CSC POLICY CONSULTATION FORM /
FORMULAIRE DE CONSULTATION SUR LES POLITIQUES DU SCC

Commissioner's Directive No: 705-6; 705-7; 710-1; 710-6; 712-1; 715-22; and Guidelines 710-2-3; 710-2-4	**Directive du commissaire nº :**
Title:	**Titre :**
The above-noted policy document has undergone changes/is new. A read-only version of the amended policy is attached for your review. The content changes are detailed in the attached draft Policy Bulletin.	Des modifications ont été apportées au document de politique précitée. Vous trouverez ci-jointe, aux fins d'examen, une version (à lecture seulement) de la politique modifiée. Les changements de fond proposés sont décrits dans le Bulletin de politique provisoire ci-joint. Prière de soumettre vos commentaires concernant ces changements, en précisant les numéros de paragraphes.
Thank you.	Merci.
Name of respondent: Jennifer Metcalfe	Nom du répondant :
Title: Executive Director	Titre :
Region/Organization: Prisoners' Legal Services	Région/Organisation :
Date: September 11, 2017	Date :

Comments / Commentaires :

Please include the corresponding paragraph numbers along with your comments. Thank you. / Veuillez inclure les numéros de paragraphes qui correspondent à vos commentaires. Merci.

Thank you for giving Prisoners' Legal Services ("PLS") the opportunity to provide comments on the draft Commissioners' Directives ("CD"s) and Guidelines specified above. In our view, the proposed revisions strengthen the Correctional Service Canada's ("CSC") compliance with its duty to give proper consideration to Indigenous prisoners' historical and personal circumstances when making decisions regarding the administration of their sentences.

PLS is happy to see that the Correctional Plan Update ("CPU") requirements under CD 710-1 paragraph 18 have been made more robust – we often receive complaints about outdated CPUs from prisoners, Indigenous or otherwise, who feel like they are being warehoused but are unsure of

how to advocate for a new assessment from their Case Management Team of where they stand in their correctional rehabilitative process.

In particular regarding Indigenous prisoners, we are pleased to see changes as made to CD 705-6 paragraph 36: "For Aboriginal offenders, their offence cycle must be explained within the context of their Aboriginal Social History." This appears to be in line with existing jurisprudence in *Twins v Canada (Attorney General)* 2016 FC 537, where the Federal Court of Canada established that, where *Charter* s 7 liberty rights are engaged or where governing legislation compels consideration of Aboriginal disadvantage, *Gladue* factors must be not only considered in general, but specifically regarding how these systemic and background factors may have played a part in bringing the individual into interaction with the criminal justice system.

Gladue factors, of course, stem from *R v Gladue* [1999] 1 SCR 688, which contained an impassioned imperative from the Supreme Court of Canada for sentencing judges to respond to the acute problem of the disproportionate incarceration of Indigenous individuals in Canada. The factors from Canada's history of colonization identified in *Gladue* include Indigenous individuals and communities' struggles with low income; unemployment; lack of opportunities, options and formal education; substance abuse, loneliness; community fragmentation; and poor social and economic conditions.

PLS is pleased that such factors have been included throughout the updated CDs and Guidelines. This certainly indicates that considerable thought has gone into how and when a prisoner's Aboriginal social history should be considered within the entirety of the corrections system. Oftentimes, in PLS' experience, the paperwork of a prisoner or individual on conditional release contains an Aboriginal social history section that seems to stand alone from the rest of the document and have little to no impact on the recommendation or decision. Hopefully, with the proposed amendments, this will change, and Aboriginal social history will not only be mentioned throughout, but thoughtfully and seriously applied in the decision making process.

One point of concern is that, on our copy of CD 712-1, Annex A does not actually contain a definition of Aboriginal social history. Instead, it reads "Aboriginal Social History: an updated definition will be provided." Clearly, one is forthcoming, but at this point PLS cannot provide full comment on this crucial part of the amendments. How Aboriginal social history is defined would seem to have an impact on every CD and Guideline being updated – too broad or too specific of a definition could potentially leave the amendments ineffective to their intended task.

PLS notices as well that GL 710-2-3 contains a passage that appears to have been edited out in the Overall Assessment section. It reads as follows, with emphases added:

> The intent of considering ASH is to examine circumstances of the Indigenous people and to seek alternative options to normal procedures to manage the Indigenous offender so that a more responsive decision can be made. ASH considerations are not risk factors and should never result in a more restrictive decision. It is possible that the end result may be the same but it is also possible that the consideration of ASH could result in alternative decision-making options, regardless of whether the offender chooses to follow a traditional path or not. To incorporate the ASH into the analysis, there are 3 components:

1. Define the unique circumstances of the Indigenous offender.

   Analyze the circumstances of the communities (such as residential school systems, child welfare, dislocation, community fragmentation, marginalization, etc.) and the extent of their impact on the Aboriginal offender at the individual level (i.e. gang affiliation, substance abuse, history of suicide, family or community history of substance abuse, family or community history of victimization, poverty, lack or low level of formal education, etc.). It should ideally answer the following question: How has their history impacted their current behaviour?

2. Ensure that all culturally appropriate and/or restorative options are given due consideration in the decision-making process.

   Identify and document all the restorative options (such as mediation, behavioural contract, etc.) and/or culturally appropriate options (traditionally-based options such as teachings, ceremonies, etc.) that are applicable to manage the offender. The options must be weighed along with all other required considerations in arriving to the recommendation.

   Should none of the restorative or cultural options be suitable, provide a detailed rationale as to why they are not appropriate.

3. The analysis is documented in the recommendation to reflect the rationale of the recommendation.

   Link the impact of the ASH consideration on the resulting recommendation for transfer decision with a rationale that explains why they did or did not impact the decision. For example, are there cultural interventions or restorative options available that can assist the offender to make the progress necessary for an eventual security reduction and/or release to the community?

   Include information provided in the Elder Review (if applicable)

The underlined sections of the deleted paragraphs are principles or guidelines that PLS finds particularly important to emphasize in the amendments. The content emphasized is either left implied or omitted entirely from the rest of the amendments. Not only do these emphasized points bear repeating, even if they are mentioned elsewhere – PLS submits that it is particularly useful to have a section like this, that makes clear CSC's position with specific instructions on how to apply Aboriginal social history to the decision making process. PLS submits that all of the emphasized points should find a home within the CDs and Guidelines, as they are essential to the spirit and implementation of *Gladue* within corrections.

PLS points out as well that CD 712-1 (Annex E) and 715-2 (Annex B) contain sections under "Institutional/Community Behaviour" that appear to offer guidance regarding the writing of

Assessments for Decision, but begin with the condition "If the offender is Aboriginal and following a traditional path . . ." PLS stresses that an analysis of institutional and community behaviour should include links to a prisoner's Aboriginal social history regardless of whether an Aboriginal prisoner is following the path. The disappearance of cultural and historical knowledge and the loss of family and community ties are key to understanding the effect of colonization on the Indigenous people of North America. An analysis of how an Indigenous prisoner's life has led them to interact with the justice system must include such crucial elements, and this should not be dependent on whether the individual is following a traditional path, as that fact has no bearing on whether or not that individual is affected by those issues.

Similarly, in CD 710-6 Annex B, there are no amendments regarding Aboriginal social history regarding Escape Risk. Of the relevant considerations in that section, many can be linked to *Gladue* factors, including (but not limited to) the "use of violence or threatened violence," the prisoner's "previous periods on parole or statutory release," "emotional instability," and "gambling/drug debts." If an individual's Aboriginal social history is properly considered and culturally-sensitive interventions are successful, the prisoner's escape risk could be lowered in a manner that would seem to reflect the overall intention of the proposed amendments.

Justice Nakatsuru with the Ontario Court of Justice in *R v Pelletier*, 2016 ONCJ 628 provided an exemplary approach to how *Gladue* factors should be considered in general. The decision involved the sentencing of a young Indigenous woman who pleaded guilty to breaching a Long-Term Supervision Order after testing positive for cocaine metabolites:

> [11] To do my job right, I must apply what I know about your indigenous identity and background in coming to the right sentence. It is what we lawyers and judges mean when we talk about how *Gladue* factors apply in a case. I am not the only person who must do this. Indeed, the Correctional Services of Canada has that duty.
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> [. . .] the risk of re-offending in your case is not just connected to an untreated addiction. It is connected to the historical injustice done to indigenous people. It is connected to your own personal indigenous history. Connected to the abuse you suffered. The breakdown in your family and social environment. The chaos of your life. The lack of chances to succeed. Given all this, it is not surprising that your first brush with the law came at the age of 13.
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> [21] I must have regard to your special circumstances as an indigenous offender. How it is connected to you and this offence. When I do, while I must hold you responsible for your actions, the moral blameworthiness of it is lessened. Quite frankly, in a way, we all share blame for what you have become and what you have done.
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> [22] I must also craft a sentence that recognizes the over-incarceration of indigenous people in our jails. Bluntly, we are jailing too many. For too long. This is not to say that jail, even lengthy periods of jail, can never be right. It just means I must think hard about alternatives in each case. I must make sure that if jail is needed, that it is carefully tailored to the offence and offender. It must be imposed with restraint.

PLS believes that, with the proposed amendments, CSC is attempting to align itself with this approach – one that is centered on restorative solutions and reconciliation. The proposed changes are undeniably steps in the right direction, and will serve to provide a policy framework to avoid some of the shortcomings in corrections' *Gladue* analysis that we have observed while fielding prisoner complaints in the past.

PLS submits its concerns within this context of goodwill and the understanding that CSC, ultimately, has the same goal: to create policy that facilitates, enforces and reflects a corrections culture that is sensitive and responsive to the issues and circumstances of Indigenous prisoners.