

October 4, 2002

Lisette Lafontaine
Department of Justice
284 Wellington St, 4th Floor
Ottawa, ON
K1A 0H8

Dear Ms. Lafontaine:

Re: Voyeurism as a Criminal Offence

I write on behalf of the National Criminal Justice Section (CBA Section) of the Canadian Bar Association (CBA). The CBA's mandate includes seeking improvements in the law and the administration of justice. The CBA Section consists of both Crown and defence counsel from across Canada. That mandate and balanced perspective guide this response to the Department of Justice's consultation paper, *Voyeurism as a Criminal Offence* (consultation paper).

The consultation paper asks several questions concerning the necessity of adding sections to the *Criminal Code* to address electronic voyeurism. The CBA Section agrees that Canada's criminal law must keep pace with technological and social changes, but has opposed creating new offences where the relevant activities are already prohibited under current law.¹ However, we acknowledge the need for legislation to combat what appears to be a developing invasion of privacy. Such legislation can be viewed as a logical complement to *Criminal Code* provisions against obscenity and child pornography. It would fill a legislative gap for offending behaviour not captured by other provisions, but which harms society and degrades its victims. The invasive nature of the offences can go beyond even that of a home invasion, through behaviours such as "up-skirting" or "down-blousing", or use of infrared technology to see through clothing, all without the target's knowledge or consent.

People have the right to expect privacy within the sanctity of their own homes or the homes of others. To an even greater extent, people also have the right to expect privacy of their bodies

¹ See, for example, the Section's submission on *Organized Crime* (Ottawa: Canadian Bar Association, March 2001) at 4-5.

and-personal space, even in a public setting. With the ubiquitous presence of increasingly sophisticated means of communicating through information technology, particularly the internet, this sphere of personal privacy is increasingly difficult to protect. Acts of voyeurism and video voyeurism can cause irreparable damage to their victims in a number of ways - not only has victims' privacy been grossly invaded, often the offending material is put on the internet and shared with the rest of the information technology world. Consequently, the breach or invasion of privacy and disrespect for the inherent dignity of the victim can continue indefinitely.

Women are disproportionately the targets of voyeuristic behaviour. According to the Electronic Privacy Information Centre, in an article entitled "Gender and Electronic Privacy":

Technology can enhance individual freedom through increased anonymity and privacy. However, the users of new technologies have employed them to violate autonomy and human dignity of others. Individuals can use privacy invasive technologies and behaviors against men or women in order to degrade or control. However, users of some of these behaviors and technologies disproportionately or entirely target women. These behaviors sexually objectify women. For instance, individuals use tiny cameras to take up-skirt and other fetish images of women. The availability of personal information about women from public records and other sources such a "pretexting" has fueled cyberstalking and real-world stalking....In order to promote a culture of equality and autonomy, our society must attend to the privacy norms that disproportionately harm women.... Privacy issues may have different contexts and consequences for women.²

Much attention has been paid to addressing this issue in the United States. Several state legislatures have either passed or are considering legislation to prohibit acts of video voyeurism.³ The United States Senate and House of Representatives are each reviewing federal legislation to amend Title §18 of the United States Code and insert a provision in Chapter 88 - Privacy prohibiting video voyeurism. The proposed penalty is currently a fine or a maximum of one year in jail. Various state legislatures have enacted their own voyeurism legislation, some with significantly higher penalties.

The bill before the Senate Committee on the Judiciary is summarized below:

*S.2661; Sponsor: Sen DeWine, Michael(introduced 6/20/2002)
Latest Major Action: 6/20/2002 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary. Title: A bill to amend title 18, United States Code, to prohibit video voyeurism in the special maritime and territorial jurisdiction of the United States. SUMMARY AS OF: 6/20/2002--Introduced.*

² The article is posted on the Centre's website - www.epic.org

³ For a summary of what the various states are doing or have done to enact voyeurism legislation, as well as the range of penalties imposed, see <http://www.techtv.com/cybercrime/privacy/story/0,23008,3380883,00.html>

Video Voyeurism Act of 2002

Amends the Federal criminal code to prohibit, within the special maritime and territorial jurisdiction of the United States, the videotaping, photographing, filming, or recording by electronic means of any non-consenting person in circumstances in which that person has a reasonable expectation of privacy: (1) if such person is nude, clad in undergarments, or in an exposed state of undress; or (2) under the person's clothing so as to expose private areas. Provides exceptions with respect to: (1) law enforcement officers pursuant to a lawful criminal investigation; or (2) correctional officials for security purposes or the investigation of alleged misconduct involving a person in custody.⁴

Defining Criminal Voyeurism

The consultation paper recognizes that voyeurism is not always associated with a sexual disorder by proposing two alternative ways of committing a criminal voyeurism offence. A definition of criminal voyeurism must be broad enough to capture not only offending “for a sexual purpose”, but also offending committed for commercial, harassment or embarrassment motives. Legislation should not be drafted so narrowly as to implicitly authorize invasions of privacy and secret observations of individuals where they have a reasonable expectation of privacy, just because those invasions are done for purposes other than those of a sexual nature.

Overly broad drafting might unnecessarily catch otherwise legitimate observers, such as private investigators or police officers. It might also impact on, for example, sensationalist photographers intruding into the private lives of celebrities, though as a gross invasion of privacy for commercial and embarrassment purposes, many people might not find that to be objectionable.

Drafting will require a careful balancing of all competing interests. The consultation paper states that the voyeurism offence “is not intended to capture the activities of persons who simply consume voyeuristic images”.⁵ While we understand that this limitation is likely to be an important safety valve to ensure the constitutionality of any legislative initiative, it may also create problems in prosecuting these offences if an accused can claim to be simply consuming the images for personal use. Obviously the circumstances of the case may establish otherwise. As consumers fuel the market for voyeuristic material, we run a risk of making eradication of the practice difficult, if not impossible, by failing to criminalize simple possession of such material. The same argument has been advanced in other areas, most recently in child pornography.⁶

⁴ The House of Representatives version is identical and was referred to the House Committee on the Judiciary in February 2002. That bill is H.R. 3726, introduced by Representative M. Oxley.

⁵ *Voyeurism as a Criminal Offence: A Consultation Paper* (Ottawa: Department of Justice Canada, 2002) at 10.

⁶ See, *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Ontario (Attorney General) v. Langer* (1995), 97 C.C.C. (3d) 290 (Ont. Ct. (Gen. Div.)), lv. to app. to S.C.C. dismissed (1995), 42 C.R. (4th) 410; *R. v. Stoempel* (1995), 105 C.C.C. (3d) 182 (Ont. C.A.).

Finally, criminal voyeurism offences should likely also contain a specific intent component, given the stigmatized nature of such an offence.

Distribution

The range of activity proposed for the distribution scheme appears appropriate. Consideration should be given as to whether it should mirror the distribution language of the child pornography provisions in section 163.1⁷ and also whether a new offence of “accessing criminal voyeurism” primarily through computer systems and the internet will be necessary to effectively combat the problem.

Police Surveillance and other Lawful Behaviour

Exceptions could be made to permit previously authorized interceptions during police surveillance activities or corrections types of investigations, as is done in the proposed federal US legislation. A law enforcement justification may exist, for example, for video surveillance of a room where drug dealing is believed to be taking place but where the occupants might also be engaged in sexual acts. However, it is difficult to conceive of a law enforcement purpose that would require the recording of images if they are completely unrelated to the offence being investigated.

Defences

Defences such as a “public good defence” or lawful excuse defence will be necessary if the legislation is to survive constitutional challenge. Although the value of the expression is on the outer periphery of freedom of expression, it may well still be considered a form of expression.

Penalties

It seems that the behaviour at issue can range from relatively minor and unsophisticated offences, to extremely organized, calculated behaviour focused on recording, distribution and profit. There should be a corresponding range of penalties. Similar to legislative treatment of sexual assault, the proposed legislation should establish hybrid offences for each offence with “super-summary” status for distribution and recording. This would allow greater flexibility in determining the gravity of each offence and the appropriate corresponding response. The penalty for recording should be greater than for simple viewing, as the recorder has a role equivalent to that of the producer in the child pornography hierarchy. Without the recorder capturing the images and taking the risk of invading another person's privacy, there would be no product to view. Furthermore, the act of recording creates a more permanent invasion of the individual's privacy.

⁷ As amended by Bill C-15A.

It is difficult to decide which of distributors and recorders are more blameworthy. Both are needed to fuel the market. Certainly the distributor continues the invasion of the individual's privacy by making the material available for wider spread consumption. In our view, the same range of penalties should be available for both offences, allowing the individual judge in each case to determine who is more culpable in the circumstances.

As for range of penalties, again it might mirror the child pornography penalties. However, consideration may be given to the issue of limiting the penalty to under five years, avoiding the necessity of jury trials, and making it an absolute jurisdiction offence for provincial court judges, as is done, for example, with section 259(4), operation of a motor vehicle while disqualified. This would also somewhat alleviate the further invasion of privacy victims might experience in having the images played or depicted in court during the trial. However, it would also limit the offence to a maximum 2 years where proceeding by indictment, which may minimize the significance of the offending behaviour and the seriousness of the invasion of privacy.

Other issues

Careful consideration should be given to the necessity of playing or displaying the images said to be the acts of voyeurism in open court. This would subject victims to further humiliation and yet a further invasion of privacy. Also, sealing and destruction orders, and the seizure of computers containing offending materials should be considered. The legislation in sections 164, 164.1, and 164.2 of the *Criminal Code* could be amended to include a voyeurism offence.

Thank you for this opportunity to comment upon proposals to create a new offence of criminal voyeurism. We look forward to our ongoing collaboration on this and other important issues to improve the criminal law.

Yours truly,

Kate Ker, Chair
National Criminal Justice Section