



## **Criminal Justice Reform and Restorative Justice**

Brief of the Association for Reformed Political Action (ARPA) Canada

to

The Standing Committee on Justice and Human Rights

regarding

*Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*

April 7, 2022

ARPA Canada appreciates the opportunity to submit a brief regarding Bill C-5: *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*. Recidivism rates are high in Canada, and crime rates concern many Canadians. As a result, there is a need for improvements within the justice system to address these realities. The use of restorative justice principles in criminal justice reform is important, and Bill C-5 attempts to apply some of those principles. At the same time, incarceration remains a just and necessary punishment for certain types of criminal offences, and to ensure the protection of the innocent. In this brief, we commend aspects of Bill C-5, as well as pointing out concerns and suggesting ways in which this legislation can be improved.

### **Principles of Restorative Justice**

ARPA Canada supports the use of restorative justice principles in Canada's justice system. Applied correctly, restorative justice helps lower the likelihood of recidivism and supports victims and communities that are dealing with crime. Charles Colson, the founder of Prison Fellowship Ministries provides a helpful definition of justice, stating that "A system of true justice...holds individuals responsible for their actions...under an objective rule of law, but always in the context of community and always with the chance of transformation of the individual and healing of fractured relationships and the moral order."<sup>1</sup> As this definition suggests, justice should include the recognition of personal responsibility for crime, as well as the importance of community and efforts to restore what has been broken by crime within a community.

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<sup>1</sup> Charles Colson, *Justice That Restores*, (Wheaton, Illinois: Tyndale House Publishers, Inc, 2001), 101.

We must not treat criminal justice like a science where there is an exact punishment to apply for anyone who commits a specific crime, no matter the circumstances and situation, or where there is no possibility of transformation for the offender. On the other hand, we cannot view crime as merely the direct result of circumstances or someone's social environment, as this approach denies personal responsibility and human agency and makes crime excusable.<sup>2</sup> Our justice system must view crime in the context of relationships. Criminal activity is harmful to a victim or victims, and we should seek to restore what has been lost, punish the offender for wrongdoing, and deter further harm in the community. By amending certain sentencing requirements, Bill C-5 addresses some principles of restorative justice which recognize the need for restored relationships and for reparations to be made.

An important component of restorative justice is restoring the relationship between the offender, the victim, and the community. This can be achieved through alternatives to incarceration by which an offender can pay back their debt to the community, including conditional sentencing, community service, referral to a rehabilitation program, or restitution.<sup>3</sup> Restitution, as an example, is an approach that has its roots in the Bible. If a thief stole an animal, he would have to return the animal and pay the victim double for what he had taken. The penalty was compounded if the thief sold or slaughtered the stolen animal, causing even further harm.<sup>4</sup> Often, principles of restitution can be used for crimes where property has been taken, destroyed, or damaged by the commission of a crime. Offenders are often unaware of the harm they have caused until they must work to pay it off. Restitution causes the offender to understand their responsibility in what they have done, and to take responsibility in making amends.<sup>5</sup>

Restorative justice also seeks to facilitate meaningful conversations between the offender and the victim so that victims can explain the impact of the crime, and offenders can take responsibility for what they have done. Based on the situation, this approach can help determine a way that the offender can seek to repair the damage that has been done. It can also help with a decision about the penalty which would be most appropriate given the nature of the crime.<sup>6</sup> This method is evidenced in the use of Sentencing Circles in Indigenous communities, where the community, victim, and offender participate in the sentencing process, determining what is best for everyone involved, and can also be applied to other situations more broadly.<sup>7</sup>

ARPA Canada believes that applying these principles in appropriate circumstances (specifically for non-violent crimes) will help reduce recidivism and assist victims and communities who seek to deal with the harm of an offence. Incarceration has not been proven to have a rehabilitative effect on offenders. Repeat offenders have not been deterred by their punishment and many

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<sup>2</sup> Ibid., 51-54.

<sup>3</sup> Manson, Allan, Patrick Healy, Julian V. Roberts, Gary T. Trotter, and Dale Ives. *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary*. (Toronto, ON: Emond Montgomery Publications Limited, 2016), 810.

<sup>4</sup> Exodus 22.

<sup>5</sup> Manson et al., *Sentencing and Penal Policy in Canada*, 422. See also *Criminal Code*, ss. 737.1 to 741.2.

<sup>6</sup> Ibid., 501.

<sup>7</sup> Ibid., 809-840.

have lost their fear of going to jail. Often, prisons can be a place where offenders conspire with others, and further crimes are committed.<sup>8</sup> Through alternative sentences, anti-social associations can be prevented and good behaviour can continue to be promoted, through attendance at work or continued education.<sup>9</sup> As discussed below, Bill C-5 applies the need for alternative sentences and expanded conditional sentencing instead of incarceration in certain circumstances. Ultimately, the goal of justice is to enact punishment and restoration to work towards peace and harmony within communities.<sup>10</sup>

## Bill C-5 and Restorative Justice

The removal of multiple mandatory minimum penalties in Bill C-5 appears to be an application of restorative justice principles in the area of sentencing. Mandatory minimum penalties can result in people being incarcerated for petty drug or theft offenses when those offenders could be dealt with more appropriately through an alternative sentence.<sup>11</sup> Convictions for petty crimes tend to fill our prisons with many people who are not dangerous and do not need to be separated from their community through incarceration.<sup>12</sup> The question is what an appropriate penalty for a specific crime would be, and this is determined by legislative and judicial authorities.<sup>13</sup> Bill C-5 recognizes this fact, and gives judges greater discretion to promote alternatives to imprisonment when sentencing an offender for specific offences, dependent on individual circumstances.

Bill C-5 also looks at the value of conditional sentencing in certain situations to provide an alternative sentence to imprisonment. As the Supreme Court of Canada has noted, “a conditional sentence is generally better suited to achieving the restorative objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender” than incarceration.<sup>14</sup> It may help keep families together, while continuing to recognize the importance of offenders taking personal responsibility for their actions, as well as the value of punitive action. Alternative sentences for minor crimes can be effective in reducing crime rates by helping offenders change their behaviour outside of the prison system. They can also prevent criminals from being affected by negative influences in prison.

In addition, the increased sentencing options this bill would create may provide more opportunity for private, non-profit, and other civil society organizations who seek to transform and rehabilitate offenders because of its approach to fewer prison sentences. Faith based organizations, for example, can have positive effects on offenders by promoting prosocial behaviour. This can help limit criminal behaviour, and “can also protect one from the effects of

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<sup>8</sup> Joseph Boot, *The Mission of God: A Manifesto of Hope for Society*. (London, England. Wilberforce Publications Limited, 2016), 345.

<sup>9</sup> See the Supreme Court of Canada’s landmark decision on conditional sentencing in *R. v. Proulx*, 2000 SCC 5, at para. 111.

<sup>10</sup> Colson, *Justice That Restores*, 115.

<sup>11</sup> *Ibid.*, 82.

<sup>12</sup> *Ibid.*, 128.

<sup>13</sup> Gerard V. Bradley, “Retribution: The Central Aim of Punishment,” 22.

<sup>14</sup> *R. v. Proulx*, *supra* note 9, at para. 109.

living in disadvantaged communities.”<sup>15</sup> Although the Bill does not give reference to community organizations, this can be applied by judges who hand down a community sentence. As non-government organizations become more involved in the justice system, it can help reduce the strain on the system, giving law enforcement the opportunity to put greater focus on other criminal and public safety concerns. To provide further clarity on this restorative aspect, the Bill should include reference to consideration of community and faith-based organizations involved in the sentencing process.

### Limits to Restorative Justice

Although restorative justice principles are appropriate for many crimes, its relation to retributive justice must also be noted. A punishment which is proportional to the crime committed remains an important part of sentencing. Retribution is not about revenge or anger, but about making a reasonable decision about which punishment will fit a specific crime.<sup>16</sup> Retribution ensures that the one who is guilty is punished and their debt to society is repaid, and that the innocent are protected. This causes a restoration in the societal balance which has been disrupted by crime.<sup>17</sup> Punishment points to the wrongdoing of the offender, deters criminality, and helps reconcile the offender and bring healing to the moral order broken by crime. At the same time, it provides appropriate recompense to the victim.<sup>18</sup>

The justice system cannot seek only to cure an offender; there must still be an application of ‘just deserts’ as well; the punishment should be appropriate for the crime committed. The concept of ‘desert’ recognizes that humans are moral actors and choose to either do right or wrong.<sup>19</sup> An offender’s environment or circumstances can have an effect on their actions, but ultimately they make a moral choice whether to commit a crime or not.<sup>20</sup>

There are also limitations to the extent that restorative justice principles can be applied when punishing an offender. Incarceration is important for incapacitating certain types of offenders, especially those that may endanger the safety of the community.<sup>21</sup> Due to the nature of violent crimes, there has been increasing focus placed on applying selective incapacitation so that those who have a high rate of committing violent crimes are still imprisoned.<sup>22</sup> Although prisons may not have a rehabilitative effect, they are necessary to incapacitate dangerous offenders and protect the public from them. Incarceration efforts should target offenders who pose a danger to those around them.<sup>23</sup>

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<sup>15</sup> Byron R. Johnson, “How Religious Freedom Contributes to Positive Criminology and Justice Reform,” (Religious Freedom Institute, No.288, December 2020), 1.

<sup>16</sup> Gerard V. Bradley, “Retribution: The Central Aim of Punishment,” (*Harvard Journal of Law & Public Policy*, 2003), 22.

<sup>17</sup> *Ibid.*, 31.

<sup>18</sup> Joseph Boot, *The Mission of God*, 319.

<sup>19</sup> C.S. Lewis, “[The Humanitarian Theory of Punishment.](#)” (*Res Judicatae*), 225.

<sup>20</sup> Joseph Boot, *The Mission of God*, 346.

<sup>21</sup> *R. v. Proulx*, at paras. 74-75.

<sup>22</sup> Manson et al., *Sentencing and Penal Policy in Canada*, 9.

<sup>23</sup> Charles Colson, *Justice That Restores*, 130.

## Concerns about Bill C-5

Although Bill C-5 applies some important principles of restorative justice, ARPA Canada also has some concerns about the extent to which that is applied. Discharging a firearm with intent is more concerning than drug possession, but both would have mandatory minimum penalties removed. Likewise, although sentences for theft over \$5000 might be served well in the community through conditional sentences including house arrest and/or restitution, kidnapping or sexual assault sentences (crimes which would directly harm another person) may be better served in prison to prevent further harm to individuals and the community. Although the principle is a step in the right direction for non-violent crimes which can be effectively addressed outside of the prison system, there should be further discussion on which crimes should and should not require mandatory minimum penalties.

The incapacitative effect of punishment is not the same for all crimes. The effect of incarceration is much stronger when dealing with violent crimes. Violent crimes are much more easily reduced by means of incarceration than non-violent crimes.<sup>24</sup> We must continue to ensure that crime is punished appropriately, and that communities and individuals are protected from it as much as possible. Some of the *Criminal Code* offences listed in Bill C-5 should maintain mandatory minimum penalties. Specific recommendations can be found in the appendix.

Additionally, conditional sentencing should only be expanded for offences that do not cause violent harm to others. The Supreme Court of Canada in *R. v. Proulx* notes that, “the conditional sentence is a meaningful alternative to incarceration for *less serious and non-dangerous offenders*” (emphasis added).<sup>25</sup> A major component of this is to analyze the gravity to the community if the offender were to re-offend during a conditional sentence.<sup>26</sup> However, some of the offenses which Bill C-5 would allow conditional sentences for are crimes which cause direct harm to another person. At the very least, Bill C-5 should require the Department of Justice to track examples of alternative sentences for the crimes affected, and to examine the effects of the legislation on recidivism rates.

Finally, Bill C-5 currently states that “problematic substance use should be addressed as a health and social issue” and that “criminal sanctions ... can increase the stigma associated with drug use and are not consistent with established public health evidence.” While health and social concerns are often involved in drug use and abuse, the federal government should still recognize illegal drug use as a criminal issue, rather than an issue that simply needs to be “destigmatized.” We should have compassion and understanding for those dealing with addiction, but the moral choices of individuals cannot be ignored. Our justice system must continue to understand that criminal behaviour is a harmful choice by moral actors; one that is also a public health and safety issue for others, particularly for vulnerable dependents. In the use of restorative justice principles, the government must ensure the idea of personal responsibility for harmful choices is not removed. Someone who commits a drug-related crime

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<sup>24</sup> Manson et al., *Sentencing and Penal Policy in Canada*, 9.

<sup>25</sup> *R. v. Proulx*, at para. 21.

<sup>26</sup> *R.v. Proulx*, at para. 69.

needs help, but the justice system should also endeavor to ensure that the crime is not repeated and that the crime is punished in an appropriate way.

## Conclusion

In summary, ARPA Canada recognizes the need for increased use of restorative justice principles in Canada's justice system. However, this cannot come at the expense of the focused need for incarceration or the importance of offenders taking personal responsibility for their actions. While there are components of Bill C-5 that we believe will improve sentencing in Canada, we also have concerns about various aspects.

A list of ARPA Canada's proposed amendments to Bill C-5 can be found in the attached Appendix.

On behalf of ARPA Canada,



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André Schutten, Hon.B.A., LL.B., LL.M  
Director of Law & Public Policy  
613-297-5172 | [Andre@ARPACanada.ca](mailto:Andre@ARPACanada.ca)



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Daniel Zekveld, Hon.B.A., M.P.A. (2023)  
Policy Analyst  
647-909-5177 | [Daniel@ARPACanada.ca](mailto:Daniel@ARPACanada.ca)

*The mission of ARPA Canada is to educate, equip, and encourage Christians to be politically engaged and to bring a biblical perspective to Canada's civil governments. As part of its mission, ARPA Canada works to promote awareness and engagement within communities across Canada on issues like compassionate care for our senior citizens. ARPA Canada intervenes in important court cases to help develop the law around human rights and fundamental freedoms, and makes regular presentations to, and prepares written submissions and briefs for, all levels of government on a broad spectrum of different issues.*

## Appendix I: Bill C-5 Amendments

Amendments in Bill C-5:	Specific Wording	ARPA Canada Recommended Changes
<p><i>Criminal Code</i>, paragraph 244(2)(b)</p>	<p>(b) in any other case, to imprisonment for a term of not <u>more than</u> 14 years.</p> <p><b>Rather than:</b></p> <p><b>(2)</b> Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable [...]</p> <p><b>(b)</b> in any other case, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years.</p>	<p>Amendment should be deleted, and mandatory minimum penalties maintained.</p> <p>In the alternative, reduce the mandatory minimum to a term of two years.</p>
<p><i>Criminal Code</i>, Paragraph 344(1)(a.1) is repealed</p>	<p><b>Currently states:</b></p> <p><b>344 (1)</b> Every person who commits robbery is guilty of an indictable offence and liable [...]</p> <p><b>(a.1)</b> in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;</p>	<p>Amendment should be deleted, and mandatory minimum penalties maintained.</p> <p>In the alternative, reduce the mandatory minimum to a term of two years.</p>
<p><i>Criminal Code</i>, Paragraph 742.1(c)</p>	<p>(c) the offence is not an offence <u>under any of the following provisions:</u></p> <p>(i) section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),</p> <p>(ii) section 269.1 (torture), or</p> <p>(iii) section 318 (advocating genocide);</p> <p><b>Rather than:</b></p> <p><b>742.1</b> If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if [...]</p> <p><b>(c)</b> the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;</p>	<p>Amendment should include further provisions of offences under the <i>Criminal Code</i> which cannot be served in the community.</p> <p>These further provisions should include child pornography-related offenses, sexual assault offenses, and human trafficking offenses for which the maximum term of imprisonment is 14 years or life.</p>

<p><i>Criminal Code,</i> Paragraph 742.1(e) and (f) are repealed</p>	<p><b>Currently States:</b>  <b>(e)</b> the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that  <b>(i)</b> resulted in bodily harm,  <b>(ii)</b> involved the import, export, trafficking or production of drugs, or  <b>(iii)</b> involved the use of a weapon; and  <b>(f)</b> the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:  <b>(i)</b> section 144 (prison breach),  <b>(ii)</b> section 264 (criminal harassment),  <b>(iii)</b> section 271 (sexual assault),  <b>(iv)</b> section 279 (kidnapping),  <b>(v)</b> section 279.02 (trafficking in persons — material benefit),  <b>(vi)</b> section 281 (abduction of person under fourteen),  <b>(vii)</b> section 333.1 (motor vehicle theft),  <b>(viii)</b> paragraph 334(a) (theft over \$5000),  <b>(ix)</b> paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),  <b>(x)</b> section 349 (being unlawfully in a dwelling-house), and  <b>(xi)</b> section 435 (arson for fraudulent purpose).</p>	<p>Maintain subsection (e)(i) and subsections (f)(ii) – (vi), (x) – (xi)</p>
<p><i>Controlled Drugs and Substances Act,</i> Subsection 7(3) is repealed</p>	<p><b>Currently States:</b>  <b>(3)</b> The following factors must be taken into account in applying paragraphs (2)(a) and (a.1):</p> <ul style="list-style-type: none"> <li>• <b>(a)</b> the person used real property that belongs to a third party in committing the offence;</li> <li>• <b>(b)</b> the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area;</li> <li>• <b>(c)</b> the production constituted a potential public safety hazard in a residential area; or</li> <li>• <b>(d)</b> the person set or placed a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.</li> </ul>	<p>Subsection 7(3) should be maintained. These factors help indicate the severity of the offence.</p>



<p><i>Controlled Drugs and Substances Act</i>, addition after section 10</p>	<p>Declaration of principles  10.1 The following principles apply in this Part:  (a) problematic substance use should be addressed primarily as a health and social issue;  (b) interventions should be founded on evidence-based best practices and should aim to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities;  (c) criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not consistent with established public health evidence;  (d) interventions should address the root causes of problematic substance use, including by encouraging measures such as education, treatment, aftercare, rehabilitation and social reintegration; and  (e) judicial resources are more appropriately used in relation to offences that pose a risk to public safety.</p>	<p>Amend section 10.1(a) to state: “problematic substance use should be addressed both as a health and social issue and as a public health and safety issue, particularly for vulnerable dependents.”</p> <p>Remove section 10.1(c)</p> <p>Amend section 10.1(e) to state: “judicial resources are appropriately used in relation to all offences that pose a risk to public safety.”</p>
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**Other Recommended Amendments:**

- Include a clause in Bill C-5 stating that the Department of Justice must track the use of alternative sentences for the crimes affected by the bill, and examine the effects of the legislation on recidivism rates for drug and firearm offences.
- Include reference to the importance of considering community and faith-based organizations who are involved in the sentencing process and are or will be working with the offender.