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## **Canadian Psychological Association Submission to the Senate Standing Senate Committee on Legal and Constitutional Affairs**

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**To:** Senate Standing Senate Committee on Legal and Constitutional Affairs

**From:** Canadian Psychological Association's Task Force on Correctional and Forensic Psychology

## **OVERVIEW**

With the introduction of Bill C-10, *The Safe Streets and Communities Act*, also known as the Omnibus Crime Bill, several changes to the *Criminal Code of Canada*, the *Youth Criminal Justice Act*, and *the Corrections and Conditional Release Act* are on the horizon. The proposed changes will impact the sentencing, management, release, and reintegration of youth and adult offenders in Canada.

These are changes that will affect both the treatment of offenders and public safety. A number of factors such as steadily falling crime rates, aging inmate populations, incidence and prevalence of mental health problems, and a need for and lack of intensive and specialized psychological services must be considered as these changes take place. Criminal behavior has a number of determinants and requires a coordinated response that balances, integrates, and promotes justice, victim's rights, rehabilitation, and offender accountability.

The Canadian Psychological Association (CPA) has convened a special task force of forensic and correctional psychologists charged with reviewing and summarizing research into the determinants of criminal behavior and "what works" in the treatment of offenders.

The summary presented in this paper focuses on key aspects of the legislation. These include;

- proposed amendments to the Criminal Code that introduce or increase mandatory minimum sentences, increase sentences lengths for some crimes, and add restrictions to conditional release,
- legislation about sexual offenders and sexual offenses involving children, and
- effective methods, or "what works", to reduce crime – as will be further detailed in this paper, the overwhelming consensus of the literature is that treatment works whereas incarceration does not.

Recommendations are made at the end of each section.

## **ABOUT**

The Canadian Psychological Association is the national association for the science, practice and education of psychology in Canada. With almost 7000 members (including more than 1800 student members), CPA is Canada's largest professional association for psychology.

## MANDATORY MINIMUM SENTENCES

To some, justice requires that punishment should fit the crime and that a given crime should always have the same given punishment, or at least the same given minimum punishment. Mandatory Minimum Sentences (MMS) make the determination of punishment uniform for any individual who commits that crime. The Omnibus Crime Bill seeks to attain justice and reduce crime by placing MMS on a number of offenses in the *Criminal Code of Canada*.

One major flaw in the prescription of equal punishment is that not every individual is alike and the context of every crime is not always the same or even similar. Moreover, incarceration alone does not reduce post-incarceration, criminal recidivism. Social science research conducted internationally on MMS has consistently demonstrated that MMS are ineffective, expensive and at times, unjust.<sup>1</sup>

- **MMS are expensive.** The provisions of MMS have resulted in the incarceration of many individuals who are not a threat to society, or who are considered at ‘low risk’ to reoffend.<sup>2</sup> Along with the cost of building prisons to house the increase of inmates expected with the adoption of MMS, there are significant costs at the front-end of the justice system (i.e., hiring police, lawyers, judges), that are often unaccounted.<sup>2,3</sup> This large investment in incarceration will likely have a small effect on public safety in comparison to alternative methods (e.g., treatment of the highest risk offenders) that are more likely to reduce crime.<sup>4</sup>
- **MMS do not reduce crime.** MMS are not effective in reducing crime. Incarceration, and longer periods of incarceration do not reduce reoffending.<sup>1,5,6</sup> Imprisonment is associated with a host of negative consequences, and can be particularly harsh on those people who are low-risk or who have mental disorders and can otherwise be effectively managed in the community.<sup>1,4,7</sup> Further MMS do not deter people from offending in the first place.<sup>1,8</sup> In other words, MMS and the threat of incarceration neither stop people from committing the crime nor from committing additional crimes.
- **MMS are unjust.** MMS have resulted in a breakdown of the criminal justice system. Currently, judges use discretion to impose community sanctions on many offenders who are deemed to be manageable in the community, in part by examining an individual’s criminal history (or lack thereof) and any factors that might mitigate the offense.<sup>9,10</sup> In jurisdictions with MMS there is evidence that the determination of justice is taken out of the hands of judges, who have been trained in the administration of justice. Instead, justice is weighted in the hands of police and lawyers who make the determination to arrest or prosecute crimes.<sup>9,10</sup> For example, prosecutors working under MMS laws in the US often did not file charges despite the presence of substantial evidence. Not filing became the only choice to acknowledge mitigating factors.”<sup>9,10</sup>

Internationally, MMS have been applied in an inconsistent manner that often disproportionately negatively impacts minority individuals and those with mental disorders.<sup>9</sup> This finding would suggest that MMS in Canada would likely result in systematic discrimination of certain groups already well over-represented in the criminal justice system in Canada (i.e., Aboriginal people and individuals with mental disorders).<sup>7,9,11</sup>

### ***Recommendations 1, 2, and 3***

The Canadian Psychological Association recommends

- 1) that the government allow for discretion in sentencing.<sup>1,9</sup> If MMS are incorporated into the Criminal Code, provisions for judicial discretion in sentencing are essential;
- 2) that the government invest in what we know works to reduce crime, specifically programs targeted at preventing crime (e.g., youth prevention programs such as the Fast Track intervention program for youth)<sup>1,12</sup> .
- 3) that the government invest in risk assessment and risk reduction programming. Valid and reliable tools are available to assess levels of risk as well as to assess the variables that impact risk management – both of which are critical to sentencing. Similarly, there are evidence-based risk reduction programs for offenders to prevent recidivism by targeting changeable risk factors. Considerable evidence on the effectiveness of these tools and programs, and many of the tools and programs themselves, were developed in Canada by Canadian researchers, and have been implemented throughout the world.<sup>4,8</sup>

### **SEXUAL OFFENSES INVOLVING CHILDREN**

Bill C-54 (Protecting Children from Sexual Predators Act) was introduced and received first reading in the House of Commons on 4 November 2010. The Act proposes amendments to the Criminal Code of Canada to create two new offenses (making sexually explicit material of a child and agreeing or arranging to commit a sexual offense against a child); expands the list of specified conditions that may be added to prohibition and recognizance orders and the offenses that can lead to such orders; and increases or imposes mandatory minimum penalties for certain sexual offenses involving children.

- The term “sexual predators” may be misleading to many people because it suggests strangers who plan and commit predatory offenses against children. The tragic reality is that the large majority of children are victimized by adults they know, in many cases family members. Some offenses are clearly planned, but others are impulsive and opportunistic.<sup>13</sup>

- Cases involving the internet or related communication technologies have been increasing in number and laws and policies need to address the impact of these technologies.<sup>14</sup> Laws need to be specific and clear if prohibiting an offender's use of these technologies because they have become a mainstay of everyday life in Canada. For example, a general condition prohibiting unsupervised access to any digital network could drastically affect an individual's ability to function in modern society, as digital networks can include mobile telephones, office telephones based on VoIP protocols, networked ATMs, etc. Inhibiting a person's access to technology may restrict or eliminate educational and employment opportunities that can mitigate risk to reoffend.
- Research from the United States suggests that sex offender registries do not have an impact on recidivism rates.<sup>15</sup> Comparable research in Canada has not yet been conducted and disseminated, but it is unlikely that registries can have a large impact on public safety because the majority of offenses against children, as noted above, are committed by someone already known to that child. Registries can be helpful to law enforcement in the specific situation when they are investigating cases involving an unknown perpetrator.
- Offenders who possess child pornography but have no prior criminal history appear to be relatively unlikely to commit another sexual offense, particularly an offense involving sexual contact with a child.<sup>16, 17</sup> In other words, first-time possession-only child pornography offenders pose a much lower risk than do similar offenders who have committed sexual or other offenses in the past.
- There is some initial evidence to suggest that luring offenders can be differentiated into those whose sexual interactions are restricted to online activity (sexual chat, exchange of pornography) and those whose interactions are aimed at meeting a minor in real life, where a contact sexual offense could then take place.<sup>18</sup> These so-called fantasy versus contact-driven offenders may differ in their risk to reoffend, rehabilitation needs and community release plans.
- There is a logical gap in the specified ages of different laws.<sup>19</sup> The age of consent for sexual activity is currently 16 in Canada, yet the child pornography law specifies that content depicting someone under the age of 18 is illegal. Thus, an adult could legally have a sexual relationship with a person aged 16 or 17, yet would be in violation of the law for privately possessing a sexually explicit image of someone of that age.
- For adolescents, there is a need for a legal distinction between poor judgment and criminal intent when it comes to sexually explicit images, consistent with the principles underlying the Youth Criminal Justice Act. An adult male with a sexually explicit picture of a 14 year old girl ought to be dealt with differently than a 15 year old boy who possesses a sexually explicit picture of his 14 year old girlfriend.

### ***Recommendations 4, 5 and 6***

The Canadian Psychological Association recommends

- 4) that sentences and other conditions target factors associated with risk and risk management and reduction, rather than non-risk related factors that may inhibit pro-social community functioning.
- 5) that sentences involving the internet, or related communication technologies, take risk to reoffend into account in order to more efficiently and effectively use existing services and resources while maintaining public safety.
- 6) that the law clarify the age of consent gap, as it does with the age of consent for sexual activity, prohibiting sexual contacts between adults and minors under the age of 16 and not criminalizing sexual activity between adolescents differing in age.

### **TREATMENT VERSUS INCARCERATION**

Most Canadians want Canada to be a safer place. Bill C-10 seeks to minimize crime by putting more people in jail for longer periods of time. Psychology researchers have identified effective methods, or “what works”, to reduce crime – the overwhelming consensus of the literature is that treatment works, incarceration does not.<sup>1</sup>

This research has primarily been conducted by Canadian scholars, with Canadian offenders, and has been successfully adopted by correctional systems in many countries throughout the world.<sup>10</sup> From this research we know that effective methods to reduce crime address risk level, changeable risk factors for crime (criminogenic needs), and responsiveness of offenders to risk reduction strategies, widely known as the Risk-Needs-Responsivity (RNR) Model.<sup>20</sup> Risk reduction programs, informed by psychological science generally, and RNR specifically, have been shown to reduce recidivism by 30-40%.<sup>20</sup>

#### **Risk**

- Low risk offenders do not need high intensity supervision or monitoring—particularly incarceration.<sup>1,5,10</sup>
- Efforts to reduce crime are most effective when risk reduction programs target moderate and high risk offenders, as opposed to low risk offenders.<sup>21</sup>
- Several meta-analyses and reviews have indicated that incarceration alone does not reduce crime, either as a general deterrent to commit crime or to prevent reoffending.<sup>1,5,6,8</sup> Degree or intensity of sanctions should correspond to risk levels of offenders.

## **Need**

- Psychology and other social sciences have identified a set of risk factors for crime.<sup>21,22</sup>
- When risk factors are addressed by crime reduction programming the risk for crime and violence significantly decreases.<sup>22</sup> That is, programs that target changeable risk factors (e.g., antisocial attitudes or peers) are the most effective in reducing crime.<sup>5,8</sup> At least two dozen studies show that the more a program targets changeable risk factors, the greater reduction we see in future crime and violence.<sup>5</sup>

## **Responsivity**

- Risk reduction efforts are most successful when they are human service-oriented programs that employ cognitive-behavioural techniques and consider the personal circumstances and characteristics of individual offenders who are in treatment.<sup>1,5</sup>
- Human service-oriented programs depend on the stewardship of specialized mental health care providers who have the knowledge and skill to assess, diagnose and respond to the diverse mental and behavioural health needs and conditions of offenders.
- Imprisonment alone, without human service intervention, at best does not affect the rate of reoffending and at worst *increases* recidivism.<sup>5,21,6</sup>

## ***Recommendation 7***

The Canadian Psychological Association recommends

- 7) that programs and other correctional interventions should concentrate on moderate and high risk offenders, target changeable risk factors for crime, and incorporate proven, human services (e.g. cognitive-behaviourally based treatments and interventions) as part of offender rehabilitation.

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