June 7, 2002

The Honourable Andy Scott, P.C., M.P.
Chair
Standing Committee on Justice
and Human Rights
House of Commons
Room 621, Wellington Building
180 Wellington Street
Ottawa, ON K1A 0A6

Dear Mr. Scott:

Re: Bill C-400, *Lisa's Law*

The National Family Law and National Criminal Justice Sections of the Canadian Bar Association are pleased to have the opportunity to comment on the above Bill. The Bill appears to be a well-intentioned effort to ensure that children are not forced to visit parents who have been incarcerated either for victimizing those children or for sexual offences. However, we believe the Bill is misguided. For the reasons set out below, we believe the Bill should not be approved by the Committee.

Best interests of the child

There is no "cookie-cutter" or "one-size-fits-all" approach to child custody and access issues. Every family is different. Every family has different dynamics. Every child has different needs and interests. An arrangement that is bad for one child may be good for another.

The ultimate question is what is in the child's best interests. Because of the wide variety of family situations, it is virtually impossible to set hard and fast rules for what is in the best interests of a child. Instead, these matters have to be determined on a case-by-case basis. That is why the National Family Law Section has consistently opposed having legislated presumptions in the *Divorce Act*.

In determining the child's bests interests, the parties – and, in disputed cases, judges – try to balance a wide variety of factors. These include the love, affection and emotional ties between the child and his or her parents, the child's views, the ability and willingness of each person to act as a parent, any history of family violence and (perhaps most significantly) the importance and benefit to the child of having an ongoing relationship with his or her parents. All of these factors, and not just the fact that the parent is incarcerated for a particular offence, must be weighed and considered in deciding whether access is appropriate for a particular child.

Furthermore, we believe that Bill C-400 is in conflict with existing provision of the *Divorce Act*. Section 16(10) sets out the general principle that children should have as much contact with their parents as is consistent with their best interests. This provision reflects the policy that although parents are often imperfect, it is generally best for children that they have the opportunity for a relationship with that parent.

Our experience in dealing with these disputes has demonstrated that it can be in the best interests of the child to include regular contact with a parent who is incarcerated – regardless of the offence for which they have been incarcerated. This includes contact with parents incarcerated for very serious offences like murder or sexual assault. A hard and fast "no access" rule for certain types of offences, as contained in Bill C-400, could therefore in some circumstances be contrary to the child's best interests. Certainly, there are cases where it is completely appropriate to terminate access, but the current *Divorce Act* already permits a court to reach that result.

The *Divorce Act* permits courts to prohibit access – including the instances listed in Bill C-400 – where it is in the best interests of the child to do so. In making these decisions, courts don't just examine the nature of the offence but look at *all* relevant circumstances, including the matters listed above. Often, in difficult cases such as when a denial of access is being considered, they review detailed assessments of the potential effects on the child. These decisions are difficult and complex and are taken very seriously by the judges who have to make them. We therefore shouldn't jump to the conclusion that a judge who orders access in such circumstances is wrong. Where there is an error, a party can appeal. Judicial discretion in matters of custody and access should be maintained.

Furthermore, we wish to emphasize that child custody and access laws are not about the rights of parents. They are about the rights and interests of children – which, in most cases, includes having a relationship with both of their parents. One of our concerns in this respect is the punitive aspect of Bill C-400. The message seems to be that parents who commit this type of offense should lose the privilege of seeing their children, irrespective of their children's interests. This "parental rights" focus is also present in proposed section 9.1, which permits a custodial parent to consent or not consent to access with the other parent – again irrespective of the child's interests. We stress that the focus must be on the child's interests and not the interests of the parents.

Applicability to Parolees

We note that the Bill is drafted so widely that it may apply to children of persons who are not just physically in prison but also to those who are on parole. Persons who are on parole are technically still serving their term of imprisonment. For the reasons set out in other parts of this letter, it is not appropriate to automatically terminate children's access to persons who are in

prison, let alone those who are on parole. If supervised access is appropriate, then a court can and will order that remedy. If the Committee does approve this Bill (which we do not support), we believe it is inappropriate to prohibit children's access to a parent who is on parole. This provision should be limited or removed.

Certain Sexual Offences and Children

Some of the offences listed in proposed section 9.1 include offences against adults. We question whether there is an established link between the commission of a sexual offense against an adult and a propensity to commit such an offence against children, not to mention a propensity to commit such an offence against a parent's own children. At the very least, establishing such a link should be one of the preconditions for approval of this Bill.

This Bill would apply to persons who are incarcerated for "sexual assault" under section 271 of the *Criminal Code*. Sexual assault can include a wide variety of non-consensual conduct – from rape to non-genital touching. If the Committee does approve this Bill (which we do not support), we believe it is inappropriate to permit all types of sexual assault to result in loss of access to a parent's children. This provision should be limited or removed.

Child victims

Section 9.1(a) would prohibit the child from having access to a person who is incarcerated "under any provision of the *Criminal Code* of which the child was the victim". While we sympathize with the intent, the word "victim" is quite open-ended and vulnerable to manipulation. The word "victim" can have quite a broad meaning and is not necessarily limited to persons who are the direct subjects of a crime. This is evident from the section 722(1) of the *Criminal Code*, which defines "victim" for the purposes of victim impact statements. It includes persons "who suffered physical or emotional loss as a result of the commission of an offence".

In a custody and access dispute, it is not difficult to imagine someone making a creative argument that a child has "suffered emotional loss" as a result of the commission of an offence – even though the offence may not have involved the child directly. If the Committee does approve this Bill (which, again, we do not support), we believe this provision should be limited to include only children to whom direct harm was done.

Sentencing

In deciding the sentence to impose on a convicted offender, the courts engage in a complex process of balancing a number of objectives set out in section 718, 718.1, 718.2 and 718.3 of the *Criminal Code*. These include denunciation of the offence, deterring the specific offender from future criminal activity, deterring members of the public generally from future criminal activity, separating the offender from the public (where necessary), assisting in rehabilitation of the offender, providing reparations, promoting responsibility and acknowledging the harm done to victims. Sentences must be proportional to the gravity of the offence and the degree of

responsibility of the offender. The punishment to be imposed on the offender is in the discretion of the court that convicts the offender. In imposing a sentence, courts are already required to consider evidence that the offender abused his or her spouse, common-law partner or child or abused a position of authority in relation to the victim.

In our view, Bill C-400 violates or undercuts a number of these important principles. By prohibiting access to an offender's children, it imposes an automatic additional penalty – thus undermining the discretion of the court that convicted the offender. Indeed, it imposes an automatic additional penalty for something which the court has already taken into account in sentencing the offender – namely, abuse of a spouse, common-law partner or child.

Bill C-400 may inhibit the goal of rehabilitation, which recognizes that most offenders will eventually be reintroduced into society. One important way of facilitating reintegration is to ensure that offenders maintain contact with their families, including their children. Family ties help to strengthen the offender's connection with society and assist in ensuring the offender will not re-offend. By inhibiting the reintegration of some offenders into society, Bill C-400 is not in the public interest. While there may be circumstances where it is appropriate for a courts to terminate offenders' access to their children, this should be assessed on a case-by-case basis with the focus on the child's needs rather than punishing the offender.

The proposals could also undermine the rationale for conditional sentences. A "term of imprisonment" may now be served "conditionally" in the community, providing that offenders do not pose a danger to society. By arguably prohibiting such persons from having access to their children during the period of the sentence, Bill C-400 would sever a very important relationship connecting the offender to the community. Offenders are already supervised in such circumstances, and face swift and severe penal sanction for breaching any conditions.

Expansion of the Bill

We are also concerned that this Bill is the thin edge of the wedge. If children are going to be automatically denied access to parents who have committed sexual offences, we foresee that the list of offences in proposed section 9.1 will expand significantly in the future. It is not difficult to envision people who would advocate expansion to include any number of offences – from any form of homicide to robbery to fraud to money laundering. Again, we stress that this is not the appropriate response either from a criminal justice perspective or from the perspective of the best interests of the child.

We thank the Committee for the opportunity of presenting our views. If you have any questions, please do not hesitate to contact us through Richard Ellis, Legal Policy Analyst, at (613) 237-2925, ext. 144 (**richarde@cba.org).**

Yours truly,

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