THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: serge.joyal@sen.parl.gc.ca

The Honourable Serge Joyal, P.C.
Chair, Legal and Constitutional Affairs Committee
Senate of Canada
Ottawa, ON
K1A 0A4

Dear Senator Joyal:

Re: Bill S-251, *Criminal Code* amendments (Independence of the Judiciary)

The Canadian Bar Association Criminal Justice Section (CBA Section) is pleased to comment on Bill S-251, *Criminal Code* amendments (Independence of the Judiciary). The CBA is a national association of 36,000 members including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section consists of a balance of prosecutors and defence lawyers from all parts of the country.

Bill S-251 is a private member's bill sponsored by Senator Kim Pate. It would represent a significant shift in Canadian sentencing law, offering a legislative exception to allow judges to depart from mandatory minimum sentences (MMSs) currently established in the *Criminal Code*. It would also restrict sentencing judges from imposing MMSs unless they found no just and reasonable alternative was available, and then require written reasons for that finding. Additionally, it would empower sentencing judges to order people, after being found guilty and prior to sentencing, to attend a treatment or counselling program that the court considers appropriate in the circumstances, *without* the consent of the Attorney General.[1]

The CBA Section strongly supports the goals of this private member's bill, having consistently opposed new MMSs as they have been introduced over the past several years, for many of the same reasons that ground the proposals in Bill S-251. We have some concerns about the proposals to achieve those goals in Bill S-251 and offer some recommendations for improvement.

[1] The Bill also includes changes to rules for imposing victim fine surcharges. Since the Bill was introduced, the victim fine surcharge has been ruled unconstitutional and of no force and effect by virtue of the Supreme Court's ruling in *R. v. Boudreault*, 2018 SCC 58.[1]

Judicial Discretion

The CBA Section is a strong proponent of preserving and enhancing judicial discretion in sentencing.[2] In recent decades, we have raised concerns that discretion is being eroded by increasing numbers of MMSs, and by limiting the availability of other alternatives to incarceration, notably Conditional Sentence Orders (CSOs).

Unduly restricting judicial discretion can lead to unjust and disproportionate sentences. As a result, many MMSs have been struck down by the Supreme Court of Canada, as well as trial and appeal courts, as contrary to section 12 of the *Canadian Charter of Rights and Freedoms*, the right not to be subject to cruel and unusual punishment.

MMSs also remove important efficiencies from the criminal justice system. They lead to fewer guilty pleas and more costly and time-consuming trials. In the wake of *R. v. Jordan*,[3] there has been heightened emphasis on the need to preserve and justify the allocation of precious court time and resources, both for the proper functioning of the courts and the public's confidence in the system.

Additionally, we know that MMSs disproportionately impact populations already over-represented in the justice system, including Indigenous people, the economically disadvantaged, visible minorities and the mentally ill.

Sentencing judges are in a unique position. They can observe the accused, learn about the accused's history and current circumstances and hear first hand the facts of the particular case, while at the same time becoming aware of prevailing conditions in the local community. Protecting judicial discretion allows sentencing judges to do their jobs, to design proportionate, just and appropriate sentences for each individual and each individual case they hear.

The CBA Section has argued for removing MMSs from the *Code*, not adding more, and where MMSs are determined to be appropriate, inserting a "safety valve" so that an MMS can be avoided to achieve justice in a particular and extraordinary case. However, since Canada abolished the death penalty in favour of life sentences for homicide in 1976, the CBA has maintained that a mandatory life sentence for murder is appropriate and should be preserved. This is the one exception to our opposition of MMSs, and should be considered in that historical context.

Bill S-251

Bill S-251 would effectively nullify existing MMSs by granting sentencing judges broad and unfettered discretion to depart from any MMS. However, it offers no guidance to judges as to when it would be appropriate to make such a departure.

We anticipate problems with introducing confusing and potentially contradictory sections into the *Code*. All existing MMSs would remain explicitly in the *Code*, but would be rendered inoperative by virtue of a blanket clause found elsewhere in the Code. If the goal is to avoid all existing MMSs, this could be more efficiently and effectively legislated by instead excising them from the *Code*.

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2 We have made this point repeatedly in our submissions and resolutions. For example, see Bill C-10, *Safe Streets and Communities Act* (Ottawa: CBA, 2011).

3 [2016] 1 S.C.R. 631.

We are also concerned that this bill may go too far in that it would also apply to mandatory life sentences for murder. As noted above, the CBA Section considers that this particular MMS is appropriate.

In the first years of the 21st century, our fundamental opposition to MMSs seemed too often to fall on deaf ears. We explored an approach adopted with success in other common law jurisdictions (including the UK, South Africa and Australia).[4] In 2011, the CBA recommended adding a "safety valve" to section 718 of the *Code*. This would legislate an exception to imposing MMSs "where injustice could result by the imposition of a mandatory minimum sentence, in extraordinary circumstances".[5] While this may accept that MMSs would continue to be part of Canadian law, it would also be a tool to avoid their most egregious application.

While we appreciate and support Bill S-251's objectives, we are concerned with the Bill as written. In our view, simply excising most MMSs from the Code, and introducing a "safety valve" provision for any that remain would be the preferable approach.

Less Severe Punishment

Bill S-251 would also require a sentencing judge to conclude that there is no just and reasonable alternative to an MMS before imposing one. We see this as unnecessary.

The "principle of restraint" is already in section 718.2 (d) and (e) of the *Code* mandating that "an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances"[6] and "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders…".[7]

Another section requiring less severe options to be ruled out before a sentence is imposed would be redundant.

Written Reasons

Bill S-251 would require written reasons if an available MMS was imposed. We generally favour transparency in judicial decision-making, but this requirement would result in unnecessary inefficiencies to the system. Sentencing hearings are often short and uncomplicated, taking place in busy docket courtrooms where trial judges may pass sentence on dozens of offenders in a single day. Trial judges' ability to move expeditiously through a lengthy list of disposition matters is essential to the proper functioning of the system, particularly in large urban centres.

Judicial transparency in sentencing is already protected by section 762.2 of the *Code* which states, "When imposing a sentence, a court shall state the terms of the sentence, *the reasons for it*, and enter those terms and reasons into the record of proceedings". Sentencing judges are required to give reasons in every hearing they preside over. The decisions they make are based on reasons, whether delivered orally or in writing.

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4 The CBA Section commissioned research on this topic in 2013, which was then used to inform our work with the Uniform Law Conference of Canada and a resolution to CBA Council (see, Justice in Sentencing 11-09-A).

5 *Ibid*, Justice in Sentencing, CBA Resolution 11-09-A.

6 718.2(d).

7 718.2(e).

The process of composing, editing and reading written reasons could lengthen minor sentencing hearings, possibly causing busy docket courtrooms to grind to a halt. Judges' reasons delivered orally are not somehow less well considered than those offered in writing. Requiring written reasons would overburden an already overburdened system.[8]

Attorney General's Consent to Counselling or Treatment

The *Code* currently empowers a sentencing judge to order a person, after being found guilty and prior to sentencing, to attend a treatment or counselling program that the court considers appropriate in the circumstances, but only with the consent of the Attorney General. Bill S-251 would remove that requirement for consent.

We support this proposal. It would enhance judicial discretion, increase access to remedial programs that would further the vital goal of rehabilitating offenders, and ultimately grant the judge increased freedom and flexibility to craft a sentence responsive to the needs of the offender and society.

Conclusion

Bill S-251 attempts to increase judicial discretion in sentencing and remove the scourge of an unnecessary and harmful mandatory minimum sentencing regime, which has had a significant impact over the past two decades. While the CBA Section supports this goal, we have recommended a different approach to address the serious problems at issue.

Yours truly,

(original letter signed by Gaylene Schellenberg for Ian Carter)

Ian Carter
Chair, CBA Criminal Justice Section

8 Bill C-337 submission.