Submission on

Child Victims and the Criminal Justice System

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

May 2002

TABLE OF CONTENTS

Submission on
Child Victims and the
Criminal Justice System

PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement by the National Criminal Justice Section of the Canadian Bar Association.

Submission on Child Victims and the Criminal Justice System

I. INTRODUCTION

The National Criminal Justice Section of the Canadian Bar Association (the Section) appreciates this opportunity to contribute to the Department of Justice's public consultation aimed at finding ways to better protect children from extreme harm by adults. This is an issue of grave importance to us, both as lawyers and as people who care about children. We have circulated the consultation paper, *Child Victims and the Criminal Justice System* (the consultation paper) broadly among our membership, which represents both Crown and defence counsel. This submission reflects that balanced perspective.

II. CREATING FURTHER CHILD-SPECIFIC CRIMINAL OFFENCES

The consultation paper proposes the enactment of new, child-specific offences within the *Criminal Code*. Creating certain new offences has the potential to increase public awareness about the seriousness of committing a crime against a child and to fill gaps in the existing system. On the other hand, child-specific offences that replicate existing offences might not actually improve protection of children, and could instead generate confusion and duplication.

A. Criminal Physical Abuse of a Child

A new *Criminal Code* offence concerning extreme physical abuse of children is unwarranted, as several categories of assault already apply to those crimes. Creating a separate offence is likely to complicate the law, causing problems of interpretation, creating an overlap with other kinds of severe assault and leading to unnecessary litigation. From a policy perspective, how should we deal, for example, with a vulnerable adult who was a victim of the same type of assault? We recommend that the current offences of physical assault, assault causing bodily harm, aggravated assault and grievous body harm be retained.

RECOMMENDATION:

1. **The National Criminal Justice Section of the Canadian Bar Association recommends that the current offences of physical assault, assault causing bodily harm, aggravated assault and grievous body harm be retained, rather than creating a new offence specifically targeted at the criminal physical abuse of a child.**

B. Criminal Neglect of a Child

Unlike physical abuse of a child, where several *Criminal Code* offences already adequately cover the impugned behaviour, extreme forms of child neglect are inadequately addressed within the current law. The Section supports an amendment to the *Criminal Code* to address this deficiency. One option would be to add an offence for extreme forms of child neglect, carrying a higher maximum penalty than the two years' imprisonment currently available for failure to provide necessaries or for criminal negligence, which is difficult to prove in situations of neglect of children. An alternative would be to amend section 215 of the *Criminal Code* dealing with failure to provide the necessaries of life to specifically include neglect and raise the maximum penalty to ten years.

Such approaches would communicate the seriousness of this offence to the public, and recognize that extreme neglect of a child can be as culpable as direct physical violence inflicted upon that child.

C. Severe Emotional Abuse of a Child

Although the most severe and long-lasting damage to children resulting from sexual and other physical abuse often involves psychological injury, we are concerned about creating a new offence criminalizing solely psychological harm. This new legal definition would allow anyone in any legal matter to raise claims based on the same type of harm.

Careful consideration must be given as to how and whether it would be possible to control prosecutions based solely on psychological harm. It is easy to envision a maze of experts and counter experts at trial, with many opportunities for abuse, excessive costs and delays. In situations where allegations of harm may be more prevalent, such as during acrimonious separations or divorce, an expanded definition of harm with inherent evidentiary difficulties could create more problems than it addresses. These serious pitfalls lead us to recommend against creating new offences relating to causing severe emotional or psychological harm to a child.

We note that, following the Supreme Court of Canada decision in *R. v. McCraw*,[1] the Crown can already proceed on a charge of causing bodily harm based on psychological harm. Further training and education on the issue for police officers and Crowns conducting investigations and prosecutions would also improve protection of children from the psychological harm resulting from abusive situations.

RECOMMENDATION:

---

[1] (1991), 7 C.R. (4th) 314 (S.C.C.).

2. **The National Criminal Justice Section of the Canadian Bar Association recommends that further training and education be offered to Crown and police officers to facilitate recognition of the psychological harm caused from abusive situations in their investigations and prosecutions.**

D. Child Homicide

We are opposed to legislative amendments that would require any homicide of a child to proceed as a first-degree murder charge, as is currently the case for homicides involving police officers. A major obstacle to creating a child homicide offence without the required intent to kill is that such legislation would be unlikely to withstand constitutional scrutiny.

We recommend instead amending the sentencing principles to provide explicitly that killing any vulnerable member of society, including a child, will always be considered an aggravating factor in sentencing.

RECOMMENDATION:

3. **The National Criminal Justice Section of the Canadian Bar Association recommends that the sentencing principles of the *Criminal Code* be amended so that the killing of any vulnerable member of society, including a child, is always considered an aggravating factor in sentencing for a murder conviction.**

E. Failing to Report Suspected Crimes Against Children

The consultation paper asks whether an offence of failing to report suspected criminal offences involving abuse or neglect of children to the police should be added to the *Criminal Code*, supplementing provisions already contained in provincial and territorial child welfare legislation. In our view, this would rely too heavily on the criminal law, and

could potentially target the innocent or even those who are also victims. For example, would older siblings of an abused child, who share the same fears or who have had similar experiences, be obliged by law to report the abuse? In addition, the proposal could criminalize well-intentioned health care workers, teachers and social workers who often attempt a very difficult balance between offering assistance to families and reporting to authorities.

A criminal sanction could result in over-reporting for fear of criminal charges for failing to report. It is also possible that by requiring unnecessary reporting, we would inadvertently cause a critical report to be overlooked simply as a result of sheer volume.

Instead of creating further criminal penalties, both levels of government should work together to educate the public about how to detect abuse and when to report suspected abuse. We urge the federal government to encourage their provincial and territorial counterparts to ensure that the mandatory reporting requirements under child welfare legislation are free of loopholes, effective and appropriately punitive in the event of non-reporting.

RECOMMENDATION:

4. **The National Criminal Justice Section of the Canadian Bar Association recommends that the federal government encourage their provincial and territorial counterparts to ensure that the mandatory reporting requirements already contained under child welfare legislation are free of loopholes, effective and appropriately punitive in the event of non-reporting.**

III. SENTENCING TO PROTECT CHILDREN

A. Addressing the Needs and Interests of Children in Sentencing Policy

In general, we support the kinds of modifications suggested on page 11 of the consultation paper to better address the needs and interests of children in the sentencing process. However, when considering the use of additional tools, such as long term supervision, we must remain aware of the difficulty in predicting which offenders will pose a continuing danger and be sensitive to the constitutional rights of the offender, as well as the rights of children to be protected from abuse and violence. Further, we must remember that children and society at large are ultimately best protected when offenders are treated, rehabilitated and reintegrated into the community. Such an approach requires a commitment of resources to ensure that appropriate services are available.

The fourth point in the consultation paper at page 11 pertains to familial child abuse or breach of trust cases. It suggests that perhaps less emphasis than usual should be placed on previous good character or lack of a criminal record when sentencing for those offences. While this suggestion has merit in some cases, we believe it would be unfair to apply it unquestioningly to all situations. As with certain other crimes such as domestic violence, intervention to address and remedy the deviant behaviour within a family can sometimes best serve all those involved.

B. Reference to Children in Fundamental Purpose and Principles of Sentencing

There should be an amendment to the *Criminal Code* statement of purpose and principles in sections 718 or 718.1 to refer to children. The amendment should include defined objectives relating to child protection, deterring offences against children, denouncing crimes against children and recognizing the importance of supervising and providing rehabilitation to offenders against children.

As a society, we should emphasize the importance of principles of child protection and safety. As a signatory to the United Nations *Convention on the Rights of the Child*, Canada has a very clear obligation to protect the rights of children. An amendment to the sentencing principles in sections 718 or 718.1 to incorporate reference to Canada's commitment to honour its obligations under the UNCRC would demonstrate the seriousness with which Canada regards those obligations.

However, careful consideration should be given before amending sentencing principles to specify that all offences of adults against children are to be considered inherently grave. Judicial discretion is necessary to address individual situations where offences are less serious, the offender and victim are very close in age, appropriate treatment is received, the child recovers well, or dysfunctions in a family are properly remedied.

RECOMMENDATION:

5. **The National Criminal Justice Section of the Canadian Bar Association recommends that judicial discretion is necessary to address individual situations as to the gravity of the consequences for an individual child.**

C. Other Sentencing Principles - Section 718.2

The aggravating factors listed on page 13 of the consultation paper should be included as considerations in sentencing. We support amending the principles of sentencing to stress the seriousness of these offences by including an explicit statement that offending against a child will be considered an aggravating factor. Other aggravating factors might include the injuries to the child and abuse of the power differential between an adult and a child, especially when the child is young. We note that section 718.2 already outlines aggravating and mitigating factors, making it an aggravating factor to offend against one's own child in

subsection a(ii) or to abuse someone in a position of trust in respect of the offender in subsection a(iii).

Expanding the scope of aggravating factors in sentencing to include more offences involving child victims would convey a strong message of Parliamentary intent to increase penalties where offences against children are involved.

RECOMMENDATION:

6. **The National Criminal Justice Section of the Canadian Bar Association recommends that the *Criminal Code* be amended to consider it an aggravating factor in sentencing whenever there are serious injuries to a child or abuse of the power differential between an adult and a child, especially for young children.**

D. Expanding the Courts' Powers to Structure Conditions in Sentencing

The consultation paper suggests adding a form of probation to a federal sentence if required for child protection. Ideally, this proposal would allow judges another sentencing option for offences insufficiently serious or repetitive to justify Long Term Offender or Dangerous Offender status. In our view, such an amendment should explicitly state that it is not intended to lengthen sentences, but to divide them between a period of incarceration and a period of reintegration into the community, with appropriate supervision and treatment. A similar statement is contained in Bill C-3, *Youth Criminal Justice Act*, at section 38(8).

However, there are potential pitfalls to adding lengthy periods of supervision to incarceration, which we have discussed in greater detail in our submission on Bill C-55,

High Risk Offenders.[2] Sufficient resources must be dedicated to ensure that treatment, rehabilitation and supervisory services are available. Otherwise, longer probation will simply permit the state to impose extended periods of monitoring and potential incarceration for breaches of probation conditions, rather than criminal acts. This would not ultimately improve child protection.

IV. IMPROVING THE EXPERIENCE OF CHILD WITNESSES AND FACILITATING THEIR TESTIMONY IN CRIMINAL PROCEEDINGS

A. Competency of Child Witnesses

It appears that the rationale for the competency requirements, like that dealing with the corroboration of complainants' evidence, may be becoming somewhat obsolete. If a judge applies an outdated notion of competency for our diverse modern society, for example, by asking only whether or not a child attends Sunday school, a competency examination may not be particularly helpful. A child's ability to observe and recall can be tested by examination of the child, both in direct and cross, subject to the child's age and development. At the same time, the need to ensure that children are aware of the importance of their testimony should not be minimized or overlooked.

We question the effect on section 16 of the *Canada Evidence Act* of possibly abolishing the competency requirements. While there are merits to arguments on both sides of this debate, we believe that further study into options for accepting testimony by witnesses challenged by either youth or capacity, such as those being explored in the United States or the United Kingdom, should be undertaken before amending our laws.

---

2 National Criminal Justice Section, Submission on Bill C-55, *Criminal Code* amendments - High Risk Offenders (Ottawa: Canadian Bar Association, 1996).

B. Methods of Presenting Evidence of Child Witnesses

The Canadian criminal justice system has been criticized for lacking respect for victims of sexual offences. We have come to realize that the system has evolved in a way that too frequently is insensitive to its impact on women and children, the primary victims of these offences.

Recent legislative amendments have significantly alleviated the stress and anxiety for victims and witnesses in sexual assault cases.[3] Still, it is difficult to appreciate the actual impact on child victims of testifying about a sexual offence. We should continue to consider ways to lessen the trauma experienced by child witnesses:

i) Testimony outside the courtroom or behind screens

Child complainants in cases involving sexual offences could testify outside the courtroom and have their evidence presented via closed circuit television if they choose. Their testimony would usually be limited to cross-examination. Section 486 (2.1) currently has limited provisions relating to children giving testimony outside the courtroom. Any expansion of that section must also respect the constitutional importance of a public hearing and the right of an accused to face the accuser.

If a child or young person is to testify in court, whether or not the child is the alleged victim of a sexual offence, use of a screen pursuant to subsection 486 (2.1) of the *Criminal Code* should be at the discretion of the party calling the witness, based on the best interests of the child or young person.

ii) Use of videotaped evidence

---

3 See for example Bill C-79, *Victims of Crime*, which was brought into force on December 1, 1999 and is now Statutes of Canada (1999) Chapter 25.

Section 715.1 of the *Criminal Code* currently authorizes limited reception of videotaped evidence. The use of this and other testimonial supports must be balanced to ensure that the rights of accused are also protected. Provided that normal police procedures and appropriate precautions are employed for videotaping, we would support the expansion of categories for which it is used. However, a videotape procedure should not routinely be available, but should instead be the exception.

In addition, more police officers should be trained to interview child victims of sexual assault, or have access to persons capable of properly interviewing child victims of sexual assault.

iii) Hearsay statements

This in an area of law that is developing and requires future study. Necessity and reliability are the minimum thresholds required by the Supreme Court of Canada for the admission of out-of-court hearsay statements.[4]

C. Other Assistance for Child Witnesses

Section 486(1.2) of the *Code* provides for support persons for witnesses under the age of fourteen at the time of the offence or on application by the Crown. It should be expanded.

Judges and prosecutors should be better educated about children and child development to ensure that expectations of child witnesses and victims are sensitive and appropriate. For example, complainants under the age of eighteen should not be required to testify for more than a half day at a time. Most adults find it impossible to function for more than

---

4 See *R. v. Khan* (1990), 79 C.R. (3d) 1 (S.C.C.)*; R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.).

three hours at a stretch at the intellectually and physically taxing level required to testify, and we should not expect that of children and young people.

One issue not specifically addressed in the consultation paper is that younger children's memories fade more quickly than adults. If the purpose of a trial is to seek the truth, perhaps an effort to expedite cases involving child victims and witnesses would assist, to an extent reasonable to also allow the defence to prepare for trial.

Another improvement for children would be to add other offences to the lists of those mentioned within sections 486 and 715.1. Those sections should clearly include protections for child witnesses or victims of specified offences. For example, children who witness offences of violence, such as the murder of a parent, should receive the same protections as children testifying in sexual assault cases, as should those witnessing manslaughter, criminal negligence, aggravated assault and assault causing bodily harm. This is especially true if the offence involves a domestic or familial situation. While section 486 has been recently amended to include "offences in which violence against the person is alleged... ", this should be clarified to include witnesses to offences of violence.

D. Different Ages for Different Purposes: Age of Consent

Determining the optimal legal age for consent to sexual activity raises complex issues. We must balance respect for the choices of young people to determine their own sexual partners with society's interest in protecting young people from exploitation by adults that profit from pornography and child prostitution. There are such adults who will wait until young people reach fourteen years of age to approach them for these purposes, hiding behind the legal age of consent. On the other hand, we must avoid creating rules that allow for abuse of the legal process and multiplication of unwarranted charges from any young person who would take advantage of their age or appearance to mischaracterize consensual sexual activity between those close in age or mistaken as to age. Careful study

and deliberation to balance these difficult issues must take place prior to determining the correct age of consent.

E. Invalid Consent: Its Effect on Sentencing

While consent is not a defence, it should be relevant as a potential mitigating factor at the sentencing stage. Considering the issue of consent is the only way to fairly adjust the absolute unavailability of the defence to borderline cases such as tricking, consent, prostitution and appearance.

V. CONCLUSION

We trust that our suggestions will assist in determining changes that could be made to the criminal justice process so that it better protects children from criminal acts. For those unfortunate occasions when our society fails adequately to protect children from harm, we have offered proposals to improve services by making them as sensitive as possible to the needs of children.

We look forward to ongoing collaboration with the Department of Justice on this and other matters, to improve our criminal justice system.

VI. SUMMARY OF RECOMMENDATIONS

The National Criminal Justice Section of the Canadian Bar Association recommends:

1. **that the wording currently used for physical assault, assault causing bodily harm, aggravated assault and grievous body harm be retained, rather than changing the terms or creating new terms specifically targeted at the criminal physical abuse of a child.**

2. **that further training and education be offered to Crown and police officers to facilitate recognition of the psychological harm caused from abusive situations in their investigations and prosecutions.**

3. **that the sentencing principles of the *Criminal Code* be amended so that the killing of any vulnerable member of society, including a child, is always considered an aggravating factor in sentencing for a murder conviction.**

4. **that the federal government encourage their provincial/territorial counterparts to ensure that the mandatory reporting requirements already contained under child welfare legislation are free of loopholes, effective and appropriately punitive in the event of non-reporting.**

5. **that judicial discretion is necessary to address individual situations as to the gravity of the consequences for an individual child.**

6. **that the *Criminal Code* be amended to consider it an aggravating factor in sentencing whenever there were serious injuries to a child and/or was abuse**

of the power differential between an adult and a child, especially for young children.