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UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON STATUTORY EXEMPTION TO MANDATORY
MINIMUM PENALTIES OF IMPRISONMENT**

STATUS REPORT

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1. Context of the Resolution

[1] At the 2023 Uniform Law Conference of Canada (ULCC), the Criminal Section adopted the following resolution at the request of Québec (QC2023-03):

We recommend the creation of a working group, chaired by a representative from Québec, with the mandate to update, in light of the coming into force of Bill C-5 (*An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, c. 15, 2022) and the various decisions that found mandatory minimum penalties unconstitutional for sexual offences committed against a person under 16 years of age, the 2013 final report “Statutory Exemptions to Mandatory Minimum Penalties”. The working group can also opine on whether or not the mechanism discussed in paragraph 36 of the *Lloyd* decision should be implemented in the *Criminal Code* and if so, what should be the parameters of such a mechanism in Canada.

[2] This resolution reflects the need to update the recommendations and conclusions arising from the 2013 ULCC report regarding the possibility of incorporating an exemption provision into the *Criminal Code*, taking into consideration the substantive legislative and jurisprudential developments over the past few years. With regard to legislative changes since 2013, it is worth noting that several mandatory minimum penalties of imprisonment (MMPIs) for sexual offences have been increased.¹ More recently, Bill C-5 repealed all MMPIs in the *Controlled Drugs and Substances Act* as well as a number of MMPIs in the *Criminal Code*, most of which related to firearm offences.² These reforms also repealed a number of ineligibility criteria to the availability of conditional sentences, increasing their use for a greater number of offences, including some of a sexual nature against children where the MMPI has been declared of no force and effect.³

[3] Since the publication of the first report, the Supreme Court of Canada (SCC) has also rendered landmark decisions in 2015 (*R. v. Nur*⁴) and 2016 (*R. v. Lloyd*⁵), which clarified the existing constitutional framework to assess *Charter*-compliance of MMPIs by redefining the application of “reasonably foreseeable circumstances.” These cases served as an impetus for a new wave of constitutional challenges, particularly in relation to the MMPIs that have been added and increased over the past few years. More recently,

¹ *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23. These minimum sentences were increased following the large-scale introduction of minimum sentences for sexual offences in 2005 and 2012: *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32; *Safe Streets and Communities Act*, S.C. 2012, c. 1.

² *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15.

³ As an example, luring could theoretically give rise to a conditional sentence, since the MMPIs of 6 months and 1 year have been declared unconstitutional in *R. v. Bertrand Marchand*, 2023 SCC 26.

⁴ *R. v. Nur*, 2015 SCC 15.

⁵ *R. v. Lloyd*, 2016 SCC 13.

in *R. v. Bertrand Marchand*, the SCC commented on the constitutional vulnerability of MMPIs and reiterated what was raised by Chief Justice McLachlin (as she then was) in *Lloyd* regarding the possibility for Parliament to build in a “safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment.”⁶

[4] Finally, the resolution reflects the need to find practical solutions to the growing concern about the effective administration of justice, in line with the lessons learned from *R. v. Jordan*.⁷ Indeed, the rising number of motions challenging MMPIs require considerable court time, as well as significant resources and may contribute to backlog and delay. In addition, where an accused is facing a MMPI, there may be less incentive to resolve a matter with a guilty plea.

[5] The Working Group on Statutory Exemption to Mandatory Minimum Penalties of Imprisonment (the working group) met virtually 10 times between January and August 2024. It is chaired by Lina Thériault (Directeur des poursuites criminelles et pénales, Québec).⁸ Members of the working group also include Leah Burt (Justice Canada), Emma Evans (Ministry of the Attorney General, Ontario), Sylvain Leboeuf (Ministère de la Justice, Québec), Dayna Queau-Guzzi (Manitoba Prosecution Service), Sheldon Steeves (Public Prosecutions, Department of Justice and Public Safety, Newfoundland and Labrador), and Matthias Villette (Justice Canada).

[6] At ULCC 2024, the working group called for greater representation of defense lawyers. Morgane Laloum (PRPL Law) joined the working group in the fall of that year. However, in the absence of Lina Thériault and following the assignment of her replacement, Anthony Cotnoir, to other mandates, the group has not met since.

2. Work Completed to Date

[7] In light of the developments previously described, the working group focused on assessing whether an exemption provision could be an appropriate measure for Parliament to consider when reconciling different sentencing objectives. The group also examined the question of whether this mechanism could function effectively within the existing constitutional and statutory sentencing framework in Canada and, if implemented, what the exemption scheme could consist of. Finally, the group sought to highlight factors that Parliament may wish to contemplate if considering an exemption mechanism. The discussions to comprehensively update the 2013 report were informed by the following five key issues:

- 1) What are the main legal issues that arise in the consideration of an exemption provision?

⁶ *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 108.

⁷ *R. v. Jordan*, 2016 SCC 27.

⁸ **However, a replacement will have to be found, as she will be on sabbatical for 2024-2025.**

- 2) What should be the key element(s) of an exemption provision?
- 3) Should some MMPIs be excluded from the proposed exemption?
- 4) What are potential issues arising from the inclusion of an exemption mechanism in the *Criminal Code*?
- 5) If the policy choice was made to enact a general exemption provision, which formulation of such a provision would the working group recommend?

[8] To date, there appears to be general agreement in the working group that, should Parliament choose to allow courts to depart from MMPIs, a properly structured exemption mechanism such as the ones found in other jurisdictions⁹ could be crafted to allow for the imposition of MMPIs for several categories of offenders, while ensuring consistency with Canadian legal principles.

[9] Much of the discussions revolved around examining potential triggering thresholds for an exemption mechanism. Of all the thresholds considered, the one identified in the ULCC 2013 report (“exceptional circumstances”) still seems to be the most appropriate approach, as it highlights the truly exceptional nature of the exemption. Also, as concluded in the 2013 report, this threshold would seem to preserve the more traditional role of sentencing and appellate courts, while retaining the conceptually separate notion of a constitutional remedy available to strike down the provision in all cases.

[10] The working group also focused on determining whether it was necessary to outline factors to provide guidance to sentencing courts in applying the proposed exemption mechanism. As of today, the working group is of the view that delineating a non-exhaustive list of clearly defined factors could ensure that a uniform approach would be taken regarding the use of exemption provisions, thereby preserving their exceptional nature.

3. Work to be Completed in 2025-2026

[11] Although the discussions and update of the 2013 report are well advanced, the working group believes it is necessary to solicit input from defence counsel to reflect an alternative perspective from that of prosecutors and government lawyers. Indeed, it is

⁹ The working group significantly benefited from a 2016 update to the report “Exemptions from Mandatory Minimum Penalties” prepared by Professor Yvon Dandurand. This report surveyed the structure and operation of statutory exemptions to MMPIs in five other common law jurisdictions: the United States, England and Wales, South Africa, Australia, and New Zealand.

imperative to take into consideration the point of view of offenders who will be most affected by the implementation of an exemption mechanism.

[12] Over the coming year, the working group will pay particular attention to the following issues, which merit further discussion:

- 1) *Further consideration is required in delineating the nature and extent of the potential exemption mechanism.* For example, should an exemption mechanism allow courts to impose any sanction that is otherwise available, including in some cases discharges, or should it be restricted to certain types of sentences and for certain types of offences?
- 2) *Monitor the evolution of sentencing post-Bill C-5 in cases where a MMPI is declared unconstitutional.* This will assist in understanding whether an exemption mechanism would result in overall lower sentencing ranges, including through a greater use of conditional sentence orders.
- 3) *Explore the practical ramifications of an exemption mechanism.* For example, the working group has begun to consider the interplay of an exemption mechanism and section 12 of the *Charter*. This and other potential ramifications of an exemption mechanism merit further discussion.