Submission on Bill C-23, Sex Offender Information Registration Act

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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 of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section and its Committee on Imprisonment and Release, (collectively, the CBA Section) appreciate this opportunity to review the government's proposals to create a sex offender registry, as proposed in Bill C-23, the *Sex Offender Information Registration Act*. The Bill's objective attracts significant and understandable public sympathy, while those whom it would target for registration do not. Precisely for that reason, the CBA Section believes that Parliament must proceed cautiously, and with vigilant respect for long-standing principles of criminal law and the protections guaranteed within the *Canadian Charter of Rights and Freedoms.*

II. STATEMENT OF PRINCIPLES

Bill C-23 begins with a statement of purposes and principles. Section 2(2)(c)(i) requires that "the information be collected only to enable police services to investigate crimes that they have *reasonable grounds* to believe are of a sexual nature…" In our view, this should instead read "…reasonable **and probable** grounds…" There is no reason to deviate from the traditional test of reasonable and probable grounds, which is well understood and avoids overly subjective, and therefore variable, application.

The following paragraph requires that "access to the information and use and disclosure of it, be restricted." We recommend that this statement be followed by explicit clarification that such access, use and disclosure be restricted in ways consistent with the *Charter of Rights and Freedoms*, the *Access to Information Act* and the *Privacy Act*.

III. DEFINITION

Given the seriousness of a national sex offender registry, the definition of a "crime of sexual nature" set out in section 3(2), which prescribes which offences bring registration in the proposed registry, must be that of a crime under the *Criminal Code*. It should not extend to offences under provincial legislation or ones that might be subject to a ticket under the *Contraventions Act*.

IV. REGISTRATION

Section (4)(1)(c) of the Bill requires that sex offenders be subject to an order to report and be registered when "…they are released from custody pending the determination of an appeal relating to the offence in connection with which the order is made."

The collection of information for a sex offender registry is analogous to collection of information for the DNA databank. Section 487.054 of the *Criminal Code* creates a right of both the state and the accused to appeal orders to provide samples to the DNA databank. Importantly, it does not require the offender to submit a sample pending the outcome of the appeal. To be consistent with similar information systems, and in line with basic due process considerations, the CBA Section recommends that the information for this registry not be gathered pending determination of an appeal. Either the offender should not have to report until that determination, or a section could be added permitting a Judge of the Court of

Appeal sitting in Chambers to hear an application for a temporary stay of the Order pending the outcome of the appeal. The test could mirror the test for release from custody pending appeal. The latter is, in our view, the preferred option. It would enable the court to control the stay and ensure that an appeal is not launched simply as a means of frustrating compliance with these provisions.

We have objection in principle with a person receiving an absolute discharge or being found not criminally responsible on account of mental disorder, then being required to comply with "obligations" incumbent on a "sex offender". As neither of these findings is actually a conviction, we are concerned that this proposal would diminish the impact of existing *Code* provisions and the underlying objectives of such dispositions. In addition, the requirement of regular reporting, including threat of incarceration for not complying, would be especially onerous for people otherwise found mentally incompetent. It is too easy to imagine additional offences accumulating as a result of an offender's inability to keep appointments. Further, people who commit crimes falling within the definition of section 3(2) will already be monitored by medical staff and be subject to residing and reporting conditions imposed by the Mental Health Review Board.

The registry raises other practical concerns. Who will be responsible for the costs of getting to the registration centre? The costs could be considerable for people who live outside urban centers, possibly requiring accommodation away from home. Even if a registration centre were in the same town or city, logistics such as travel costs, time away from work, or family responsibilities could result in people being charged for non-compliance when compliance was virtually impossible. While these costs exist when a person is bound by probation, bail or parole terms, they should be kept in mind in considering Bill C-23 for the added potential they create for unintended default.

Section 5(1)(f) calls for reporting a "description of any physical distinguishing marks" that offenders might have. How far will this extend? Does it refer only to

those visible while clothed? Who determines whether or not the marks are "distinguishing" – the offender or the person collecting the information? Will an offender be sanctioned for making an inadvertent omission? In our view, information consistent with that found on existing CPIC databases would be sufficient to note any distinguishing features unique to the identification of the offender.

Section 5(2) of Bill C-23 permits a person authorized to collect information pursuant to section (1) to ask for additional information. However, it does not require the sex offender to provide the additional information. It is illogical to permit the state to ask for additional information that the offender need not provide. In our view, this section should be deleted in its entirety.

Sections 5(2) and 9(2)(a) leave substantial discretion to the person collecting the information. For example, section 5(2) states only that the person "may" ask? If the stated purpose of the legislation is to be met, presumably the same questions should be asked of all sex offenders. Section 5(2) and the additional power of an authorized person to inquire as to the time and place of the conviction appears to contain a drafting error that should be cured by adding these items to the enumerated list of information that offenders are required to provide.

V. RESEARCH

Section 13 of the Bill would permit access to the database for research or statistical purposes. In our view, this access is one of the Bill's most obvious vulnerabilities to a *Charter* challenge. To address this vulnerability, we suggest that the scheme for access to the database for research or statistical purposes involve an application and a test balancing the value and goal of the research against the potential risks of violation of privacy of the sex offenders. Although some limitations on privacy may be in order in light of public safety concerns,

they should not be lightly or automatically imposed without cautious deliberation by a court. While possibly rendering use of the registry for research somewhat more difficult, the CBA Section believes that it would make it more defensible against possible section 7 and 8 *Charter* challenges.

We also note that if such research were to be truly for statistical purposes, there would be no need to reveal an offender's name. Instead, allowing for a number based access would help address privacy concerns, and save the legislation.

VI. RETAINED INFORMATION

Section 15(3) allows for two possible interpretations. It could be seen as granting the Commissioner broad powers of delegation, including the power to delegate decisions about access to the database for research and statistical purposes pursuant to section 13. Given the sensitive nature of the registry and the concern about potential constitutional challenges discussed above, authority to delegate the Commissioner's powers should lie with Parliament, not with the Commissioner.

The alternative interpretation, and more likely the legislative intent, is that section 15(3) simply grants power of delegation to the Commissioner for matters contained in that particular section [permanent removal of information], but not the ability to delegate the power to grant access for research purposes under section 13. While the latter interpretation would not, in our view, warrant comment, the existing wording could permit the former interpretation as well. This section should be clarified.

Our concerns about excessive discretion in the hands of information collectors are heightened by proposed section 12(2)(a), which provides the process to be used if an offender believes that erroneous or incomplete information has been registered. The collector alone assesses whether the information is wrong or incomplete, and

is only obliged to make a note that a correction was requested but not made. In our view, there should be an independent means of correcting such information. The proposed Order to Report and Provide Information provided to the offender advises the offender that if he or she believes "that the information registered in the database contains an error or omission, … may ask a person who collects information at the registration center nearest to your home to correct the information." The offender could well believe that, simply by asking, the correction would be made.

Finally, we believe that information that goes to a correctional institution must be kept confidential. We must guard against this information being shared with other inmates.

VII. DESIGNATED OFFENCES

If a pressing public safety concern is thought to warrant such an intrusion as that represented by Bill C-23, we must diligently ensure that the proposal is not drafted to be more expansive than it needs to be. Clause 20 of the Bill amends the *Code* by adding sections 490.02 through 490.09. Section 490.02(1)(a) would set out designated sexual offences for the purposes of the Bill. This appears to be similar to the primary and discretionary DNA orders in the DNA databank legislation.

Under itemized offences subsections (1)(a)(xiii) and (xiv), offences of living off the avails of prostitution are included as designated offences, regardless of the presence or absence of a sexual intent. These are not offences traditionally designated as "sexual" and, indeed can occur without any sexual component or intent at all, for example where someone shares the rent with a prostitute. In our view, no offence should bring registration unless it is clearly an offence of a sexual nature. However, the bulk of these offences are of a sexual nature. Perhaps a more appropriate placement of these two offences, along with (xx) – removal of

a child from Canada – would be under the "discretionary or secondary" designated offences. That category seems to acknowledge that some circumstances may not amount to an offence of a "sexual nature" while others may in fact be of such a nature. In such circumstances the application for an order is to be taken under section 490.03(2), which places an additional burden on the Crown to establish beyond a reasonable doubt that the offences under sections (1)(b) or (1)(f) were committed with the intent to commit one of the enumerated designated sexual offences in section (1)(a)(c)(d) or (e).

VIII. RETROSPECTIVITY

Section 490.03 is poorly drafted. In subsection (1), the court shall make an order upon request of the prosecutor, but subsection (4) indicates that the court has discretion to make the order. In our view, the provision should be similar to that for a DNA order. The consequences of an order are significant enough that an offender should be entitled to a hearing.

Section 490.03(3) of the C*riminal Code* appears to import retrospectivity to the commission of all section (a), (c), (d) and (e) designated offences. We believe that a registration order must occur as part of the sentencing process following a conviction to be constitutionally sound. Retrospectivity is inconsistent with the fundamental legal principle that an accused is entitled to the more favourable sentencing regime should their matter temporally span two different regimes. In our view, section 490.03(3) should be removed from Bill C-23.

Any proposal for a blanket retrospective application of Bill C-23 would be call for serious *Charter* concerns. People who have already been convicted and sentenced are entitled to procedural fairness and protection of the law as it was when they were sentenced. If, in the clearest and most serious of circumstances, retrospectivity is believed necessary, it should only be contemplated after a hearing to ensure that a judge has determined the application of the law to be

consistent with *Charter* protections.

Finally, we note that under subsection (4), the court is not required to make an order if, on balance, the impact on the offender would be *grossly* disproportionate to the public safety interest. Surely, the test should not be one of gross disproportionality. If a court believes that making an order would have a disproportionate impact on the offender, considering the public safety interest, such an order should not be made.

IX. DURATION OF ORDERS

The CBA Section does not support the inflexible approach taken to the duration of the orders contained in Bill C-23. The duration is calculated according to available statutory ceilings for the punishment on the predicate offences. Even with a careful reading of the *Code*, the rationale for these ceilings is at best confusing and contradictory. Further, these upper limits bear little or no resemblance to the actual range of dispositions usually imposed in relation to these offences. Such an uncertain basis for establishing the duration of these orders is problematic. This difficulty is not offset by the fixed periods of review at 5, 10 and 20 years respectively.

In our view, courts must be given greater flexibility to determine the length of such orders, having regard to the circumstances and seriousness of the offence, and the character and background of the offender. While the statutory maximum should play a role in this evaluation, it should be only one factor.

Section 490.04(3) of the *Criminal Code* appears to mandate a retrospective [subsection (a), (c), (d) and (e) designated offences] order to last for the life of the offender. This is again inconsistent with fundamental sentencing principles and with section 490.04(1) of the *Criminal Code*, which sets out a scheme of

differing durations of orders depending on the maximum punishment available for the predicate subsection (a), (c), (d) and (e) designated offences. While a contemporaneous order could result in a 10 or 20 year order, a retrospective order for exactly the same offence must result in an order for life. Again, the CBA Section believes that section 490.04(3) should be deleted. At a minimum, it should be harmonized with section 490.04(1).

X. RIGHT OF APPEAL

Section 490.05 of the *Criminal Code* grants both the state and the accused a right of appeal on a question of law, mixed law and fact or fact alone. An appeal of fact alone will result in a trial *de novo*, and will greatly increase the workload of the various Courts of Appeal. Accordingly, the right of appeal on a question of fact alone should only be available for the offender. The same should apply in the case of section 490.07, appeal of fact alone from a decision under section 490.06.

Given our previously expressed concerns about the very significant discretion allowed to "information collectors", the CBA Section believes that Bill C-23 should include some sort of defined appeal from decisions of the those "information collectors".

We note also that under sections 490.09(1) and (2), there is no lawful excuse defence. The only recognized inability to comply under those sections is if a person's liberty is restricted, under lawful authority, thus preventing them from reporting. If a person is, for example, in hospital, surely that person should not be expected to get to the reporting center. These sections should include a general common law defence of lawful excuse, such as that used in the context of probation orders.

XI. REVIEW MECHANISM

Given the impact of the registration orders proposed by Bill C-23, the CBA Section believes that the Bill should include some form of formal reporting or review mechanism, analogous either to the formal reports provided pursuant to section 195 of the *Code* for wiretap applications and authorizations, or a Parliamentary review as in relation to the DNA databank legislation. If properly crafted, such a mechanism would enable a thorough, and hopefully ongoing evaluation of the effectiveness of this legislation in achieving its stated objective. We note that the absence of data to support the effectiveness of similar legislation was a significant feature in oral argument before the United States Supreme Court when it considered the constitutional validity of sex offender registry provisions in Alaska and Connecticut.

In our view, a mechanism to monitor the accuracy and degree of compliance with the reporting requirements is essential to this initiative. The United States experience indicates that the failure to report, or inaccurate reporting, is significantly undermining the effectiveness of similar sex offender registries across that country. On average, States cannot account for approximately 24% of individuals who should be included in the database. In addition, 19 States indicate that they were unable to provide information regarding either the extent of underreporting or on the accuracy of information received.[1]

XII. CONCLUSION

If the government is to embark on a course of monitoring a large group of offenders over a long period of time, sound public policy and legitimate privacy concerns require that it document the effectiveness and accuracy of the undertaking.

1 Katheen Murphy, "States Lose Track of Sex Offenders" ; www.erepublic.con, ConVurge Gov.2003, Feb.4/2003.

This Bill proposes very significant additions to our current sentencing regime, in effect subjecting certain offenders to what may be lifelong supervision and vulnerability to further charges for breaching conditions of that supervision. The CBA Section questions whether a sex offender registry is the most efficient expenditure of public funds to promote the protection and safety of vulnerable members of our community. If such a proposal is necessary and expected to achieve the desired results, it should be approached very cautiously, with proper, ongoing attention to all Canadian constitutional safeguards.