

Bill C-20 – An act to amend the *Criminal Code* (Protection of children and other vulnerable persons) and the *Canada Evidence Act*

The Canadian Resource Centre for Victims of Crime is a national, non-profit advocacy group for victims of crime. We provide direct assistance to crime victims dealing with the criminal justice system as well as advocate for justice reform to better protect their rights and prevent victimization.

The CRCVC is pleased to take part in the debate over Bill C-20. There are several provisions of the bill that we support and we believe the bill can be enhanced in other areas so it better meets the goals set out in the Preamble.

Child pornography

The Robin Sharpe case focused the public's attention on the issue of child pornography like no other case before it. Bill C-20 attempts to respond to two court decisions with respect to the case.

The Supreme Court of Canada upheld the child pornography provisions of the *Criminal Code* but created two exemptions: written material or visual representations created by the accused alone and held by the accused for his exclusive use; and any visual recording created by the accused that does not depict unlawful sexual activity¹, and is held by the accused for his exclusive use. The court also found "artistic merit" should be interpreted liberally.

Bill C-20 seeks to eliminate the existing defences for child pornography² and replace it with one single defence of "public good." Many have asked what possible public good could be found in child pornography. In a letter to the CRCVC dated March 6, 2003, the Honourable Martin Cauchon, Minister of Justice, stated,

"the existence of the public good defence pre-dates the Criminal Code, and it has been the subject of legal interpretation. For example, the Supreme Court of Canada has interpreted the public good as including matters necessary or advantageous to the administration of justice, such as the possession of child pornographic material by police or Crown prosecutors for purposes associated with investigation and prosecution. In this instance, the public good is clearly served by enabling our police and prosecutors to possess child pornography for the purposes of investigating and prosecuting child pornography offences."

Bill C-20 would therefore require courts to apply a 2-step test: (i) does the material or act serve the public good, and if so, (ii) does it go beyond what serves the public good. The artistic merit defence, on the other hand, had one test – did it have artistic merit.

If we could be assured the amendments in Bill C-20 would be interpreted as narrowly as the Minister suggests, the public's expectations may be satisfied. The question remains, though, how will the courts interpret these changes? We are concerned because ultimately, the same court that said artistic merit should be interpreted liberally will decide what public good is.

¹ This could currently include sexual relations between a 14 year old and a 45 year old.

² Artistic merit or an educational or scientific purpose.

It may be necessary for the federal government to amend the Preamble to emphasize the government's intentions with these changes.

Bill C-20 also expands the existing definition of written child pornography to include material that is created for a sexual purpose and predominantly describes prohibited sexual activity with children. This is significant because the current definition only applies to material that advocates or counsels prohibited sexual activity with children, which was very narrow and difficult to prove. The BC Supreme Court found that Sharpe's writings did not advocate or counsel illegal sexual activity, and if they had, the artistic merit defence would have succeeded.³

The CRCVC recommends the child pornography provisions, as amended by Bill C-20, be reviewed by the Commons Justice Committee in 3-5 years.

Age of Consent

The CRCVC, among other groups, has called for the age of consent to be raised to 16. We are disappointed that the government failed to make this change in Bill C-20 and are concerned with the complex approach the government has taken.

Despite a 2001 resolution of provincial Ministers of Justice to raise the age of consent, the federal government says it cannot get consensus from the provinces to amend the age of consent. Media reports a small minority of provinces object to the change, due to concerns about criminalizing sexual activity between two young people.

We understand these concerns but believe they can be dealt with. Currently, section 150.1 allows for young people close in age to have sexual relations, even if one is under 14 (i.e. a 12 year and a 14 year old). There is no reason why these protections cannot be expanded if the general age of consent is raised to 16. The focus is not on young people, but on the motives of adults who seek out young people for sexual purposes.

Currently, there is an inconsistent application of Canadian consent laws. It is illegal, for example, to have sex with a sex trade worker under the age of 18. It is illegal to lure a young person under the age of 18 via the Internet for the purposes of having sexual relations.⁴ Yet it may not be illegal for either of the men in these scenarios to have sex with a 14 year old as long as he did not purchase sex or meet the victim online. The inconsistency of Canada's age of consent laws was raised as a concern in the *Sharpe* case.

Bill C-20 creates a new category of sexual exploitation, which would require courts to determine whether a relationship is "exploitative of the young person." Section 153 is amended to include a person "in a relationship with a young person that is exploitive of the young person." Currently, this section applies only to a person in a position of trust or authority toward the young person or with whom the young person is in a relationship of dependency. Section 153(1.2) requires the court to consider the age difference, the evolution of the relationship and the degree of control or influence exercised over the young person.

³ Sharpe was convicted in relation to photos he had in his possession.

⁴ Not to mention those under 18 who break the law have an entirely different justice system.

The CRCVC believes that this section is unnecessarily complex and does not offer young people the protection they deserve. We also are concerned about the burden of proof Crown counsel may have to meet and whether this is realistic.

In all but two US states, the age of consent is 16, as it is in England and Australia. We know of no problems where people close in age are being thrown in jail.

The CRCVC recommends an amendment to section 150.1(1) to raise the age of consent to 16. Amendments should also be made to 150.1(1)(a) and (2) as well as the scheme of sexual offences currently found in Part V of the *Criminal Code*.

Penalties

Bill C-20 amends sections 151 and 152 (sexual interference and invitation to sexual touching of a victim under 14) to increase the maximum sentence from 6 to 18 months, if the Crown proceeds summarily. The bill also increases the penalties for section 153, 215 (failing to provide the necessities of life) and 218 (abandoning a child).

These are cosmetic changes – those who offend against children rarely get the maximum. In fact, the CRCVC has heard reports that conditional sentences are becoming the norm for child sexual offences. If the government really wants to make changes, the maximums are not the problem.

Bill C-20 also expands the list of offences under section 161, which allows courts to prohibit convicted sex offenders from attending schools, playgrounds, etc. or seek paid/volunteer employment where they would be working with children. The new offences of luring and other historical offences are added.

The CRCVC recommends the following amendments to section 161:

- **raise the age from 14 to 16 or 18;**
- **include the new offence of voyeurism;**
- **create a process where a court could impose this condition at the end of someone's sentence (as opposed to the time of sentencing as is currently the case).**

Protections for witnesses

Bill C-20 seeks to expand on *Criminal Code* provisions to protect victim/witnesses. We are pleased to see these amendments, some of which the CRCVC has been asking the federal government to make for years, such as the expansion of protections for victims from being personally cross-examined by an accused. We are pleased to see the new sections 486.3(2), which gives judges the discretion to limit the ability of an accused to personally cross-examine a victim.

Section 486.3(4) creates a presumptive protection for victims of criminal harassment, similar to that found in s.486.3(1) which covers witnesses/victims under the age of 18 in any proceedings. While we support the specific protections for criminal harassment victims, and understand why they are necessary, we would also argue that sexual assault is equally as important, and we recommend this section be amended to include sexual assault cases as well.

We are also pleased to note that Bill C-20 allows witnesses to make an application to the judge for this protection as well, which does not currently exist.

We support the expansion of other protections as well, including the use of a support person while testifying,⁵ the use of remotes/screens,⁶ publication bans,⁷ video recordings⁸ and non-publication orders.⁹ Bill C-20 also gives victims/witnesses the ability to ask for these protections, which is not currently available in all cases.

Bill C-20 does not expand this ability to victims and witnesses in section 486(1), which allows a judge to exclude the public from the courtroom. In other words, victims or witnesses who may want to have a support person with them while they testify can make application to the court, but a victim/witness who want the public excluded during his/her testimony cannot make an application.

In *French Estate v. Ontario Attorney General*,¹⁰ families of two murder victims challenged the constitutionality of s.486 on the grounds that victims were not given automatic standing to argue that the public should be excluded. The court ruled the provisions were constitutional, but that the privacy interests of victims could be considered by the court and the harm suffered by victims. Justice Gravelly said, “It is a necessity of the judicial system that often the privacy of victims and witnesses is sacrificed in order that justice be done.”

Publication bans were the subject of a recent decision of the Saskatchewan Provincial Court. In that case, CBC was charged with violating a publication ban by interviewing a sexual assault victim on television (with her consent). Charges were dismissed, and the judge ruled that victims should be able to choose whether their identities will be protected. The court heard from one victim who spent over \$3000 to get a ban lifted.

Publication bans remain relevant and necessary for many victims, but not all victims want them. Victims must be given the choice, and also be allowed to change their mind.

The CRCVC recommends the following amendments:

- **amend section 486(1) to provide for a judge to consider an application from a victim;**
- **amend section 486.3(4) to include sexual assault;**
- **amend section 715 to allow for judges to have discretion to use video recordings for victims/witnesses of any age in any proceedings, similar to amendments in section 486.1(2);**

⁵ Section 486.1 (presumptive protection for any offence for those under 18) and section 486.1(2) (judicial discretion for any age in any proceeding);

⁶ Section 486.2(1) (presumptive protection for any offence for those under 18) and section 486.2(2) (judicial discretion for any age in any proceeding);

⁷ Section 486.4(1) (expansion of list of offences), s.486.4(3) (presumptive protection for any offence for those under 18 and anyone depicted in child pornography);

⁸ Section 715.1/715.2 (presumptive protection for any offence for those under 18 or with mental/physical disability);

⁹ Section 276.3/278.9;

¹⁰ [1996] O.J. No. 1300

- **amend s.486.4(7) to include the views of the victim in the list of things a judge must consider. There should also be amendments to ensure victims can apply to have the bans lifted and that the process not be onerous;**
- **amend section s.486.3(1) to include victims/witnesses with a mental/physical disability;**

Voyeurism

Bill C-20 creates the new offence of voyeurism. The CRCVC participated in the consultation on this issue and we supported the creation of a new offence.

The proposed offences would make it a crime to deliberately and secretly observe or record another person. Distributing the material would also be a crime. The maximum penalty would be 5 years.

Voyeurism is a sexual disorder in which someone derives sexual gratification from secretly observing others undress or engage in sexual activity. It is a great invasion of someone's personal privacy and can cause great distress to victims. If the recording is distributed, the victim can be revictimized many times over.

The Department of Justice's Consultation Paper noted that at least twenty percent of offenders may go on to commit more serious sexual assault offences (and this number is probably higher). Serial killer Paul Bernardo began as a "peeping tom" and progressed to become a sadistic rapist and murderer.

Without the amendment, the criminal justice system is incapable of dealing with this kind of behaviour. With the increased impact of the Internet, the consequences of this kind of activity will only grow more serious.

Conclusion

The CRCVC supports much of what is in Bill C-20, but believes that with the amendments we have proposed, the bill will be stronger and provide better protection for young people and victims/witnesses.