that we've undertaken with respect to the evaluation of the drug court system shows that it is costly. It's an expensive court system. Those who graduate, and even those who don't graduate, who go through the system but maybe actually fail, have lower recidivism rates. The drug treatment courts do seem to work, but it's a costly process.

● (0925)

Mr. Colin Fraser: Thank you.

I'm just wondering about conditional sentence orders and the incidence of repeat offending or recidivism while they are serving conditional sentence orders. Have we seen any change in that, and how does that compare to recidivism for those who actually serve custodial sentences?

Mr. Donald Piragoff: I'm not aware of the statistics or whether we have comparative statistics.

Alyson, do you know?

We're not aware if we have statistics comparing conditional sentence offenders to other types of offenders. We can check to see if Stats Canada has something on that.

Mr. Colin Fraser: Okay.

Just on the bail piece, more than half are in remand rather than sentenced to actual custody. That's what the base is.

Mr. Donald Piragoff: That's correct.

Mr. Colin Fraser: Do we see any correlation between resources in legal aid? Has that been investigated? What the resources are in the provinces that have higher incidence of people on remand versus the resources in the administration of justice at the provincial level, for example, in legal aid? Has that ever been explored?

Mr. Donald Piragoff: We have rates of legal aid province by province. We have the remand rate. I don't know if someone has actually evaluated province by province if there's a correlation between legal aid and remand. As I indicated in the statistics that I did mention, where legal aid is present, court processing times are significantly delayed, which means that if a person is in remand as opposed to on bail, that would definitely have an impact in reducing remand custody time.

The Chair: Thank you very much.

We're going to move to Mr. Rankin.

Mr. Murray Rankin: Thank you, Mr. Chair.

Thank you, Mr. Piragoff. It was an excellent presentation.

I had a number of specific questions, but maybe I'll pick up on where Mr. Fraser left off on legal aid. Have you statistics on the number of unrepresented accused in courts? I'm hearing anecdotally from judges that in my province, British Columbia, there's a huge increase in the number of people who are appearing without counsel. I want to know what that means in terms of costs and in terms of the kinds of delays and lengths of trial that might result.

Mr. Donald Piragoff: I don't have the numbers on hand. If you'd like them, Mr. Rankin, we can get those.

There is anecdotal evidence that the number of unrepresented persons is increasing, not only in the criminal justice system but also in the civil system, in particular the family law system.

Mr. Murray Rankin: That's as a function of lower legal aid access opportunities, I presume.

Mr. Donald Piragoff: Well, that's part of it, yes.

Mr. Murray Rankin: There are no stats that you're aware of that would talk about the increase in the length of trials that results from that. If you're not represented, do you have shorter trials or longer trials?

Mr. Donald Piragoff: No. I mentioned the stats earlier in my presentation. If you're not represented, the trial takes longer.

Mr. Murray Rankin: Right.

Just for definitional purposes—some of us, most of us, are new on this committee—when you speak of administration of justice offences, what does that term include?

Mr. Donald Piragoff: It means breach of a bail condition while you're out on bail or breach of a probation order.

Mr. Murray Rankin: Those are the two main things.

Mr. Donald Piragoff: Those are the two main ones. It's either up front or it's after the sentence and you breach a probation order. The conditions vary. With some police officers and some judges, there could be some 20 conditions on a bail order.

Mr. Murray Rankin: Understood.

Mr. Donald Piragoff: It's kind of boilerplate. The real question is that a number of judges are now talking about more fine-tuning of the conditions to the actual offender, less boilerplate and more custom conditions, which actually makes sense. It really makes no sense to impose a condition on alcoholics that they not drink. I mean, you're basically setting the person up to fail, and you're essentially setting it up for the police to arrest the person. Now if he gets convicted of a breach of an administration of justice charge, he now has conviction for, essentially, a social problem. He's an alcoholic.

● (0930)

Mr. Murray Rankin: I understand the example.

I just want to ask you about a couple of things in the statistics. On page five you set out the overall crime rates showing, of course, there and on the next slide, that they're much higher in the north. I wonder if some of that has to do with a greater propensity to charge or greater reporting that might occur. Just in general, the stats are much higher in the north, as you point out. I wonder, aside from the difference in the population—you mentioned more indigenous people—could this just be better stats on reporting or more charging opportunity there? Why would that be?

Ms. Alyson MacLean (Acting Director, Research and Statistics Division, Policy Sector, Department of Justice): We don't have very good statistics on that issue. The research and the data do show that the northern parts of the provinces also have high crime rates, in between those of the territories and the provinces. Of course, crime is affected by many factors, including economic factors, unemployment rates, lack of education, and lack of employment opportunities. We typically find that those factors are more prevalent in the territories and the northern parts of the provinces.

Mr. Murray Rankin: There's a statistic about sexual assaults. I just need clarification on the third bullet. It reads, “For sexual assault, 83% of incidents were not reported to the police, while 5% of incidents were reported.” Is there a gap? I'm just not sure where, logically, the other per cent goes.

Ms. Alyson MacLean: Twelve per cent of the respondents did not answer or did not know if they had reported it to the police.

Mr. Murray Rankin: That would cover it all. Okay.

On page 11, the last bullet talks about the bail issue. It makes the point that, “Criminal justice professionals have noted an aversion to risk reduces discretion at all stages of the bail decision-making process.” I understand that, so is there a recommendation that results from that observation?

Mr. Donald Piragoff: Yes. The federal government works together with the provinces in a number of forums: at the ministerial level, at the deputy minister level, and also at the officials' level. Federal, provincial, and territorial ministers of justice have approved some recommendations coming from officials that greater discretion should be given to police officers at the front line.

Right now there are certain types of situations where even the police officer must send the case up to an officer in charge as opposed to actually dealing with the situation. One of the proposals is to give greater discretion to the front-line police officer to release on conditions as opposed to passing it up the line. Whether that, of course, is going to psychologically affect the person's reticence, I think that's going to require a lot more training for police in terms of how they exercise their discretion, when it is appropriate to release, and when it is appropriate to pass the person to the next level of processing.

Mr. Murray Rankin: Given that so much of our policing is done by the RCMP on contract, would that training or that additional discretion, if it were to be bestowed on police officers, be done at RCMP headquarters? Or would that be a provincial initiative, due to their administration-of-justice responsibility?

Mr. Donald Piragoff: I think that most of the policing is actually under provincial control. Quebec and Ontario have provincial police forces. Municipal police forces are, again, under provincial control or municipal control. The RCMP really is only contracting, and in a sense, is contracting in the western provinces and in the Maritimes.

The Chair: Thank you very much, Mr. Rankin.

[*Translation*]

We will go back to Mr. Fraser.

[*English*]

Mr. Colin Fraser: Thank you.

I have just one more question. I believe there are other questions from our side.

With regard to the Gladue factors, it appears as though they're not having an impact in reducing the representations of indigenous people in custody. Are the Gladue reports being utilized and are they accessible across the country, as envisioned, I guess, in the Gladue response?

Mr. Donald Piragoff: We're just starting to undertake research in the area of the impact of the Gladue reports. There is variation across the country. Even within provinces, there's variation. In certain parts of Ontario, the Gladue reports are quite regular, while in other parts they are not. In some provinces, they are not being utilized that much, despite the fact that some of those provinces have high indigenous populations.

● (0935)

Mr. Colin Fraser: Okay.

If I could ask just one quick follow-up, where Gladue reports are being utilized, do we see any reduction in custodial sentences?

Mr. Donald Piragoff: Alyson, do we have research into that yet?

Ms. Alyson MacLean: No, we don't have research that would point to that.

Mr. Colin Fraser: Thank you.

The Chair: Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you.

That was a very good presentation. Thank you very much for coming in and speaking to us about this.

After listening to the questions of our peers and your responses, I'm wondering about how this information is collected. How are these stats put together? What information are they based on?

Mr. Donald Piragoff: I'm going to let Alyson take this.

Ms. Alyson MacLean: The best source of national statistics in this area is Statistics Canada's Canadian Centre for Justice Statistics. It obtains the information through the national justice statistics initiative, which is a partnership with provinces and territories.

The Canadian Centre for Justice Statistics collects national policing data, courts data, and corrections data. However, there are gaps, and some of those have been noted during this session. Additionally, there are academics who provide other sources of information to us.

Ms. Iqra Khalid: How often is this review, collection, or compilation of information done? Is it done on a yearly basis, every couple of years, or...?

Ms. Alyson MacLean: The police, courts, and corrections data are provided annually.

In addition, I might mention that Statistics Canada does a victimization survey every five years. That is a source of information on crime that is not reported to police. The most recent one was conducted in 2014.

Ms. Iqra Khalid: I have questions that are very similar to those of my colleagues with respect to remand times and why they're increasing. What would you recommend that would help to decrease remand times and the cost of the administration of justice?

Ms. Alyson MacLean: As acting director of research and statistics, I would like to see better data in this area, of course. To my mind, the best decisions would be data driven. However, there are certain challenges, of course, to obtaining this data in a timely way to inform decisions.

Mr. Donald Piragoff: The department is focusing right now, along with some of the provinces and territories, on administration of justice offences. The question is whether there could be alternative measures, as opposed to laying a criminal charge, for an administration of justice offence.

For example, with the conditional sentence that Mr. Fraser raised, one of the methods to deal with conditional sentences is to bring individuals back before the court, not to charge them. Essentially, the judge asks, “Why are you here? Why did you breach your condition? I can send you to jail. What's going on?” Some people say that, maybe, the same kind of process should be done.

I think there's an Australian state—it could be New South Wales—that has a process where, for an administration of justice offence, the police officers can give a warning, rather than charge. The person can be brought before the court, not for a charge but just brought before the judge, so the judge can ask why they're there and why they're breaching their curfew. The person may have a good explanation for it, such as getting a new job and the bus schedule is such that they can't get home any earlier. Why charge the person when you can just change the condition in that case?

We are looking at what other countries are doing in handling administration of justice offences so that we can maybe avoid some of these, I would say, needless charges and convictions and people getting huge criminal records. What happens when you have a series of convictions for administration of justice charges is that the judge looks at the record and says, “I can't let you out because you're not reliable; if I let you out, you're going to breach.” The problem is that the record doesn't actually show the reason for the breach. It simply says “breach”. It doesn't say you breached your condition because you got drunk and you're an alcoholic, and your condition says to abstain from alcohol. That's a condition that sets the person up for failure.

● (0940)

The Chair: Thank you. We've now completed our first round of questions, so we're going to move to our second round of questions. In this round, we have six minutes for the Liberals, six minutes for the Conservatives, six minutes back to the Liberals, five minutes back to the Conservatives, and three minutes for the NDP.

Go ahead, Mr. Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you, Mr. Chair.

Thank you, Mr. Piragoff, for coming in and giving us a very valuable presentation.

I have two questions that are both related to the bail issue. As a former criminal defence lawyer, I was greatly concerned with bail because, at least in Ontario, the way the legal aid system is structured tends to discourage criminal defence lawyers from taking on bail, because they're not sure if the person will be approved for legal aid or not.

I just wonder, in terms of the bail issue, if your department has looked at how the structure of legal aid programs across the country affects a person's ability to access those programs and how that affects their ability to get representation, which affects their ability to get bail, because when you don't have representation, it's hard to put together a good case for release.

Is that something your department has looked at?

Mr. Donald Piragoff: Mr. Chair, with your schedule of six minutes and three minutes and six minutes, I feel like I'm in the penalty box. I'm not sure when I'm on the ice and when I'm in the penalty box.

The Chair: You're scoring lots of goals. You're doing fine.

Mr. Donald Piragoff: We're working with the provinces. As you know, the administration of justice and legal aid is a provincial responsibility. We are working with the provinces to undertake best practices.

We actually undertook a study a couple of years ago on innovations in legal aid to see what kinds of best practices.... Each province has a different means of delivering legal aid. Some use a certificate system. Some use more in-house legal aid lawyers, who are government lawyers. Others provide certificates to the private bar. Some jurisdictions have a mixture of both in-house legal aid lawyers and the private bar.

We are looking at that issue, and if the committee wants, we can give you a copy of that report on innovations in legal aid that we undertook a couple of years ago. It was an interesting report, because we got a number of key individuals from other sectors of society to sit on the board. For example, we had the head of the Ottawa Hospital and used the experience that they had in reducing wait times, etc., in the hospital system, and looked at what kinds of innovations they used there, and whether they could also be applied to the criminal justice system. We looked at whether we could learn from innovations in other parts of society.

It's an interesting study, and we can provide you with a copy of it.

The Chair: You have more time, Mr. Hussen, if you want to continue.

Mr. Ahmed Hussen: No. That was my question.

Thank you.

The Chair: Thank you.

Is there anyone else on this side who wants to continue this round? You have about three and a half minutes.

Mr. Bittle.

Mr. Chris Bittle: Going back to the issue on incarceration rates for vulnerable persons and vulnerable populations, have there been any pilot programs that have been run by the department or through the provinces that have shown some success and could be replicated on a broader scale?

Mr. Donald Piragoff: One of the funding programs the department has is the aboriginal court work program. It's made up of about 180 court workers who are spread out across the country. Some of them are co-funded through the provinces.

These individuals are the liaisons between the individual and the court system, whether the individual be the offender or a victim, to help them understand what the court process is about. For many of the offenders the court system is a foreign culture.

For example on the administration of justice offence issue—this is purely anecdotal—I was told by one director trying to reduce the number of breaches of administration of justice offences because of failure to appear, that the problem was that the closest court house was miles away from the reservation and from the band, and people weren't appearing in court because they couldn't get to town.

The court workers got a school bus, went around on court day and picked up everybody, took them to court, made sure they made their appearance, and then drove them back to their homes. This was an innovative way of ensuring people were not being charged for failure to appear when it wasn't anything intentional, but simply that they had no means to get to town.

● (0945)

Mr. Chris Bittle: As a student at Queen's I had the opportunity to participate in a sentencing circle as a representative of the university. A couple of students, instead of being charged with a property crime, were diverted into a program like that. I was disappointed after law school that I never saw that again. It seemed to be anecdotal. That one instance seemed to be an effective way to get people out of the criminal justice system for a first offence on a minor crime. Have there been any reports on that, or any discussion on that, or any findings on alternative methods such as that?

Mr. Donald Piragoff: I'm not sure if there have been formal studies, but I know the sentencing circles are not used as much as they were in the past. Of course in some places it's not appropriate. It doesn't make sense in downtown Toronto. It only makes sense where there is a well-known community.

I know that Yukon or the Northwest Territories were using them for a while a number of years ago, but I think they're using them less and less now. I'm not sure why.

The Chair: You have about 20 seconds. Do you have a fast question?

Mr. Chris Bittle: I don't know that I have a 20-second fast question because there won't be an answer.

The Chair: Mr. Fraser.

Mr. Colin Fraser: I have a quick follow-up. Restorative justice exists in some places, usually for youth. I know there's a move in Nova Scotia to incorporate that for adults as well. Can you comment on restorative justice principles and how they are effectively managed across the country?

Mr. Donald Piragoff: They are a provincial responsibility. In terms of management of the program, it's provincial.

There are a lot of people who are saying some of the successes in the youth criminal justice system, such as restorative justice diversion, should be used more regularly with respect to the criminal justice system, particularly for low-level offences and offenders who are non-violent and first-time offenders. Maybe some of these people should be diverted out of the system, as opposed to getting a criminal charge. Then they're in the system and it's one thing after another.

The Chair: Thank you.

Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you and good morning.

I have a couple of question related to indigenous offenders. First of all, I want to clarify one statistic you mentioned with respect to indigenous persons in remand. You indicated I believe that it was somewhere around 24% of the remand population in Canada.

You also cited another statistic that indigenous persons represent about 25% of the prison population that is incarcerated upon conviction. In other words there's no differentiation between those indigenous persons in remand and those that are incarcerated upon conviction. Did I hear you correctly on that?

Mr. Donald Piragoff: I'd have to double-check the statistics and get back to you on whether they're exactly the same.

Alyson, do you have that?

Ms. Alyson MacLean: We know that at all levels of the criminal justice system indigenous peoples represent 20% to 25% of the overall population. That's all I can say there.

Mr. Michael Cooper: Okay.

At page 19 of your presentation, the first bullet points states, "If nothing changes, approximately 1,000 more offenders will be in federal custody in ten years."

Could you elaborate on how you've come to that figure and how that can be addressed? What do you mean by "if nothing changes"? What should change?

● (0950)

Ms. Alyson MacLean: As I mentioned earlier, a number of factors affect the crime rate: the economy, employment. Those sorts of factors would influence the crime rate, and more specifically the rate of indigenous involvement in the criminal justice system. Other changes could be some of the things raised earlier with respect to policies or legislation.

Mr. Michael Cooper: What about the significant number of programs for indigenous persons that the federal government provides in terms of funding levels, etc.? Would you be able to comment on that?

Mr. Donald Piragoff: The phrase "if nothing changes" essentially means that if the status quo remains as it is, which includes the existing programs—in other words, if they're not augmented, if they're not increased, if things just stay the way they are—then given the rates, given the demographics, the prediction is that there will be an increase in federal custody unless measures are taken to either increase programs or undertake other measures to basically bend the curve.

Mr. Michael Cooper: At page 16 of your presentation, there's a chart on Canada's incarceration rate per 100,000 people. Where is this statistic from, and when? Has there been any trend over, say, the last 10 years in the level of incarceration in Canada?

Ms. Alyson MacLean: These are data provided to the United Nations by the countries identified.

Mr. Michael Cooper: Are you able to comment on whether there have been any trends over the last 10 years or so? Have we seen an increase, for example, in the incarceration rate in Canada?

Ms. Alyson MacLean: There has been an increase in the incarceration rate in Canada. However, I don't know how it compares with the increases or decreases that may have occurred in the other countries identified here.

We can get you that information, if you would be interested.

Mr. Michael Cooper: You've just said generally there's been an increase, but you don't have the statistical data on what that increase has been.

Ms. Alyson MacLean: I don't have that information at hand.

The Chair: We have another minute and 20 seconds.

Mr. Falk or Mr. Nicholson—or Mr. Cooper?

Mr. Michael Cooper: I can ask one final question.

Certainly in your statistics you note that chronic or repeat offenders are responsible for a large volume of crimes; that there has been, over the last 10 years or so, a marked decrease in violent crime; and that there's been a 32% increase in corrections costs over roughly the same period.

Isn't it the case that those who commit the most violent crimes are not committing them because they're behind bars? I mean, there seems to be some logic, in those figures, in terms of why that may be.

Mr. Donald Piragoff: One of the justifications for mandatory minimum penalties is the incapacitation principle, or denunciation. We don't have evidence that shows that MMPs have a deterrent effect, but they clearly have an incapacitation effect, or a denunciation effect by society.

Yes, if a person is locked up, then they're not on the street. But MMPs do not have the same effect with respect to drug trafficking. When you pull a drug trafficker off the street, there's an economic incentive there and the void is filled. As long as there's a market for someone who wants to buy drugs, if you take a person off the street there'll be a new person coming along to push the drugs.

The effect that penalties have depends on the crime.

The Chair: Thank you very much. If it's okay with my colleagues, I'm just going to take one small second of the Liberal time that's coming up, which will start now, to ask a follow-up question to Mr. Cooper's question related to page 19.

Just for clarification, my understanding, based on what you're saying on page 19, is that simply because the percentage of aboriginal Canadians is estimated to have increased from 4.6% to 6.1% of the population of Canada, and because of the birth rate, many of those people will no doubt be young, then given the existing percentage of incarcerations of aboriginal Canadians and that population increase, you're estimating that there will be an extra 1,000 prisoners in 10 years. Is that not correct? I think you're saying that it's simply based on demographics.

● (0955)

Mr. Donald Piragoff: One factor is pure demographics. The other factor is that if everything else stays the same in terms of the amount of money that is put in programs, and programs are not increased despite the fact that there is an increase in population, then there will be an increase.

The Chair: Right. Nothing else changes based on demographics.

Mr. Donald Piragoff: That's right.

The Chair: Moving to the Liberal side, who is going to lead on this round?

Mr. Chris Bittle: Mr. Casey.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

I want to drill down a little bit on the remand issue—that's one trend you identified—and seek your advice on the explanation for the increasing population in remand. I can think of some reasons why we're seeing this. I could set them out and perhaps invite you to let us know which ones are identified as being behind this. My expectation is that people are spending more time in remand because we're seeing more not guilty pleas. Perhaps it's because of sentencing reform or some other reason such as an inability to meet onerous bail conditions. A backlog in matters getting to trial would lengthen remand periods. Also, as you indicated, there is the proliferation of offences related to the administration of justice, and the funding challenges within legal aid. To my mind, those would all be factors that would be relevant to remand. I invite you to respond to that.

Are there some factors that are missing? Are some more prevalent than others? I think for us to be able to address the issue of the expanding length of time that people are spending in remand, it would help to get your advice on which key factors are playing into that.

Mr. Donald Piragoff: All of the factors you mentioned, Mr. Casey, are relevant. Is one of those more important than another? I don't know. I would have to check to see if we have research showing that some factors are more important. There's also another factor, which is discrimination. To what extent does discrimination play a role in the fact that certain individuals are in the system? Mental health is a significant factor as well. Fetal alcohol syndrome, for example, is a big factor with respect to some populations in particular not only in terms of substantive crimes but also with regard to the administration of justice offences just because of the effects that syndrome has on people's ability to remember dates or to follow instructions, etc.

Mr. Sean Casey: To completely change gears here, the most recent set of stats that were publicly released related to youth justice. Can you give us a high-level account of what those statistics told us and what we can learn from the most current information with respect to youth criminal justice?

Ms. Alyson MacLean: We do know that the number of charges is going down. The youth crime rate is going down. I'm not really prepared to speak to any of the other more detailed statistics, but I'm able to get that information to the committee. There's an excellent "Juristat" from the Canadian Centre for Justice Statistics.

Mr. Sean Casey: One of the problematic areas you identified in your earlier remarks is the disturbingly high incidence of impaired driving. We've seen various measures taken by provincial governments, as well as the measures contained in the Criminal Code, to address this. I'm looking for your advice in terms of best practices. Are there provinces that have adopted measures that have been effective? Are there jurisdictions we can look at to try to reduce the incidence? Are there tools other than what the federal government has done in the Criminal Code through which we can show leadership to address this?

● (1000)

Mr. Donald Piragoff: British Columbia, for example, rarely uses the Criminal Code for the enforcement of impaired driving. They are using their own provincial administrative schemes whereby there is instantaneous suspension of the licence and actual impoundment of the car at the roadside. They're basically using the Criminal Code provisions only for repeat offenders or very serious repeat offenders. For first-time offenders, they're using their provincial administrative legislation. I understand from the statistics they have that this has had a significant impact on the impaired driving rates.

Again, as indicated earlier, it's not simply a question of penalty. It's also a question of how quickly the penalty is imposed proximate to the offence. When you get the penalty right at the roadside, you feel it right away. It's not like something happens 10 months later and you go to court. In fact, probably the biggest pain of going to court 10 months later is not the fine; it's paying the lawyer's fee.

The Chair: Thank you very much. We definitely agree with that.

Coming back is Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Thank you, Mr. Chairman.

Thank you to Mr. Piragoff and Ms. MacLean for providing testimony this morning to our committee.

I am intrigued with several of the statistics you have highlighted to the committee, so I do have a couple of questions that I'd like to ask, and some observations.

You can correct me if I'm wrong, but one of the statements your report made is that there are decreasing crime rates. Is it fair to assume that the legislation on the books, which the previous government was very instrumental in introducing, has contributed to lowering crime rates? Is that a fair assessment?

Hon. Rob Nicholson: It's very fair.

Mr. Donald Piragoff: I can't say whether it is or not, but the trend has been going down, and it's still going down. Has that contributed? Maybe. Has it not? Has it had a neutral effect? I don't know. Clearly the stats show that the trend is still going down.

Mr. Ted Falk: That's certainly what your data shows, yes. Thank you.

I do notice that the costs have been going up. Also, over the 10-year period from 2002 to 2012—and I don't know if it's a 10-year period or an 11-year period—you're citing a 36% increase in costs for the criminal justice system, 43% in policing costs.

Can you comment any further on why those costs have increased more than the rate of inflation?

Mr. Donald Piragoff: Public Safety Canada has undertaken some studies in this area. A lot of the increase in the police costs are associated with the fact, as I indicated, that the system has become the default for failures of other parts of the social system. Police officers are spending a significant amount of their time dealing with people who have mental health problems, or other types of problems.

If a police officer takes a person to the hospital because of a suspected mental health issue, that police officer may be there for a couple hours while they're waiting. That's a significant amount of time, which becomes a police cost. It's not a traditional policing cost in terms of investigation. It's essentially being a social worker. The police will say that a lot of their increased costs are because they are becoming more and more social workers as opposed to law enforcement officers.

Correctional costs would make sense if there were more people going to penitentiaries and jails and staying there longer. Then, of course, the correctional costs would go up. Costs of the system, if trials take longer, would indicate the greater costs for prosecutors, judges, etc., because their time is being eaten away with respect to lengthy processing as opposed to moving people through the system more quickly.

● (1005)

Mr. Ted Falk: Thank you.

One of the comments your report made is that over 50% of the people currently incarcerated have not been convicted. Has your department worked on any initiatives to change that?

Mr. Donald Piragoff: That's in provincial custody, and 50% of those in provincial custody are there for remand purposes as opposed to undertaking a federal sentence. Now, in part, the remand custody may actually be increasing; in part it may be that provincial sentenced custody has decreased.

I did indicate that with MMPs, the effect has been that some people automatically push to the federal system, which means they go to penitentiaries. If they're convicted, they do not undertake any sentence in the provincial system. They go to the federal system. Of course, that would have the effect of changing the proportion between sentenced offenders in provincial custody and those in remand.

There are a number of factors going on at the same time.

Mr. Ted Falk: My time is quickly slipping away, and I have lots of questions, so I'm going to try to prioritize them a little.

One of the things I wonder about is why such a high percentage of crimes are unreported, according to the statistics you've provided here. I'm wondering whether it's a lack of confidence in the justice system, the police system, or what. Why would it be unreported?

I'm not going to ask you to answer that. I just want to throw that out.

What I would like you to comment on is that it seems to me that the only tool the justice system has in its tool belt is incarceration. I'm wondering what part in the whole justice system could restitution be incorporated into. Has your department given any consideration to that?

Mr. Donald Piragoff: Incarceration is not the only tool in the box. I think most criminal charges are disposed of without incarceration. It'll be a fine or a probation order. The probation order might include an order for restitution to the victim.

The biggest issue with respect to restitution is not the order of restitution; it's the ability to collect it. So, of course, many victims are not getting restitution because there are no means. There are some programs. Saskatchewan, for example, has some very innovative programs to improve the amount of restitution paid to victims. But I'd say most sentence dispositions in Canada are not incarceration.

The Chair: Thank you.

Mr. Rankin.

Mr. Murray Rankin: I wanted to clarify again, by way of overview the statistics on page 3, that the total costs of $31.4 billion in 2008 were for Criminal Code offences. Are we also talking about controlled drugs and substances here? Are they part of what you are telling us about today or not, or are these simply Criminal Code offences? Because I'd like to know about marijuana, the drug courts, etc.

Ms. Alyson MacLean: These figures are based on a study that was done using 2008 data called “Costs of Crime in Canada”. It looked at Criminal Code offences.

Mr. Murray Rankin: Prosecution of drug offences is not included in what we're talking about today.

Ms. Alyson MacLean: Not in this study, no.

Mr. Murray Rankin: I was going to ask you about the breakout of drug crimes in the analysis you're presenting, but drug crimes aren't included in the analysis that you're presenting. Marijuana, for example, is not relevant to this discussion.

Ms. Alyson MacLean: I'm not sure. I would have to consult the study once again.

Mr. Murray Rankin: Because you suggested, Ms. MacLean, that the youth crime rate is going down, and I wondered as one example if that has to do with the propensity to charge or not charge young people with marijuana. But I can't correlate that at all because we don't even know whether it's included.

Ms. Alyson MacLean: No.

Mr. Murray Rankin: Okay.

Let me then go to page 15 where you talk about impaired driving cases having decreased. I wanted to know what impaired driving meant. I certainly know it includes alcohol. In my part of the world an increasing number of people are driving under the influence of marijuana, and we've certainly read a lot about that in Colorado and the like as well.

Are there charges for people who are impaired under the influence of marijuana, for example? Would that be included in impaired, or are we to limit this to alcohol impairment?

● (1010)

Mr. Donald Piragoff: The statistics don't make a distinction between the substances that caused the impairment. Stats Canada records the fact that there was a conviction for impaired driving. That's all Stats Canada has. The circumstances of the offence, whether there was a drug involved alone or together with alcohol is not.... Stats Canada doesn't have that information.

So you would include drugs as well. Whatever constitutes a conviction would be captured most likely, but there's no breakdown by Stats Canada as to what is drugs and what is not. There may be other studies that have looked at the prevalence of drug-impaired driving. I think there are some regional or city ones, but they're not national stats.

The Chair: Thank you very much.

I'd like to thank both of the witnesses for having come before us today. We very much appreciate your presentations and your answers to the questions. I'd ask you to please send to the clerk some of the documents you said you would deliver to the committee.

We're going to suspend for a couple of minutes for the next panel.

● (1010)

(Pause)

● (1015)

The Chair: We are reconvening and resuming.

I'd like to welcome our second panel, which is our double Laurie panel. It's probably the only time this year that only Lauries will be witnesses.

From the Department of Justice, we have Laurie Wright who is the assistant deputy minister of the public law sector, and Laurie Sargent who is the deputy director general and general counsel from the human rights law sector of the public law and legislative services sector. You have one of the longest titles I've ever heard, Ms. Sargent.

Ms. Laurie Sargent (Deputy Director General and General Counsel, Human Rights Law Sector, Public Law and Legislative Services Sector, Department of Justice): It's a military rank.

Some hon. members: Oh, oh!

The Chair: I'd invite you each to present for 10 minutes, and then we've agreed that we'll do one round of questions instead of two, so that we finish on time.

Please go ahead.

Ms. Laurie Wright (Assistant Deputy Minister, Public Law Sector, Department of Justice): Thank you very much.

It's a pleasure for me to be here today to talk about the Department of Justice's approach to supporting our minister, the Minister of Justice, in performing the examination of government bills and regulations as mandated by section 3 of the Canadian Bill of Rights, section 4.1 of the Department of Justice Act, and also by subsection 3(2) of the Statutory Instruments Act.

These examination provisions and the process surrounding them play an important role in promoting the rule of law. First, they require the minister to examine every bill introduced or presented to the House by a minister of the Crown to ascertain whether any of the provisions of a draft bill are inconsistent with the purposes and provisions of the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms.

[*Translation*]

In the case of draft regulations, a comparable duty is imposed on the Clerk of the Queen's Privy Council of Canada, in consultation with the deputy minister of Justice.

While the process through which government bills are examined is not exactly the same as that employed for draft regulations, the object of the examination is the same, namely, to ascertain whether any of the provisions are inconsistent with the purposes and provisions of guaranteed rights.

[*English*]

Second, when either the Minister of Justice or the deputy minister of justice forms the opinion described by the examination provisions, they must report it. Either the minister may report it to the House of Commons after first reading, or the Clerk of the Privy Council may report it to the regulation-making authority after consultation with the deputy minister.

For the purposes of today's presentation I will focus on the review of government bills rather than regulations. As you may be aware, there have been no reports of inconsistency with respect to government bills since the enactment of the charter.

[*Translation*]

In the Department of Justice's view, this reflects the work we do with the sponsoring departments to ensure that legislation is consistent with constitutional guarantees. It also reflects a careful balancing of the roles and responsibilities of the executive, Parliament and the judiciary in upholding the Constitution and the rule of law.

I would like to take a moment to describe the department's work in more detail.

[*English*]

Officials in my department, the Department of Justice, play an important role in the development and preparation of government legislation, a process that involves many stakeholders.

Department of Justice lawyers provide legal advice to policy officials all across government on how to achieve their policy objectives while respecting the constitution and all other relevant legislation. Most often, any legal risks identified are reduced or mitigated before they reach Parliament. Justice lawyers are typically involved throughout the policy development process, from initial policy development to legislative drafting, by providing advice on any legal concerns which may arise including those related to the charter.

To support this important function, the department long ago created a centre of expertise on human rights. Officials in the human rights law section, for which I am responsible, ensure that the government benefits from expert legal advice on complex and novel human rights questions, both domestically and with respect to our international human rights obligations.

The section also seeks to promote coherence and consistency of legal advice across government on the Charter of Rights and the Canadian Bill of Rights.

● (1020)

[*Translation*]

In the initial phases of the policy development process, government officials work closely with Justice Canada's legal counsel to address human rights and charter concerns. All through the process, the policy can be adjusted as required to minimize any risk of inconsistency with guaranteed rights.

[*English*]

These adjustments inform the recommendations that are made to cabinet and take into account all the identified legal risks including any with respect to compliance with charter rights. For example, where a sponsoring department's options raise significant legal risk, policy officials and justice counsel would report their concerns to senior management for discussion. This would include a discussion of risks up to and including those that would trigger the minister's obligation to report an inconsistency.

If the discussions don't lead to changes, the human rights law section will participate alongside other justice counsel in briefing senior departmental officials on the legal advice provided so that discussions at the senior level and the cabinet table are properly informed. Finally, at the cabinet table, the minister herself can again raise any significant legal concerns and advise her colleagues in respect of the constitutionality of the proposal being proposed. Once policy direction is received from cabinet, the legislative drafting process begins.

[*Translation*]

Legislative Services counsel are specialized lawyers responsible for drafting legislation. They are also responsible for examining legislation and regulations for consistency with guaranteed rights. In fulfilling this responsibility, legislative counsel work closely with other government lawyers, including lawyers from the human rights law section. Once again, they will seek to mitigate any charter or other legal risks that may be identified at the drafting stage.

[*English*]

The chief legislative counsel provides final examination from the branch of all government bills for consistency with guaranteed rights in consultation with the human rights law section as required. As you can see, before legislation is introduced in Parliament, it has gone through a very rigorous review by the Department of Justice.

At this point I'd like to take a moment to speak more specifically about the scope of the duty of the Minister of Justice, who has to report to Parliament any provisions that are inconsistent with the charter or the Canadian Bill of Rights once the proposed legislation is drafted and ready to be introduced.

[*Translation*]

The government's position on the scope of the minister's duty has been described to Parliament many times over the years, including by several previous ministers of Justice. It has also recently been the subject of a legal challenge brought by former Department of Justice counsel Edgar Schmidt. As you may be aware, we are still awaiting the decision of the Federal Court in this matter.

[*English*]

If at the conclusion of the legislative drafting phase the Minister of Justice is of the view that there is an inconsistency between a provision of a government bill and a guaranteed right, it is at this stage that she must report the inconsistency to the House. In practice this would be tabled after first reading. In plain language, section 4.1 imposes on the minister the duty to ascertain that a proposed government bill is inconsistent with government rights. Given that responsibility, the reporting standard must reflect the wording and intent of the provision. In the case of government bills, the minister has the duty to ascertain the inconsistency and may do so, informed by the legal advice of the Department of Justice, and of others if she so desires.

● (1025)

[*Translation*]

Therefore, it is ultimately the minister who must come to her own assessment based on the advice she receives, as well as her own appreciation of the legal issues at stake.

[*English*]

As you may be aware, the government's long-standing position is that the minister's obligation to report only arises when there is no credible argument to support the constitutional validity of the legislation. A credible argument is an argument that is reasonable, bona fide, and capable of being raised before and accepted by the courts. This standard requires substantial but not absolute certainty of inconsistency, and it's not based on fixed percentages.

As you might suspect, this kind of assessment can sometimes be a challenging exercise. It's made by applying a law to a set of facts at a particular time. However, facts relating to a law's impact can change as society evolves, including facts that speak to either the purpose of the measure, the rational connection between the measure and its purpose, and the proportionality between the nature and scope of rights infringement and the importance to society of the objective that's being pursued.

[*Translation*]

The jurisprudence about guaranteed rights is also constantly evolving, sometimes very significantly and unpredictably. There have been many examples of this over time, including, to give just one example with which Parliament is now grappling, significant shifts recently in what had appeared to be settled law under the charter in relation to assisted suicide.

[*English*]

I wanted to take this opportunity to highlight the broader principles that have informed the department's approach in supporting the minister in exercising her powers and duties. Under our constitutional system of government all branches of government —Parliament, the executive, and the courts—have responsibility for ensuring that protected fundamental rights and freedoms are respected.

The system of examination put in place by the department to support the minister and the deputy minister is intended to ensure respect for the role that each branch performs in this regard. The examination provisions mark the outer boundary of when Parliament must be informed that a bill, which it's about to debate, is clearly inconsistent with a guaranteed right. However, within that boundary there remains considerable scope for debate in Parliament as to whether laws may be found consistent with guaranteed rights, and the Constitution, more generally.

The credible argument standard takes into account the multiple roles that the minister performs in Canada's constitutional democracy. It's sensitive to the duty to uphold the rule of law and the Constitution, while ensuring that the minister, through the exercise of statutory duty, does not foreclose legislative debate over policy except in the clearest cases of inconsistency with the charter.

The Chair: Thank you very much for that very clear and coherent presentation.

It's been agreed, as I understand, by all sides that we're going to do just one round of questioning so that we finish on time.

We're going to start with the Liberals and Mr. Fraser.

Mr. Colin Fraser: Thank you very much for your excellent presentation. I very much appreciate that. I have a question.

[*Translation*]

I know that there is currently a—

Is there a problem?

[*English*]

The Chair: We're going to continue. I will fix this the next time. I realize that in this round it's actually the Conservatives that are first.

Actually, if you don't mind, we'll go to Mr. Cooper. I apologize. I didn't realize that it was different for the second group from the first group. Sorry to put you on the spot there.

Mr. Michael Cooper: You had mentioned something about assisted dying at one point, but I didn't hear you finish your thought. I'm on the special joint committee, so it just perked my attention. But I didn't hear what you were specifically referring to.

Ms. Laurie Wright: I don't believe I made any remarks with respect to the special joint committee.

Mr. Michael Cooper: No, but you did mention the topic of assisted dying and I didn't hear what the context was.

Ms. Laurie Wright: Sorry, it was simply to say that we were sometimes looking at cases where the law had seemed settled and we received an unexpected decision from the court. That would have been the Carter decision, which has now led to the special joint committee that is looking at that issue.

Mr. Michael Cooper: Thanks for that clarification.

You provided a fairly comprehensive overview of the process and analysis that takes place with respect to legislation to ensure charter compliance. Are there any changes to that process that are envisioned at this time?

Ms. Laurie Wright: I think, at the departmental level, we're quite satisfied that we have an entirely robust and well-functioning system in terms of how the advice is given and how it is reflected in the policy development process. As I mentioned in my remarks, at the end of the day, it's the minister's responsibility to make the final decision with respect to whether a bill meets the standard in section 4.1 or not.

● (1030)

Mr. Michael Cooper: That standard, again, is credible, bona fide, and...? What was the other criterion?

Ms. Laurie Wright: The way we look at it is that it has to be a bona fide and reasonable argument that's capable of being accepted by a court.

Mr. Michael Cooper: I will designate the balance of my time to Mr. Falk.

Mr. Ted Falk: Thank you.

Thank you, witnesses, for coming here this morning, Ms. Wright and Mrs. Sargent.

I'm wondering if you can give us a little bit of a report on the frequency of incidents that have actually happened in the past.

Ms. Laurie Wright: Well, I can say in terms of the role of the department that we're certainly involved every time there is a memorandum to cabinet that's being prepared with respect to a proposal for new legislation. The review for all legal risks, including those related to the charter, would take place every time a legislative proposal is under development, either during the policy development phase, at the phase of the memorandum to cabinet, or during the drafting phase. We're certainly involved consistently every time legislation is being prepared.

Mr. Ted Falk: Okay, thank you, and I appreciate that answer.

If I understood you correctly, though, the minister has an obligation to report to the House any time government legislation contravenes the charter or the Constitution. Can you report on how often that has happened?

Ms. Laurie Wright: Certainly. Because of the high threshold for the report, there has never been a Minister of Justice who has ever made a report under this section. When bills are tabled, there is a certification that they have been examined for compliance with the charter, but a report under section 4.1 has never been made.

Mr. Ted Falk: I haven't been here that long, but that's the way it would seem to me. I can't imagine a Minister of Justice producing that kind of report in the House of Commons against their own government.

Ms. Laurie Wright: We feel it's a mark of success with respect to adjustments that are made to policy proposals as they're developed that we have never come to that impasse where a minister would be at odds with cabinet colleagues with respect to the constitutionality of legislation.

Mr. Ted Falk: Okay, and as the Justice department you've never had cause in the past to think that should have happened?

Ms. Laurie Wright: It's the minister's decision at the end of the day with respect to advice that the department provides. I think we have a good track record of managing to work with clients in order to address those risks before it would get to that stage.

Mr. Ted Falk: Okay, and this is something that only applies to government legislation and does not apply to private member's business.

Ms. Laurie Wright: That's correct. The obligation in the Department of Justice Act does not apply to private member's bills. I understand there is a House committee process that looks at private member's bills before they're put forward for eligibility for the list. It does look at constitutional issues, but that's not an obligation on the minister.

Mr. Ted Falk: Thank you very much, Mr. Chair.

The Chair: Thank you very much, Mr. Falk.

Now, we will go to Mr. Fraser.

I apologize to both sides. I didn't realize that we reversed the other panel.

Mr. Colin Fraser: Thank you very much, Chair.

Thank you very much for coming in and for your presentation.

[*Translation*]

I know that Bill C-452 seeks to amend the Criminal Code to make it provide for consecutive sentences for offences related to exploitation and trafficking in persons.

Could you share your views on this bill, which may well be deemed unconstitutional, and on the possible links with section 4.1 of the Department of Justice Act?

[*English*]

Ms. Laurie Wright: That is because this provision is a private member's bill. It's not covered by the scope of section 4.1 of the Department of Justice Act, and the minister does not have a responsibility to report with respect to private member's bills.

On the question of the constitutionality of the bill itself, unfortunately I'm not in a position to be able to provide legal advice to the committee on that, but I would recommend that you can turn to your law clerk of the House.

● (1035)

Mr. Colin Fraser: Okay, thank you.

With regard to legal opinion sought by the Minister of Justice under 4.1 of the Department of Justice Act, that legal opinion is given from within the department. Is that correct?

Ms. Laurie Wright: We do provide considerable advice. We're not the only source of advice to which our minister or other ministers are entitled. There is a process for seeking advice from private firms if a minister wants to do so, but the bulk of the advice that our minister receives would come from within the Department of Justice.

Mr. Colin Fraser: I have one final question. With regard to that legal advice, is that subject to privilege?

Ms. Laurie Wright: Yes. The crown is considered to be the same as a private person when she is consulting her counsel, so there is solicitor-client privilege that respects the confidentiality of that advice.

Mr. Colin Fraser: Thank you very much.

I don't know if my colleagues have questions.

The Chair: Mr. Hussen.

Mr. Ahmed Hussen: Thank you, Mr. Chair.

Thank you for coming in and giving us a good presentation.

I have two questions with respect to the courts declaring laws to be contrary to the charter in recent years. Due to the frequency of those decisions in recent years, in which the courts have declared laws to be contrary to the charter, what are we to conclude about the efficacy of the section 4.1 reviews?

My second question is this. How can those reviews and that efficacy be improved so we have fewer laws being ruled contrary to the charter by the courts?

Ms. Laurie Wright: I think that there are several things to keep in mind. Many of the provisions that have been struck down in recent years by the courts are relatively old provisions that would have predated the charter and the obligation on the minister to report. That's certainly one factor to keep in mind.

I think it's also important to note that there has been a number of important successes with respect to defending Parliament's laws before the courts in recent years. There are some examples that come to mind such as the security certificates regime and some terrorism offences in the Criminal Code.

The other thing to keep in mind is that the law is in constant change. Even when you look at the progress that one case makes, going from its trial level all the way up to the Supreme Court, you may find that reasonable people, i.e., different judges who are sitting on the cases will take different approaches to the same issue. You may have at a trial level, for example, a court that says that something is not constitutional, but when it's appealed to a court of appeal, the court of appeal will disagree and uphold the law. On an appeal panel, you will have more than one judge, so you may have some judges who disagree even within the same panel about the constitutionality of the legislation.

This puts us in a situation, as lawyers, of acknowledging that what we do is an art, not a science. It's hard to come up in every case with a level of certainty that something is not going to be struck down by the courts.

The Chair: Are there any further questions from that side? If there aren't, can I just ask one small question, as we have one minute left?

Just for clarification, you said that there's no percentage basis on the 4.1(1) decision as to whether or not a report is required. In the event that you found that the preponderance of the evidence would conclude that there is a charter violation, would you deem that a requirement to report, or could you still say that, even though there's a 60% or 70% chance that the charter is violated here, there's still a bona fide chance that there will not be a violation, and as such, the legislature should be allowed to go ahead and do what it wants without advice?

Ms. Laurie Wright: I think that when you get to the reporting standard, it's looking at it a little bit from the other way around. It's not to say that there might not be impacts on rights and freedoms and that the government doesn't have a case that it wants to make for justifying that impact. The question is, have you crossed over the threshold where a lawyer would not be able to make the credible argument in court in order to be able to justify the legislation?

The Chair: At that point, then, as long as you can make a credible argument, you could say, "I think there's a 10% chance that it will be upheld, but I can make a credible argument that it's still...." Okay, I understand.

Mr. Rankin.

● (1040)

Mr. Murray Rankin: Thank you. I'd like to continue in that vein, if I could.

I can understand, as Mr. Falk pointed out, how unlikely it would be that in the 31 years of this requirement's existence a minister would stand up and actually table something to say that it is inconsistent with the charter.

What the Schmidt case seems to be showing us—and I take it that we still have to wait for the court's decision—is that the standard is just much too low. My opinion is that the standard is ridiculously low. Apparently it's whether it is "manifestly unconstitutional and could not be defended by credible arguments before a court."

Whether there's a good chance that a provision would be found unconstitutional, more likely than not, as the chair said, that's the standard that I would argue needs to be there, rather than some 10% or 20%. I know you don't quantify it, but that's what Mr. Schmidt asserted and that's what's before the courts in that decision.

It seems to me that the standard is very low, and if one looks at the amount of time and money that we have spent on the federal government's losing cases about the charter in the last few years, I would assert to you that the proof is in the pudding.

Ms. Laurie Wright: There are certainly different approaches that can be taken. I think that the idea behind the standard here is that it's only in the clearest of cases that you would want, essentially, the executive to prevent Parliament from being able to have a debate on whether it wishes to go forward with a certain piece of legislation representing a certain policy solution to a problem.

The report that a Minister of Justice might make is not the only source of information that's available to parliamentarians when they're considering legislation as to the questions of constitutionality. Certainly, there is a law clerk for the House; there's a law clerk for the Senate. In addition to that, at committee hearings there's often a wide variety of witnesses who appear to offer their views with respect to the legal issues, including constitutional issues on bills.

I believe that the purpose of the standard that's been adopted is to recognize the important roles that each of the branches plays and not to foreclose democratic discussion.

Mr. Murray Rankin: Have you had a chance to compare the standard that exists in section 4.1 of the Department of Justice Act with similar provisions across the country to see whether they're applied in a more rigorous fashion? Anecdotally, that appears to be what's happening.

Ms. Laurie Wright: On section 4.1 in terms of Canadian standards, there are no comparable provisions across the country with respect to the provincial legislatures. There are some international comparators. I can perhaps ask Laurie Sargent to—

Mr. Murray Rankin: When you say there's nothing comparable, in British Columbia this is done routinely for regulations as per the Statutory Instruments Act and for legislation. It's routinely done by attorney general lawyers. Whether it exists as a practice or whether it is in statute, they provide, I'm told, a much higher standard than what exists under the federal 4.1 rule.

Ms. Laurie Sargent: We'd have to review again more carefully, but my understanding is that it would be their role as attorney general, which of course we also fulfill in advising all the time consistently as to what the likelihood of an adverse outcome would be. But it's not a statutory obligation on the attorney general, the minister in B.C., to report in the same way that we have here.

If you would indulge me, the international examples are interesting. If you look at New Zealand, you see that they have a similar statutory obligation, but it's phrased quite differently and talks about the minister reporting when something "appears to be inconsistent". Elsewhere, in the United Kingdom and Australia, there are different types of standards whereby ministers or attorneys general are reporting on "compatibility", as opposed to reporting on something being inconsistent.

It's just important to remain mindful of the way in which section 4.1 is framed, and that has, of course, influenced the way it's been interpreted. The issue is before the courts, though, and we will see, of course, how the Federal Court rules.

Mr. Murray Rankin: I would just say, as a matter of public policy, that we're spending a lot of money in the federal government in the last while by losing cases on the charter. I can think of many examples: mandatory minimum sentences, the Insite case, and so forth. To think that the check is working seems to me to be wildly counterintuitive.

I would suggest that one of the things this committee ought to do is examine whether a better standard would allow fewer cases to get through the sieve than get through now, because it's certainly costing Canadians a lot of money to lose these cases.

Those are my comments.

● (1045)

The Chair: Thank you very much, Mr. Rankin.

I have just one small clarification question again. I'm sorry to do it.

I understand that there's a review done. Laws then come to committee. Let's say that this committee—for example, in the case of the assisted dying law—were to amend proposed legislation. Would there be a re-review of subsection 4.1(1) after a committee has made an amendment to a law?

Ms. Laurie Wright: The review would be done when the bill is tabled. If the government were proposing amendments in committee, there would be another review that would be done internally of the amendment at that time. Obviously, amendments that come from other parts of the committee wouldn't be subject to a reporting obligation, but advice could be sought.

The Chair: Thank you very much. I think we've now got to exactly when we're supposed to close.

I'd like to thank all the members of the committee for their good questions.

I'd like to thank the witnesses for their excellent presentations and their clear answers.

The meeting is adjourned.