

JUDICIAL DISCRETION BILL

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THE OBJECTIVE OF THE BILL

The bill allows judges the discretion to not impose mandatory minimum penalties

As a result of approximately 20 to 25 years of regressive law reform in this country, a proliferation of mandatory minimum penalties has increased criminalization of those who are poorest, racialized (especially Indigenous Peoples), women and those with disabling mental health issues

WHY DO WE NEED JUDICIAL DISCRETION?

The Truth and Reconciliation Commission (TRC): Recognizing the disproportionate impact on Indigenous Peoples, Call to Action #32 calls on the federal government “to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences.”¹

The Government (and voters) of Canada: The Government’s 2015 commitment to implement the TRC’s Calls to Action, including #32, remains unfulfilled. According to Government consultations, 90% of Canadians support “giving judges the flexibility to impose a sentence that is less than the mandatory minimum” in at least some circumstances.²

The Supreme Court of Canada: “Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes.”³

The Standing Senate Committee on Legal and Constitutional Affairs: “On its face, a mandatory minimum sentence would seem to violate the principle of proportionality in that it does not take into consideration the gravity of the offence and the degree of responsibility. ... A suggestion was made that ... the judge could determine on a case-by-case basis whether it is advisable to lower a sentence.”⁴

The Sentencing Commission of Canada: “In the past 35 years, all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished.” ... “When asked if minimum penalties restricted their ability to give a just sentence, slightly over half [of sentencing judges] (57%) responded affirmatively. Only 9% stated that mandatory minima never restricted their ability to impose a just sentence.”⁵

The Law Reform Commission of Canada: “Generally, the reported research does not show that harsh sanctions are more effective than less severe sanctions in preventing crime. ... [N]ot every case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and non-custodial sentence.”⁶

The Self-Defence Review: Justice Lynn Ratushny’s review found that a key reason that 98 women were found guilty of murdering abusive partners, despite claiming self-defence, was the mandatory minimum sentence of life in prison. Women did not trust they would get a fair trial, did not want to expose their children to having to testify in court, and when faced with the potential of a life in prison, they accepted offers to plead guilty, despite having a defence.⁷

The National Inquiry into Missing and Murdered Indigenous Women and Girls: “Mandatory minimum sentences are especially harsh for Indigenous women, girls, and 2SLGBTQQIA people as Gladue principles for sentencing cannot be applied. This leads to higher incarceration rates. Further, sentences fail to meet the rehabilitative needs of Indigenous women, girls, and 2SLGBTQQIA people.”⁸

SELECTED HISTORY OF MANDATORY MINIMUM PENALTIES

1970

1976

When the death penalty was abolished, life sentence parole ineligibility periods were increased to 10 years for second-degree murder and 25 years for first-degree murder, the latter with a 15-year review under the “faint hope clause”.⁹

1980



1990

1995

Bill C-68 introduces 19 new mandatory minimum penalties.¹⁰

2000

1997

Access to the faint hope clause is restricted.¹¹

2005-2015

A series of government bills¹² more than doubles the number of *Criminal Code* mandatory minimum penalties from 29¹³ to about 63.

2010

2011

The faint hope clause is eliminated and multiple parole ineligibility periods are introduced for those convicted of more than one murder.¹⁴

2020



TO LEARN MORE ABOUT THE JUDICIAL DISCRETION BILL AND TO FOLLOW ITS PROGRESS THROUGH PARLIAMENT, SENCANADA.CA/EN/SENATORS/PATE-KIM/



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¹ Truth and Reconciliation Commission, Calls to Action (2015): http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

² Liberal Party of Canada, A New Plan for a Strong Middle Class (2015) at 48: <https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>; Department of Justice, Research At a Glance: Mandatory Minimum Penalties (2018): <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar02.html>.

³ R v Nur, 2015 SCC 15 at para 114 (McLachlin CJ): <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15272/index.do>

⁴ Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice Is Denying Justice* (2017) at 54-55: https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf

⁵ *Sentencing Reform: A Canadian Approach; Report of the Canadian Sentencing Commission* (1987) at 178, 180.

⁶ Law Reform Commission of Canada, *Imprisonment and Release* (1975) at 24: <http://www.lareau-law.ca/LRCWP11.pdf>.

⁷ *Self-Defence Review* (1997) at ch 5, pt 5: <https://www.publicsafety.gc.ca/lbrr/archives/ke%208839%20r3%201997-eng.pdf>

⁸ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place* (2019), Volume 1a at 644: https://www.mmi-wg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

⁹ Isabel Grant, “Rethinking the Sentencing Regime for Murder” (2001) 39:2/3 *Osgoode Hall LJ* 655 at 691.

¹⁰ An Act respecting firearms and other weapons, SC 1995, c 39: http://www.parl.ca/Content/Bills/351/Government/c-68/c-68_4/c-68_4.pdf.

¹¹ An Act to amend the *Criminal Code* (judicial review of parole ineligibility) and another Act, SC 1996, c 34: http://www.parl.ca/Content/Bills/352/Government/C-45/C-45_4/C-45_4.pdf.

¹² An Act to amend the *Criminal Code* (protection of children and other vulnerable persons) and the *Canada Evidence Act*, 2005: http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2005_32/; *Tackling Violent Crime Act*, 2008, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2008_6/page-1.html; *Safe Streets and Communities Act*, 2012, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_1/; *Protection of Communities and Exploited Persons Act*, 2014, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2014_25/page-1.html; *Tougher Penalties for Child Predators Act*, 2015, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2015_23/page-1.html.

¹³ *Mandatory Sentences of Imprisonment In Common Law Jurisdictions: Some Representative Models* (2005), http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_10.pdf.

¹⁴ *Legislative Summary of Bill C-48: An Act to Amend the Criminal Code and to Make Consequential Amendments to the National Defence Act* (2011); *Bill S-6: An Act to amend the Criminal Code and another Act (Serious Time for the Most Serious Crime Act)* (2011).