THE CANADIAN BAR ASSOCIATION
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Bill C-26 — *Tougher Penalties for Child Predators Act*

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

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

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I. INTRODUCTION

The Canadian Bar Association National Criminal Justice Section (CBA Section) appreciates the opportunity to offer our views on Bill C-26, the *Tougher Penalties for Child Predators Act*. Protecting children and other vulnerable people is an important priority for Canadians, and also for the CBA Section. Both effective legislative tools based on existing facts and evidence, and significant resources are necessary to accomplish this goal and ensure public safety.

II. EFFICACY OF REGISTRIES

After more than a decade of Canadian experience with sex offender registries, at both the federal and provincial levels, policy makers can assess their efficacy in preventing crime and protecting the public. An evidence based assessment can and should dictate how future sex offender databases are designed or modified, and how resources are best allocated to reduce risk to society.

Unfortunately, the Canadian experience with registries has not, in general, been positive. In 2007, the Auditor General of Ontario issued a report to the Ministry of Community Safety and Correctional Services, identifying deficiencies in the administration of that province's sexual offender registration program:

> Even though sex offender registries have existed for many years and can consume significant public resources, we found surprisingly little evidence that demonstrates their effectiveness in actually reducing sexual crimes or helping investigators solve them, and few attempts to demonstrate such effectiveness.[1]

And:

> A 2004 research paper issued by Public Safety and Emergency Preparedness Canada based on a review and analysis of 95 different recidivism studies between 1943 and 2003 found that the sex offenders most likely to re-offend had deviant sexual

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1 See the Auditor General's report (Toronto: Auditor General, 2007) at 272.

> interests and anti-social orientations, such as a history of rule violation, lifestyle instability, and anti-social personalities. It concluded that, given the identifiable differences in sex offenders' recidivism risk, the application of policies equally to all sex offenders would waste resources on low-risk offenders while failing to direct sufficient attention to high-risk offenders.[2]

The John Howard Society has described these registries as "a costly illusion".[3] According to Heather Davies, in "Sex Offender Registries: Effective Crime Prevention Tools or Misguided Responses?":

> In 1998, the federal government was clearly of the opinion that a national registry was not the best way to combat the problem of sex offenders. Since that time, it does not appear that there has been any evidence to suggest that offender registries are effective and successful in achieving their stated goals. In fact, there is now mounting evidence to the contrary..."[4]

The Court of Appeal for Ontario has upheld the constitutionality of the province's registry,[5] but also accepted evidence that "as a group sex offenders are always going to be at risk" and recognized that "there may be numerous offenders amongst that group who ultimately do not re-offend at all".[6]

In 2008, Ontario expanded the stated justification for the law from protecting children to protecting the entire public. The Minister of Community Safety then stated:

> Christopher's Law is one tool for helping to secure the protection of our community. It is based on the simple proposition that if police know the whereabouts of all convicted sex offenders in the community, they are better able to identify potential threats and can better focus their investigation into actual crimes.
>
> Christopher's Law requires sex offenders convicted of criteria sex offences to register with the police service in their area of residence. This act has proven very helpful to police in keeping track of sex offenders in the community, conducting investigations into sex crimes and, in some cases, preventing these crimes.[7]

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2 *Ibid.,* at 272 - 273.

3 John Howard Society of Ontario "Sex Offender Registries: A costly illusion", July 2001.

4 (2004) 17 C.R. (6th) 156 at 177.

5 Christopher's Law (Sexual Offender Registry) 2000, S.O. 2000, c. 1.

6 *R. v. Dyck,* 2008 ONCA 309, at para. 100, citing testimony from Dr. Collins.

7 Hansard, April 23, 2008.

He added that the police used the registry 500 times per day,[8] yet offered no instance or data about the registry preventing or solving any crimes.

The reality is that sexual offender registries, as administered presently, are not proving effective. This is not to say that they cannot be. Registries should be tailored to sexual offenders who are an ongoing potential danger to the community and require monitoring and police attention, rather than expending scarce resources on those who are very unlikely to re-offend.[9] To illustrate this point, the board that oversees California's sex offender registry has recently proposed thinning out that state's registry, noting it has become so unwieldy that it "does not help law enforcement or the public differentiate between offenders who pose significant risks and those not likely to reoffend."[10]

Unfortunately, Bill C-26 would move in the opposite direction. It would add reporting requirements, such as requiring that authorities be notified of receipt of a driver's licence or passport, and information about where a person will be staying in or outside Canada under certain conditions. In our view, this will not affect sex crimes nor make communities any safer. Convicted offenders must already inform the registration centre of their current addresses, so also providing with driver's licence information will have no effect. In any event, the police can obtain information about offenders' licences through their own databases and provincial or territorial ministries of transportation.

Likewise, passport notification does not in itself combat the scourge of sex tourism. Any action in this area depends on international cooperation with authorities in other states. Canada has limited powers to enforce its courts' orders beyond its borders[11] and cannot simply send officers to other countries to enforce Canadian laws there. Proving that an offender committed an offence beyond our borders presents almost insurmountable problems. The proposed legislation would not assist with this reality.

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8 *Ibid.*

9 Melody Gutierrez, "Board wants to remove low risk offenders from registry", May 25 2014 www.sfgate.com/default/article/Board-wants-to-remove-low-risk-sex-offenders-from-5503219.php.

10 *Ibid.*

11 *R. v. Greco*, 2001 CanLII 8608 (ON CA); *R. v. Rattray*, 2008 ONCA 74 (CanLII).

In recent litigation before the Supreme Court of Canada,[12] an affidavit by Superintendent Dave Truax of the Ontario Provincial Police provided evidence about the reality of sex crimes and supported authorities having current addresses for sex offenders:

- sex offenders often lived, worked or had some other legitimate reason for being in the area where the crime occurred;
- unique patterns of distance relationships exist in child abduction murders i.e. the offender often resides in close proximity of the victim when the crime is perpetrated and offenders tend to commit offences in areas that are familiar to them;
- 80% of initial contact between the sex offender and the victim occurs within a quarter mile of the victims' last known location (suggests stalking prior to offence); and
- many sex crimes are crimes of opportunity.

The Superintendent's testimony supports the CBA Section's view that the proposed amendments would not increase detection or prevent sex crimes. Instead, it suggests that a concerted effort is needed to focus the registry on those who are truly a danger to re-offend and pose a risk to the community, and that available resources must be directed to allow the police to effectively monitor such risks. With this, it is critical for prevention and treatment programs to be available if the goal is to promote community safety and prevent crimes. Bill C-26 would not forward these essential and practical goals.

The need for treatment and prevention has been recognized in government and academic studies. In 2005, a Study Committee of the Legislative Council of Vermont determined that male offenders who completed treatment were six times less likely to re-offend than those who did not complete treatment.[13] The Study Committee was unable to identify any studies demonstrating a correlation between the establishment of sex offender registries and recidivism.[14] Professor John La Fond, a well-known scholar in the areas of mental health and law, of the University of Missouri – Kansas[15] has found that treating offenders is the most effective way to prevent recidivism and enhance safety. These are just a few examples. Many

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12 *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31.

13 Sex Offender Supervision and Community Notification: Study Committee Report; prepared by Legislative Council, State House, 115 State Street, Drawer 33, Montpelier, Vermont.

14 *Ibid*, at page 12.

15 *Preventing Sexual Violence: How Society Should Cope with Sex Offenders*, American Psychological Association, 2005.

other studies point to the same conclusions and should inform any legislative changes on this front in Canada.

The second issue of concern is the proposal for a *public* offender registry. Again, this could work against the goal of improving community safety. Driving offenders underground, away from police monitoring and supervision and needed treatment, will only interfere with successful reintegration into society.[16] This would exacerbate, not ameliorate, risk to the public.

Inspector Truax's affidavit considered by the SCC highlights these issues too. About Ontario registry (referred to as OSOR in his affidavit), this experienced police officer stated:

> As of February 11, 2009, the Christopher's Law compliance rate for sex offenders in Ontario was 96.78%. In comparison to registries in the United States, the OSOR has consistently had a very high compliance rate.
>
> It is my belief that the high registered sex offender compliance rate in Ontario is largely due to police efforts to closely monitor sex offenders, but also due to the fact that beyond the public safety notification provisions in the Police Services Act, there is no public notification component similar to many sex offender registries in the United States.
>
> The information provided as part of the OSOR registration process, including the sex offender's home address, is kept confidential by the police. Sex offenders often fear the public more than they fear the police. Public access to information concerning the home addresses of potentially identifiable sex offenders carries the risk that some sex offenders will go "underground" in fear of vigilantism as evidenced by two well-publicized cases in Ontario. Both of these cases involved sex offenders who, following public pressure, relocated to other jurisdictions where new sex crimes were committed.
>
> The decision of a Chief of Police or the Commissioner of the OPP to notify the public pursuant to the Police Services Act that about a particular high risk offender is a public safety decision that is made only after very careful consideration of all relevant facts and circumstances.
>
> Once a sex offender has gone "underground" he/she is no longer compliant with Christopher's Law requirements and police no longer know the whereabouts of this particular sex offender. In such a circumstance, the investigative value of the OSOR to enable police to quickly locate sex offenders during a critical incident, such as the abduction of a child, will be severely compromised.
>
> I believe that some of the well-publicized issues that have arisen in relation to United States sex offender registries such as the victimization of sex offenders (which have sometimes included death) and the non-compliance of the sex offender (going underground) are connected to the decision to notify the public about all sex offenders in a community rather focusing public attention on sex offenders who are deemed to be high-risk.

16 *Ibid.*

> If sex offenders believe that the police are releasing components of their personal home addresses (or any OSOR personal information for that matter) to the public for purposes not relating to law enforcement or crime prevention, this could frighten some sex offenders into "going underground" to avoid public identification. Should sex offenders not supply their current addresses to the police, the value of the OSOR as law enforcement and crime prevention tool will be compromised. This circumstance would hamper the ability of the police to prevent and investigate sex crimes in Ontario.[17]

The Superintendent's testimony supports our concerns that public identification of sex offenders can actually endanger the community, rather than keep it safe. Mental health professionals have taken a similar position, saying that publicly accessible registries have no impact in reducing levels of child abuse and rather can foster a false sense of community security.[18]

In sum, significant evidence and research points to registries as ineffective, if not counter-productive. If the goal is to advance public safety, as expressed in section 3 of the *High Risk Child Sex Offender Database Act*, which would be enacted by section 29 of Bill C-26, the best way to accomplish that objective is by abandoning the proposal for a publicly accessible offender database.

There is significant experience that people will use public information about offenders to exact their own revenge and retribution, often with terrible consequences. Legislation that could foster vigilantism actually encourages criminal behavior, and has also been known to target innocent bystanders whom vigilantes mistake as offenders. Disturbing examples are not hard to find:

- In 2006, a Cape Breton man gained access to a registry run by the government of Maine. He killed two men who had been convicted of sex crimes, then killed himself when approached by Boston police.[19]

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17 *Supra*, note 13.

18 "Public Perceptions About Sex Offenders and Community Protection Policies" Jill Levensen et al, Analyses of Social Issues and Public Policy, Vol. 7, No. 1, 2007 1 at 4.

19 Aaron Beswick, "Privacy concerned about database listing sex offenders", *The Chronicle Herald* (Truro Bureau) March 20, 2014. Other information discovered about the killer, Stephen A. Marshall, includes that Marshall had looked up thirty-four names on the Maine offender registry. One of the deceased, twenty-four year old William Elliott, was reported as being on the registry as he had been convicted of having sex with his girlfriend when she was two weeks shy of her sixteenth birthday. He was nineteen at the time.

- In New Jersey in the 1990's, a man was beaten with a baseball bat. The man was mistaken for his brother, who was an offender, according to Jack King of the National Association of Criminal Defence Lawyers.[20]
- Lawrence Trant pleaded guilty to two counts of attempted murder. Mr. Trant stabbed one man and set fire to two residences where seven convicted offenders were housed.[21] He had found their names on an offender registry. These crimes took place in New Hampshire.[22]
- Michael Anthony Mullen was sentenced to forty-four years in prison for killing two convicted sex offenders in Washington State.[23]
- In Washington State, in 2012, Patrick Drum killed two convicted offenders.[24]
- In England, the now defunct News of the World tabloid published pictures of 49 convicted sex offenders, drawing condemnation from Tony Butler, Chief Constable of the Gloucestershire Constabulary for actions which put the safety of children at risk. The Chief Constable stated that anonymity of offenders was essential to the successful operation of the offender registry.[25]
- In England, a respected pediatrician's home was attacked by vigilantes who confused the words "pedophile" and "pediatrician", and five families who were wrongly identified as harbouring sex offenders had to flee their homes in Portsmouth. This came about due to the News of the World publicity campaign.[26]

There is no reason to believe that Bill C-26's proposal to publicize offender information would avoid similar tragedies.

III. MANDATORY CONSECUTIVE SENTENCES

The *Criminal Code* amendments in Bill C-26 are directed at toughening penalties for sexual offences involving children. Most would increase the maximum sentence available for some of these sexual offences.

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20 www.freerepublic.com/focus/news/1617207/posts

21 www.boston.com/news/local/articles/2004/12/05/man_defends_attacks_on_sex_offenders?pg=ful l; Brian MacQuarrie, *The Boston Globe*, December 5, 2004.

22 www.freerepublic.com/focus/news/1617207/posts

23 *Ibid.*

24 abcnews.go.com/US/patrick-drum-killed-sex-offenders-life-sentence/story?id=17274171. In an article from ABC News, it is stated: After his arrest, Drum again confessed to police and said he would have continued killing people were he not picked up.

25 www.telegraph.co.uk/news/uknews/1350150/Newspapers-paedophile-expose-puts-children-at-risk.html; David Millward, "Newspaper's paedophile expose puts children at risk", The *U. K. Telegraph*, 24 July 2000.

26 www.theguardian.com/uk/2000/aug/30/childprotection.society; Rebeccca Allison, "Doctor driven out of home by vigilantes", *The Guardian*, 20 August, 2000.

Proposed section 718.3(7) would require a court to impose consecutive sentences of imprisonment when sentencing for more than one sexual offence committed against a child, in certain circumstances. Most of the sexual offences captured under the new provision already contain mandatory minimum sentences (MMS). As such, the effect of the proposed amendment would be to stack mandatory minimum sentences one on top of one another. This is likely to result in disproportionate and excessive sentences.

The CBA Section has consistently opposed the use of MMS[27] as they:

- do not advance the goal of deterrence. International social science research has made this clear.[28] The government itself has stated that:

  > The evidence shows that long periods served in prison increase the chance that the offender will offend again....In the end, public security is diminished, rather than increased, if we "throw away the key".[29]

- do not target the most egregious or dangerous offenders, who will already be subject to very stiff sentences precisely because of the nature of their crimes. More often, less culpable offenders are caught by mandatory sentences and subjected to extremely lengthy terms of imprisonment.

- have a disproportionate impact on those minority groups who already suffer from poverty and deprivation. In Canada, this will affect aboriginal

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27 For example, see Submission on Bill C-68, *Firearms Act* (Ottawa: CBA, 1995) at 10-13; Letter to Senator Beaudoin from CBA President G. Proudfoot (Ottawa: CBA, 1995); Submission on Bill C-41, *An Act to amend the Criminal Code* (sentencing) (Ottawa: CBA, 1994); and, Submission on Bill C-215 (*Criminal Code* amendments (consecutive sentences) (Ottawa: CBA, 2005).

28 See, for example, Michael Tonry, "Mandatory Penalties" (1992), 16 *Crime and Justice Review* 243, which begins with the simple and succinct statement, "Mandatory penalties do not work". See also, Neil Morgan, "Capturing Crimes or Capturing Votes: the Aims and Effects of Mandatories" (1999) UNSWLJ 267 at 272 and the Crime Prevention Council of Northern Australia, "Mandatory Sentencing for Adult Property Offenders" (2003 presentation to the Australia and New Zealand Society of Criminology Conference (August 2003): www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf.

Professor Morgan, of the Crime Research Centre at the University of Western Australia, notes that in the United States and Australia, criminologists have given careful study to the effects of mandatory sentencing on attaining sentencing objectives. The state of Western Australia introduced two mandatory minimum sentencing schemes in 1992 and 1996, respectively, targeting high-speed vehicle chases and home burglaries. Morgan used subsequent sentencing data in a study to examine the effects of these provisions. In the course of his study, he also examined recent literature in the United States. Morgan stated that:

> The obvious conclusion is that the 1992 Act has no deterrent effect. This is fully in line with research from other jurisdictions.

29 Department of Justice, A Framework for Sentencing, Corrections and Conditional Release: Directions for Reform (Ottawa: Justice Canada, 1990) at 9. We note that MMS have been severely criticized in many other important studies, including Canada's own Sentencing Commission Report.

communities, a population already grossly over represented in penitentiaries, most harshly.[30]

- subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization, and reliance on judges to impose a just sentence after hearing all facts in the individual case.

The CBA Section has also opposed consecutive sentences as unlikely to withstand constitutional scrutiny under section 12 of the *Charter*, representing cruel and unusual punishment.

Given our history of opposition to both mandatory minimum sentences, and consecutive sentences, the CBA Section vigorously opposes mandatory consecutive minimum sentences. Our concerns are compounded by combining these two controversial practices.

Bill C-26 would remove discretion from sentencing judges, who are in the best position to effectively determine a sentence that balances all the fundamental objectives of sentencing. Prohibiting judges from doing this important job, and exercising discretion to determine an appropriate sentence for the offender before them, is contrary to the spirit and letter of a large body of Canadian jurisprudence that recognizes the unique position of sentencing judges in assessing and determining the most appropriate sentence in the individual case.

There are good reasons for conferring discretion on the judge charged with imposing a fit sentence. The judge has heard the particular circumstances of the offence and the offender, and is best able to craft a sentence that will balance all the goals of sentencing. The judge is also best equipped to assess what will address the needs and the circumstances of the victim and the community where the crime occurred.

If evidence demonstrates that an offender should be subject to a lengthy prison sentence, the Crown will bring that to the judge's attention. In our experience practising in Canada's criminal courts across the country on a daily basis, offenders who commit sexual offences against children *commonly* receive sentences well above any mandatory minimum.[31] Still, there will be circumstances where consecutive mandatory minimum sentences will result in injustice. For

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30 *Juristat:* Canadian Centre for Justice Statistics, "Returning to Correctional Services after Release: A Profile of Aboriginal and Non-Aboriginal Adults Involved in Saskatchewan Corrections from 1999/00 to 2003/04", Vol. 25: 2 (Ottawa: StatsCan, 2005). On the inordinately high level of arrest and incarceration of people of Aboriginal background, see also *Juristat*, "Adult Correctional Services in Canada" 26:5 (Ottawa: StatsCan, 2005) at 15, which states that: "Aboriginal people represent more than one in five admissions to correctional services."

31 See for example *R. v. Woodward*, [2011] O.J. No. 4216.

example, young people who take sexual photographs of peers may run afoul of section 163.1 of the *Criminal Code* (child pornography), an offence specifically referred to in the new provision.

A sentencing judge must always be mindful of the effect of a combination of sentences. For consecutive sentences, the general principle of proportionality (sentences should be proportionate to one another in terms of the gravity of the offence) expresses itself through the more particular totality principle. The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence does not exceed the overall culpability of the offender.[32] If sentencing judges are to respect the totality principle but simultaneously impose mandatory consecutive minimum sentences, we are giving them an impossible task.

The combination of mandatory minimum penalties for various sexual offences would also have the potential to result in cruel and unusual punishment, contrary to section 12 of the *Charter*. This argument was recently made before the Ontario Court of Appeal in the context of sentences for armed robbery and using a firearm in the commission of an indictable offence. The Court allowed the conviction appeal on one of those counts and so did not need to decide whether the combination of mandatory minimum sentences in that case was unconstitutional.[33] The Court did not dismiss the argument on its merits, so this remains a live issue.

RECOMMENDATION

1. **The CBA Section recommends an amendment to Bill C-26 to allow the sentencing judge to exercise discretion in crafting an appropriate sentence. To ensure the Bill would withstand *Charter* scrutiny, we suggest the proposed wording be changed from "shall direct" to "shall consider directing". This latter phrase is taken directly from the proposed wording for the amendments to section 718.3(4) that are already contained in Bill C-26.**

32 *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500.

33 *R. v. Rocheleau*, [2013] O.J. No. 5137 (C.A.).

IV. CONCLUSION

Protecting vulnerable people is an important priority. Canadians' government has a responsibility to ensure that measures to advance this goal are effective and public resources are well directed to achieve the best results.

Bill C-26 does not meet these tests. It would not advance the goal of better protecting children, but may actually create dangerous situations for them and others. It could indirectly encourage vigilante crimes. And it would divert valuable police resources away from areas where those resources are greatly needed. On the other hand, a well-crafted and administered registry could contribute positively to crime prevention, particularly when coupled with treatment and sufficient dedication of resources.

Bill C-26 is also likely to attract *Charter* scrutiny. It would result in excessive and disproportionate sentences and increased prison populations. We suggest that Bill C-26 be carefully reconsidered and appropriate amendments made.