December 12, 2001

The Honourable Senator Lorna Milne, Chair
Senate Committee on Legal
& Constitutional Affairs
The Senate of Canada
Ottawa, Ontario
K1A 0A4

Dear Senator Milne,

We are writing as Chairs of the National Criminal Justice Section (Section) of the Canadian Bar Association (CBA) and its Committee on Imprisonment and Release (Committee). The CBA is a national association of over 36,000 jurists, with the mandate of improvement in the law and the administration of justice. The Section represents both Crown and defence counsel from across Canada, and its submissions reflect that balanced perspective. The Committee consists of academics with decades of collective experience in the area of imprisonment and release.

We thank you for inviting us to address Bill C-15A, *Criminal Code* amendments (Omnibus bill). We appreciate being able to provide you with our views on some of the several important issues contained within the Bill.

Section 690 Review Process

Section 690 of the *Criminal Code* provides a process intended to remedy cases of wrongful convictions. A few years ago, the Section and Committee prepared an extensive submission to the Minister of Justice on reforming the section 690 process. Our position continues to be that the existing process should be repealed and replaced with an independent wrongful conviction review board similar to that used in the United Kingdom. We are very disappointed that this recommendation has not been proposed within Bill C-15A. In our view, the proposed amendments found in clause 71 of Bill C-15A will do little to improve the current situation.

In our earlier submission, we highlighted the necessity that any mechanism to assess whether a wrongful conviction has occurred must be independent from the people and systems that brought about the initial conviction. According to the proposals in Bill C-15A, the question of whether to return a case to court would remain in the hands of the Minister on the criterion of a "reasonable basis to conclude that a miscarriage of justice likely occurred." Our view is that an independent agency should make this decision and should refer a case back to court whenever "there is a credible basis for believing that the conviction may be wrongful." We note that one of therecommendations made by the Honourable Peter Cory in his *Report on the Inquiry Regarding Thomas Sophonow*[1] calls for the establishment of a

---

[1] September, 2001 at p. 101.

completely independent entity to review allegations of wrongful convictions. Indeed, Commissioner Cory notes that the circumstances of the Thomas Sophonow case "demonstrate the need for the establishment of an independent body to review, in appropriate cases, allegations of wrongful convictions." We concur with the Commissioner's recommendation and echo his hope that "steps are taken to consider the establishment of a similar institution in Canada."[2]

Proposed section 696.2(1) requires the Minister to review an application "in accordance with the regulations" and proposed section 696.6(b) allows the Governor in Council to make regulations "prescribing the process of review." Until the regulations are available for discussion, it is impossible to assess this process. As one of the primary criticisms of the existing process has been its lack of openness and accountability, we cannot determine whether the proposed amendments are an improvement until the regulations are available. The power to delegate investigative powers contained in proposed section 696.2(3) may be an important amendment but will depend on when the power is exercised, the choice of delegates, and any limits placed upon the delegation.

Bill C-15A contains no requirement that applicants be given reasons for the government's refusal to refer their case to court. It is fundamental that the applicant should be given reasons and that those reasons should be available to the public. According to the Bill, the content of the required annual report is again left to regulations. There is no indication that the report will provide the degree of transparency and public accountability on both case-by-case and systemic levels that we believe is demanded by these critical issues. Reasons for a refusal to reconsider an alleged wrongful conviction should not be hidden. Both the applicant and the public have a legitimate interest in ensuring that the application was given the required careful attention.

Responding to the fallibility of the criminal process in a fair and effective way is fundamental to a just system of criminal prosecutions. While finality is an important element of any system, we know that errors with dire consequences for innocent people can, and have too frequently occurred.[3] We reiterate our position that an independent agency separate from the Minister of Justice and officials of that Minister's department is necessary to fulfill this fundamental requirement. On a related issue, the possibility of wrongful convictions highlights the public interest in ensuring that adequate publicly funded legal representation is available for all appropriate cases.

---

2 *Ibid*.

3 Consider, as examples, the notorious cases of Thomas Sophonow, David Milgaard, Guy-Paul Morin or Donald Marshall, Jr. .

Home Invasion

Proposed section 348.1 of Bill C-15A dealing with home invasion would add another aggravating factor to our sentencing regime. In our view, unnecessary additions to an already extensive list of aggravating factors in sentencing will only dilute the importance of existing factors. This amendment is unnecessary because several related offences, such as breaking and entering into a dwelling house, robbery and unlawful confinement, already carry a maximum of life imprisonment. Further, all sentencing courts have the necessary discretion to increase sentences in appropriate and egregious cases. We believe that discretion should be retained. Finally, existing case law already recognizes the targeted behaviour as an aggravating feature. We see no advantage to this proposed amendment.

Criminal Harassment

Bill C-15A would increase the maximum penalty for criminal harassment from five to ten years' imprisonment. Provided there is no mandatory minimum, we have no objection to allowing the possibility of an increased sentence in appropriate cases. Criminal harassment can be a very serious offence that can wreak havoc in the lives of those targeted, and too often leads to even more serious offences. However, we must be wary that raising the upper limit of the range of available sentences does not inadvertently increase all sentences for criminal harassment, including those that do not warrant a greater sentence than currently imposed.

Use of Agents

We support the proposal in clause 79 of Bill C-15A to limit the use of agents appearing on behalf of accused charged with offences involving a maximum penalty in excess of six months' imprisonment. In our view, it is imperative that the expertise of trained legal professionals be available to all those charged with criminal offences.[4]

Preliminary Inquiry Reform

In our 1994 submission to the Department of Justice on the preliminary inquiry, we reiterated past CBA policy and recommended that absent "study establishing the necessity for change, the preliminary inquiry be retained in its present form." We then suggested possible changes for consideration only if definitive evidence established that the preliminary inquiry was a major cause of unnecessary expense or delay in the criminal justice system and only following the enactment of a statutory disclosure scheme. We also provided suggestions of reforms other than the erosion of the preliminary inquiry that could be used to improve the operation of the criminal justice system, prior to changing the preliminary inquiry.

---

[4] See also, Canadian Bar Association Resolutions 95-05-A and 98-15-A (Attached as Appendix A).

However, we opposed, and remain opposed to "any dismantling of the preliminary inquiry and (are) adamantly opposed to its abolition."[5]

Despite the development of the law of disclosure since *Stinchcombe*[6], from our experience, lack of full disclosure to the defence continues to be a problem. While we recognize that the provisions in clause 25 maintain the existence of the preliminary inquiry, we are concerned that the clause shifts the onus on the accused to request a preliminary inquiry, rather than being entitled to one by right. The potential for problems as a result is heightened by the many unrepresented accused facing criminal charges. This change is likely to have the impact of disentitling certain accused to a preliminary inquiry unless the provision clarifies that absent a specific request or a specific waiver, a preliminary inquiry will be held. In our view, any waiver of a preliminary inquiry must be completely informed, and not merely an omission.

Proposed section 536.3 deals with procedures concerning statements of issues and witnesses before a preliminary inquiry. According to clause 29.2 amending section 540, evidence that would not be admissible at trial may be received if credible or trustworthy in the circumstances of the case. In our view, inadmissible evidence should not be admissible at a preliminary inquiry. How can the determination be made whether an accused be committed to stand trial on the basis of evidence that would be inadmissible before a trier of fact? As the Crown bears the burden of presenting its case on a *prima facie* basis, we believe that the section is unnecessary and gives rise to concerns about compliance with *Charter* protections against self-incrimination and the right to full answer and defence by permitting consideration of inadmissible evidence. Given the practical effect of the vastly increased number of hybrid offences now contained in the *Code* being a significant reduction in the number of preliminary inquiries that are actually held, we oppose any potential further erosion of the right to a preliminary inquiry.

Child pornography, luring and sex tourism amendments

The Section supports the purpose of the legislative proposals contained in Bill C-15A to protect children from exploitation, particularly sexual exploitation. We make the following minor suggestions for improvement.

Clause 5 deals with amendments to the child pornography provisions of section 163.1 of the *Code*. Subclause (3) creates the offence of accessing child pornography. For greater clarity, we would suggest that the word "knowingly" be inserted before the phrase "accesses any child pornography"

---

5 Canadian Bar Association, 1994 at 22-23.

6 [1995] 1 S.C.R. 754.

within proposed section 163.1(4.1). This would help to avoid charges for inadvertent accessing of child pornography. We recognize that the legislation may address this in proposed section 163.1(4.2) by defining "accesses" as knowingly " causes child pornography to be viewed by, or transmitted to, himself or herself " but believe the addition of the word "knowingly" in (4.1) would add certainty.

Clause 6, addressing the forfeiture provisions of section 164(4), would give the court discretion in making a forfeiture order. The current provision does not permit such discretion, and we support this amendment.

Clause 8 deals with the new offence of internet luring by adding section 172.1(1) to the *Code*. Again, the word "knowingly" should be added to the first part of (1) so that it reads "Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), knowingly communicates with... ." That addition would avoid the creation of a strict liability offence. In our view, this must be a full *mens rea* offence, given both the stigma attached to a conviction for such an offence and the potential penalty involved. In addition, there appears to be no definition of "facilitating" or "facilitation" provided in the Bill. Section 172.1(4) also appears to omit any recognition of a mistaken belief of a person communicating in regards to the age of the recipient of the communication. These omissions should be remedied.

Generally, we believe that the amendments Bill C-15A contains to protect children from exploitation represent a careful and measured response to a very complex area of law, morality and human behaviour.

We trust that our comments on selected aspects of Bill C-15A will assist the Committee in its deliberations.

Yours truly,

Heather Perkins-McVey
Chair, National Criminal Justice Section

Allan Manson
Chair, Committee on Imprisonment and Release

APPENDIX A

RESOLUTION 95-05-A: **REGULATION OF PARALEGALS**

WHEREAS The Canadian Bar Association endorsed the recommendations of the Committee on the Status of Paralegals ("the Strauss Report") at the 1989 Annual Meeting in Vancouver;

WHEREAS the Strauss Report recommended that paralegals work only under the supervision of lawyers and that unsupervised paralegals be prohibited from providing legal services directly to the public;

WHEREAS at the continued urging of the Young Lawyers' Conference a draft report entitled "A Discussion of the Status of Paralegals in Canada" ("Report") was circulated to all Branches for consultation October 1994;

WHEREAS the Report notes that certain measures are needed to protect the public interest in the provision of paralegal services and to respond to the current economic and employment climate facing the profession;

WHEREAS The Canadian Bar Association is committed to the principle that it is in the public interest that only persons who have formal and a proven comprehensive knowledge and understanding of the law should be permitted to practise law and engage in the delivery of legal services directly to the public in a properly regulated environment;

WHEREAS The Canadian Bar Association is committed to the principle that legal services should be accessible to all members of the public and that the cost of legal services be reasonable;

BE IT RESOLVED THAT The Canadian Bar Association adopt the following recommendations for any jurisdiction which authorizes the delivery of any legal services by independent paralegals:

1. Independent paralegals should be subject to regulation by the provinces and territories;

2. The regulation of independent paralegals shall include the following elements:

a) completion of a specified standard of education and training;

b) passing an examination on their knowledge and expertise;

c) adherence to a code of professional conduct and being subject to discipline for breach thereof;

d) establishing a compensation fund for claims arising from unethical or fraudulent practices by independent paralegals;

e) requiring that independent paralegals have liability insurance.

3. Where regulation of paralegals does not occur, the federal, provincial and territorial governments should cooperate to clarify the activities of agents in particular areas of law. In particular, the legislation which permits appearance by "agents" must be either omitted or clarified to better protect the interests of the public.

4. The operation of independent paralegals before administrative tribunals should be clarified by the federal, provincial and territorial governments.

5. The *Criminal Code* should be amended to clarify who is permitted to appear as agent on behalf of the accused in summary conviction matters.

CERTIFIED TRUE COPY OF A RESOLUTION CARRIED AS AMENDED BY THE COUNCIL OF THE CANADIAN BAR ASSOCIATION AT THE ANNUAL MEETING HELD IN WINNIPEG, MB ON AUGUST 19-23, 1995.

STEPHEN BRESOLIN
ACTING EXECUTIVE DIRECTOR

Paralegals — Criminal Code Definition of "Agent"

WHEREAS the Ontario Judges' Association has adopted a resolution in May 1998 proposing amendments to s. 800 of the *Criminal Code*, which include the definition of "agent";

WHEREAS at the 1995 Annual Meeting in Winnipeg, Council recommended that the *Criminal Code* be amended to clarify who is permitted to appear as an agent on behalf of the accused in summary conviction matters;

BE IT RESOLVED THAT the Canadian Bar Association endorse the Ontario Judges' Association resolution and urge the Minister of Justice to amend s. 800 of the *Criminal Code* as follows:

Parajuridiques - Définition de «représentant» dans le *Code criminel*

ATTENDU QUE l'Association des juges de l'Ontario a adopté une résolution en mai 1998 proposant des modifications à l'article 800 du *Code criminel* pour y ajouter la définition de «représentant»;

ATTENDU QUE lors de l'Assemblée annuelle de l'ABC en 1995 à Winnipeg, le Conseil a recommandé de modifier le *Code criminel* afin de préciser avec exactitude quelles sont les personnes habilitées à comparaître comme représentant(e)s d'un(e) prévenu(e) faisant l'objet d'une poursuite sommaire;

QU'IL SOIT RÉSOLU QUE L'Association du Barreau canadien entérine la résolution adoptée par l'Association des juges de l'Ontario et exhorte la ministre de la Justice à modifier l'article 800 du *Code criminel* pour y inclure la définition suivante de «représentant» :

800.(4). For purposes of proceedings under this Part, "agent" for a defendant that is not a corporation includes, without restricting the meaning of the term under the law of the province in which proceedings are conducted:

a) a personal friend or relative of the defendant;

b) an articled student-at-law appearing and acting under the supervision and responsibility of counsel for the defendant;

c) a member of a university law students' legal aid clinic, society or association, appearing and acting under the supervision of counsel, but does not include such a person who is not counsel and is not a person named in paragraphs (b) or (c) appearing and acting for compensation or remuneration or in the

800.(4) Pour l'application des procédures prévues dans cette partie, le «représentant» d'un défendeur qui n'est pas une personne morale comprend, sans pour autant restreindre la signification donnée à ce terme par la loi en vigueur dans la province □□les procédures sont intentées :

a) un ami personnel ou un parent du défendeur;

b) un stagiaire en droit comparaissant et agissant sous la supervision et la responsabilité de l'avocat du défendeur;

c) un membre d'une clinique, société ou association d'aide juridique d'étudiants en droit d'une université comparaissant ou agissant sous la supervision d'un avocat mais à l'exclusion d'une personne qui ne serait pas avocate, ou d'une personne énumérée dans les paragraphes précédents comparaissant et agissant moyennant une rétribution

expectation of compensation or remuneration.

ou rémunération ou dans l'espoir de recevoir une rétribution ou une rénumération.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the Annual Meeting held in St. John's, NF, August 22-23, 1998.

Copie certifiée conforme d'une résolution adoptée par le Conseil de l'Association du Barreau canadien, lors de l'Assemblée annuelle 1998, à St. John's NF, du 22 au 23 □□□□1998.

John D.V. Hoyles
Executive Director/Directeur exécutif