Legislative Summary **LS-444E**

BILL C-20: AN ACT TO AMEND THE CRIMINAL CODE (PROTECTION OF CHILDREN AND OTHER VULNERABLE PERSONS) AND THE CANADA EVIDENCE ACT

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LEGISLATIVE HISTORY OF BILL C-20

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	5 December 2002	First Reading:	
Second Reading:	1 April 2003	Second Reading:	
Committee Report:	30 October 2003	Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-20: AN ACT TO AMEND THE CRIMINAL CODE (PROTECTION OF CHILDREN AND OTHER VULNERABLE PERSONS) AND THE CANADA EVIDENCE ACT*

Introduced on 5 December 2002, Bill C-20 proposes amendments to the *Criminal Code* and the *Canada Evidence Act* intended to "help safeguard children and other vulnerable persons from sexual exploitation, abuse and neglect," and to "better protect victims and witnesses in criminal justice proceedings."(1) Bill C-20 pursues those objectives through a three-fold approach. First, the bill will expand the scope of some existing offences, narrow the availability of statutory defences and/or increase penalties available following conviction. Second, the bill proposes the creation of new offences relating to "voyeurism." Finally, Bill C-20 proposes a variety of procedural reforms intended to facilitate testimony by young persons and broaden the courts' ability to accommodate the needs of children and other vulnerable witnesses in a variety of criminal justice proceedings. **Bill C-20 was amended by the House of Commons Standing Committee on Justice and Human Rights, and those changes to the bill are indicated in bold print in the Description and Analysis section of this legislative summary.**

BACKGROUND

Bill C-20 constitutes the Government's response to a wide variety of recently articulated public concerns. For example, a 2001 resolution of provincial Ministers of Justice had urged the federal Minister to raise the age at which a young person under 18, but over

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It should be noted, however, that Bill C-20 died on the *Order Paper* when Parliament prorogued on 12 November 2003. **(Note: Bill C-20 was re-introduced by the government as Bill C-12 on 12 February 2004, during the 3rd session of the 37th Parliament.)**

(1) Department of Justice, Media Advisory, Ottawa, 5 December 2002.

14 years of age, can validly consent to sexual activity with an adult. That and a number of other issues affecting child victims were canvassed in a Consultation Paper circulated by the Department of Justice in November 1999.(2) Presumably as an alternative to raising the age of consent in all cases, Bill C-20 expands the offence of "sexual exploitation." At present, section 153 of the *Criminal Code* makes it an offence for an adult to engage in sexual activity with anyone over 14, but under 18, where the adult is "in a position of trust or authority" towards the young person, or where a "relationship of dependency" exists. Following Bill C-20 amendments, an adult's sexual contact with someone in that age group will also constitute an offence where the relationship is "exploitative of the young person." The maximum available penalty is also increased from five to ten years' imprisonment. At the same time, the maximum penalties for convictions under section 215 (failing to provide necessaries of life) and section 218 (abandoning a child) are increased from two to five years. Bill C-20 also proposes amendments to allow children and other vulnerable witnesses greater access to testimonial aids, such as screens and closed-circuit television, and to eliminate the need for a competency hearing prior to the admission of testimony from a child under 14.

In the aftermath of the Supreme Court of Canada's broad interpretation of the "artistic merit" defence in child pornography proceedings, Bill C-20 eliminates existing exemptions for material with "artistic merit or an educational, scientific or medical purpose," leaving the single statutory defence of "public good." Amendments also broaden the scope of the offence by eliminating the need to show that written materials advocate or counsel illegal sexual activity with children. To satisfy the definition of child pornography, it will be sufficient to establish that the "dominant characteristic" of any written material is the description, "for a sexual purpose," of sexual activity involving a person under 18 that would be an offence under the *Criminal Code*. Bill C-20 also adds child pornography offences to the list of those for which a sentencing court can make an order prohibiting the offender from attending at public places ordinarily frequented by children under 14, from seeking paid or volunteer employment that involves being in a position of trust or authority towards persons of that age group, and from communicating with them by computer.

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(2) See: *Child Victims and the Criminal Justice System*, available on-line at: http://canada.justice.gc.ca/en/cons/child/toc.html.

In response to public concerns about the effect of technological developments on personal privacy, the Department of Justice circulated a Consultation Paper in 2002, seeking public input into the question of whether new criminal offences were needed to deal with "voyeurism," or the secret viewing or recording of citizens, "for sexual purposes or where the viewing or recording involves a serious breach of privacy."(3) The Consultation Paper noted that criminal prohibitions of that nature had been suggested in a motion passed at the Uniform Law Conference in August 2000, and by a resolution passed in February 2002 by Provincial and Territorial Ministers Responsible for Justice.(4) In keeping with the recommendations of a majority of respondents to the Consultation Paper, Bill C-20 proposes the creation of two new hybrid offences of voyeurism, both of which incorporate a "public good" defence.(5)

DESCRIPTION AND ANALYSIS

A. Preamble

The first paragraph of the Preamble provides a context to Bill C-20 by noting Parliament's "grave concerns regarding the vulnerability of children to all forms of exploitation, including child pornography, sexual exploitation, abuse and neglect." The second paragraph cites Canada's obligations under the United Nations Convention on the Rights of the Child and the Optional Protocol to the Convention, respecting the sale of children, child prostitution, and child pornography. The third paragraph articulates Parliament's wish to facilitate criminal justice system participation by children and other vulnerable witnesses, through the use of protective measures that also respect the rights of accused persons. Finally, the last paragraph identifies the need to respond to new technologies that may facilitate sexual exploitation and breaches of privacy.

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(3) *Voyeurism as a Criminal Offence: A Consultation Paper*, Department of Justice, 2002, available on-line at: http://canada.justice.gc.ca/en/cons/voy/toc.html.

(4) *Ibid.*, p. 3.

(5) *Voyeurism as a Criminal Offence: Summary of the Submissions*, Department of Justice, 28 October 2002, available on-line at: http://canada.justice.gc.ca/en/cons/voy/summary_final.html.

B. Young Persons' Consent to Sexual Activity: Offences and Penalties

Clauses 2-5 broaden the scope of *Criminal Code* offences involving sexual contact with persons under the age of 18 and/or increase the penalties that may be imposed following conviction. Specifically, clause 3 amends sections 151 and 152 (sexual interference and invitation to sexual touching of a victim under 14) to increase the maximum available jail term from 6 to 18 months where the Crown proceeds summarily.(6) The maximum penalty for conviction upon indictment remains unchanged at ten years for either offence.

Clause 4 expands the application of section 153 (sexual interference and invitation to sexual touching of a victim under 18), to include anyone "who is in a relationship with a young person that is exploitative of the young person." At present, section 153 applies only to persons in a position of trust or authority toward the young person, or with whom the young person is in a relationship of dependency. Clause 4 also increases the maximum available penalty from five years to ten following conviction upon indictment, and from 6 to 18 months where the Crown proceeds summarily. **A judge may infer that a young person is being exploited in a relationship from the nature and circumstances of the relationship. Factors that a judge may consider include the age of the young person, the age difference between the parties, the evolution of their relationship, and the degree of control or influence exercised over the young person.**

In order to incorporate the concept of exploitative relationships into the general consent provisions as they apply to sexual offences, clause 2 amends section 150.1 to further limit the availability of defences for accused under 14, as well as those under 16 who are less than two years older than the complainant (who is over 12 but under 14). At present, section 150.1 of the *Criminal Code* effectively negates the ability of persons under 14 to consent to sexual activity, except with a partner who is under 16 and less than two years older than the complainant, and is neither "in a position of trust or authority towards the complainant" nor "a person with whom the complainant is in a relationship of dependency." The new law removes the defence of consent where there exists a relationship that is "exploitative" of the complainant.(7)

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(6) At present, the maximum jail term following summary conviction is 6 months, as provided under section 787 of the *Criminal Code*.

(7) Likewise, clause 2 would remove existing barriers to the prosecution of persons under 14, for certain sexual offences, if the accused is in a relationship that is "exploitative of the complainant."

Clause 5 redrafts section 161 to expand the list of those offences for which a sentencing court can prohibit a convicted offender from attending at schools, playgrounds, day care centres, or other public places ordinarily frequented by children under 14, from seeking paid or volunteer employment that involves being in a position of trust or authority towards persons of that age group, or from communicating with them by computer.(8) Specifically, clause 5 adds offences relating to child pornography (s. 163.1), luring a child (s. 172.1),(9) and indecent exposure involving a victim under 14 (s. 173(2)), as well as a number of sexual offences that no longer appear in the *Criminal Code* but have been altered or replaced by subsequent amendments.

C. A New Offence of "Voyeurism"

Clause 6 of Bill C-20 inserts a new offence of voyeurism into Part V (Sexual Offences) of the *Criminal Code*. In keeping with the previously mentioned public consultation document and responses thereto, the new law targets voyeurism as both a sexual offence and a privacy offence. For example, section 162(1)(c) makes it an offence to "surreptitiously" observe or make a visual recording of a person "in circumstances that give rise to a reasonable expectation of privacy," where that is done "for a sexual purpose." In addition, proposed section 162(1) makes the same surreptitious observation or recording an offence, if the person being observed or recorded is: (a) in a place in which they can "reasonably be expected" to be nude; to expose their genital organs, anal region or breasts; or to be engaged in **explicit** sexual activity, or: (b) in such a state or engaged in such activity and the observation or recording is done for the purposes of seeing or recording it. As a result, voyeurism could also be prosecuted as an offence against privacy, whether undertaken for commercial profit, to harass the complainant, or for some other non-sexual purpose.

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(8) The option to prohibit electronic communication with persons under 14 was enacted in the 1st Session of the 37th Parliament: *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13, s. 4.

(9) The new offence of using a computer to communicate with a child for the purposes of committing (mostly sexual) offences was enacted during the 1st Session of the 37th Parliament; see S.C. 2002, c. 13, s. 8.

Proposed section 162(2) defines the term "visual recording," while section 162(3) exempts police officers from the application of the new privacy-related offence, when they are engaged in judicially authorized surveillance. Proposed section 162(4) extends criminal liability to anyone who "prints, publishes, distributes, circulates, sells**, advertises** or makes available" such a recording or has it in his or her possession for such a purpose, knowing that it was "obtained by the commission of an offence" under section 162(1). Section 162(5) makes voyeurism a hybrid offence, punishable by up to five years' imprisonment, when prosecuted by indictment, or up to 6 months following summary conviction. Finally, sections 162(6) and (7) exempt liability for acts that serve the "public good" and set out the limits of that defence.

D. Administration and Enforcement

Clause 8 redrafts part of the French text and expands section 164(1) to add "voyeuristic recording" to the list of items for which a judge may issue a warrant of seizure. Clause 8 also makes the necessary consequential amendments to the remaining provisions of section 164 and adds a definition of "voyeuristic recording" by reference to section 162 that would contain the new offence of voyeurism as described above. In addition, clause 8 amends section 164(4) to include voyeuristic recording among the list of things for which a judge may make an order of forfeiture for disposal as the Attorney General may direct.

Clause 9 amends section 164.1(1) to add voyeuristic recording to the list of things for which a judge can order the custodian of a computer system to produce an electronic copy, to render the material inaccessible, and to provide the necessary information to identify and locate the person who posted it.[(10)] Additional amendments to section 164.1(5) add voyeuristic recording to the list of materials that the court can order deleted from a computer system, if certain conditions are met. Finally, clause 10 adds voyeurism to the list of offences in section 183 for which an authorization to intercept private communication can be sought.

(10) That authority was given to the courts in *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13, s. 7.

E. Child Pornography: Definition and Defences

At present, section 163.1 of the *Criminal Code* makes it an offence to possess, access, make, print, publish, transmit, import, export, distribute or sell child pornography.(11) The maximum available punishment for accessing or possession alone is five years' imprisonment, where the Crown proceeds by indictment, or 6 months following summary conviction. Making, printing, publishing, importing, distributing, or selling child pornography, or possessing it for the purposes of doing any of these things, is a hybrid offence carrying a maximum ten-year prison term when prosecuted by indictment. Although the child pornography provisions of the *Criminal Code* have withstood challenges under the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada's interpretation of the law in *R.* v. *Sharpe* and its subsequent application by the British Columbia Supreme Court has been a source of concern for some.(12) For example, the majority decision of the Supreme Court of Canada created two exemptions to the ban on making or possessing child pornography, one of which would include "any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use."(13) These exemptions were based at least in part on the Court's finding that the making or possession of such materials poses little or no risk of harm to children. At the same time, the Supreme Court of Canada made clear that these exemptions would not extend to the printing or publishing of child pornography, or to possession for the purposes of publishing. The Court also held that "artistic merit" should be interpreted as including "any expression that may reasonably be viewed as art" and that "[a]ny objectively established artistic value, however small" would support the defence. Relying in part on the artistic merit defence, Justice Shaw of the British Columbia Supreme Court found Mr. Sharpe not guilty on some counts of possession of written child pornography and possession for the purposes of distribution or sale.

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(11) By contrast, the possession of pornographic materials not involving children is not an offence, although making, printing, publishing, distributing or circulating such material may constitute an offence under section 163 if it is found to be "obscene."

(12) *R.* v. *Sharpe*, [2001] 1 S.C.R., 45 and *R.* v. *Sharpe*, [2002] B.C.J. No. 610 (B.C.S.C.).

(13) The second exemption would apply to "any visual recording created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use." This was intended to protect, for example, a teenage couple that together create sexually explicit pictures of each other or both and retain them for their own exclusively private use.

In light of the reasoning and outcome in the *Sharpe* case, it comes as no surprise that Bill C-20 proposes amendments to the child pornography provisions that will broaden the application of the law and limit the available defences to such a charge. First, clause 7 redefines child pornography by adding a second category of written material to section 163.1(1), "the dominant characteristic of which is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act." As a result, written material will no longer have to advocate or counsel illegal sexual activity with a person under 18 to fall under the definition of child pornography.(14) Clause 7 also replaces existing sections 163.1(6) and (7), to eliminate defences for material having "artistic merit or an educational or scientific purpose," while retaining a defence for acts or material that "serve the public good and do not extend beyond what serves the public good." **Public good is defined to mean that which is necessary or advantageous to the administration of justice or the pursuit of science, medicine, education or art.**

F. Penalties

As mentioned above, clause 11 amends section 215(3) to increase the maximum available penalty for failing, "without lawful excuse," to provide "necessaries of life" for anyone to whom such a duty is owed, including children under the age of 16 years.(15) That penalty will rise from the existing maximum of two years' imprisonment to five years, when the Crown proceeds by indictment, and from 6 to 18 months following summary conviction.

Similarly, clause 12 amends section 218 to replace the existing penalty scheme for abandoning or exposing a child under 10, in a manner likely to endanger his or her life or health, or risk permanent injury. At present, child abandonment is a purely indictable offence with a maximum penalty of two years' imprisonment. Bill C-20 makes it a hybrid offence, with a maximum penalty of five years' imprisonment, when the Crown proceeds by indictment, or 18 months following summary conviction.

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(14) In *R.* v. *Sharpe*, [2002] B.C.J. No. 610, the B.C. Supreme Court found that the impugned written descriptions did not advocate or counsel such activity.

(15) Section 215(1) imposes the same obligation to provide necessaries of life to a spouse or common-law partner, or to any person under an accused's charge who is "unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself or herself from that charge" and unable to provide for himself or herself.

Clause 24 broadens the sentencing provisions in section 718.2(a) to deem, as an aggravating factor in sentencing, "evidence that the offender, in committing the offence, abused a child." At present, section 718.2(a)(ii) refers specifically to abuse of the offender's child. And, finally, clause 1 of the bill would amend section 127(1) of the *Criminal Code* to make disobeying a lawful order of the courts a hybrid, rather than purely indictable, offence, presumably to facilitate prosecution where a lesser penalty would be appropriate.

G. Complainant/Witness Accommodation

1. Non-Publication of Sexual History or Personal Records

As previously noted, Bill C-20 contains several procedural amendments intended to accommodate the needs of vulnerable complainants and witnesses, particularly in the prosecution of sexual offences. For example, clause 13 amends section 276.3 to make it an offence to "publish in any document, or broadcast or transmit in any way," the contents of an application, or any evidence taken, at a hearing to determine the admissibility of evidence respecting a complainant's sexual history during the trial of specified sexual offences. At present, section 276.3 simply prohibits publication in a newspaper or in a broadcast. Clause 14 makes similar amendments to section 278.9(1), concerning applications for the production of a complainant's personal records during the trial of a sexual offence. The new wording makes clear that the prohibitions are intended to apply to all forms of electronic dissemination, including Internet transmission.

2. Special Procedure and Powers

a. Clause 15

The *Criminal Code* has long recognized that testifying at a criminal proceeding may be even more stressful than usual for some particularly vulnerable witnesses. In recognition of that fact, and in order to ensure that the court will have access to the fullest and best possible account of the evidence, section 486 has been amended several times, to incorporate special rules of proceeding that are intended to facilitate the hearing process by addressing the needs of these vulnerable witnesses. Bill C-20 proposes amendments that will organize these special procedures in a more rational way, while incorporating a number of incremental changes. To accomplish this, clause 15 divides matters now dealt with in section 486 into seven new and separate sections.

1) Exclusion of Public

New section 486(1) deals only with the reasons for which a judge or justice can exclude "all or any members of the public from the court room for all or part of the proceedings," including where he or she considers such an order to be in the interest of "the proper administration of justice." The major change to this provision would define the "proper administration of justice" to include safeguarding the interests of witnesses under 18 in all proceedings. At present, the definition of the "proper administration of justice" refers to the interests of witnesses under 18 in proceedings related to a sexual offence or an offence in which violence was used, threatened, or attempted. Thus, Bill C-20 would give the courts much broader authority to limit public attendance when young persons are testifying, while continuing the same option for the benefit of "justice system participants."

2) Support Person

New section 486.1 incorporates and amends existing provisions that allow the courts to permit witnesses under 14, or those with a mental or physical disability, to be accompanied by a support person while testifying. At present, such authority is limited to proceedings respecting a sexual offence or an offence in which violence was used, threatened, or attempted. Section 486.1(1) extends the provision to include persons under 18 testifying in any proceedings. Furthermore, a judge or justice will be required to make such an order, where requested, unless he or she "is of the opinion that the order would interfere with the proper administration of justice." Proposed section 486.1(2) extends the courts' authority even further, by allowing such an order for the benefit of a witness of any age in any proceeding, if the judge or justice "is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of." In making that determination, the court would be directed to take into account the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant. Finally, proposed section 486.1(6) specifies that "no inference adverse to the accused may be drawn from the fact that an order is, or is not, made under this section."

3) Remote or Screened Testimony

At present, section 486(2.1) allows the court, in the trial of most sexual offences, to order that a witness who is under 18, or who may have difficulty communicating evidence by reason of a mental or physical disability, may testify from outside the courtroom or behind a screen, if the judge or justice considers it "necessary to obtain a full and candid account of the acts complained of." New section 486.2(1) extends the courts' authority to make such an order for the benefit of such witnesses during any proceedings and will require the court to make such an order, where requested, unless the judge or justice "is of the opinion that the order would interfere with the proper administration of justice." Furthermore, new section 486.2(2) allows such an order for the benefit of any witness, if the judge or justice considers it "necessary to obtain a full and candid account from the witness." Once again, the judge or justice would make that determination having regard to the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant.

4) Cross-examination by Accused

New section 486.3 enacts an amended version of existing section 486(2.3) that now prohibits an accused from personally cross-examining a witness under 18, in proceedings respecting a sexual offence or an offence in which violence was used, threatened, or attempted. Again, amendments in section 486.3(1) extend that prohibition to any proceedings in which the witness is under 18, upon application by the prosecutor or witness, unless the presiding judge or justice is of the opinion "that the proper administration of justice requires the accused to personally conduct the cross-examination." The same presumptive protection is extended to victims in criminal harassment proceedings by new section 486.3(4). In addition, new section 486.3(2) allows the court to make such an order for the benefit of any age witness, in any proceeding, upon application, if the presiding judge or justice is of the opinion that "in order to obtain a full and candid account from the witness," the accused should not personally conduct the cross-examination. In making that determination, the court is again directed to consider the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant.

5) Publication of Identifying Information

New section 486.4(1) amends existing provisions that allow the courts to prohibit the publication of identifying information about a complainant or witnesses in proceedings relating to a list of mostly sexual offences. The amendment adds section 162 (voyeurism), section 163.1 (child pornography) and section 172.1 (luring a child) to the list of those offences for which such an order can be made. In addition, new section 486.4(3) mandates such an order for the benefit of a witness under 18, as well as any person depicted in any visual representation that constitutes child pornography, in proceedings relating to such an offence. As with previously described amendments, the new provisions make clear that such information is not to be published, broadcast, or "transmitted" in any way.

As is now possible under section 486(4.1), new section 486.5(1) retains the courts' authority to prohibit the publication of identifying information respecting a victim or witness in any proceeding, upon application by a victim, witness, or the prosecutor, where the order is "necessary for the proper administration of justice." Similar protection is continued under section 486.5(2) for the benefit of a "justice system participant" involved in proceedings related to specifically enumerated offences.

Finally, section 486.6(1) retains the existing punishment for failure to comply with court orders issued under the authority of the foregoing, and section 486.6(2) makes clear that publication bans also apply to proceedings taken against anyone for failure to comply with such an order.

b. Clause 23

Clause 23 amends sections 715.1 and 715.2 of the *Criminal Code* to expand the circumstances under which a victim or other witness may be permitted to give evidence by way of a video recording, if it is made within a reasonable time after the alleged offence and the victim or witness adopts the contents of the recording, while testifying. At present, that option is available only for witnesses testifying in proceedings relating to an enumerated list of predominantly sexual offences who were under 18 at the time of the alleged offence (section 715.1), or who might have difficulty communicating evidence because of a mental or physical disability (section 715.2). Amendments to section 715.1 make such a recording admissible in any criminal proceeding where the victim or witness is under the age of 18, "unless

the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice." Similarly, amendments to section 715.2 make such a recording admissible in any proceeding where a witness might have difficulty communicating evidence because of a mental or physical disability. The amendments also adopt new terminology by substituting "video recording" for the existing reference to "videotape," and "victim" in the place of "complainant."

H. Amendments to Terminology

Clauses 16-22 amend various provisions of the *Criminal Code* to delete definitions of "newspaper" and again to make clear that publication bans will extend to prevent information from being transmitted "in any way." The affected provisions include section 487.2 (search warrants), section 517(1) (judicial interim release), section 539(4) (preliminary inquiry), section 542(2) (confession or admission of accused), section 631(6) (identity of juror), section 648(1) (voir dire), and section 672.51(11) (Review Board disposition hearing).

I. *Canada Evidence Act*

Clause 25 amends section 16(1) of the *Canada Evidence Act* to clarify that section 16 applies only to proposed witnesses who are 14 years of age or over and whose mental capacity is being challenged. In these circumstances, the court is required to conduct an inquiry into the witness' capacity to testify. At present, section 16 mandates such an inquiry respecting any proposed witness under 14. Clause 26 will add section 16.1 to the *Canada Evidence Act* to deal specifically with persons under 14 years of age. This section will make clear that a person under 14 years of age is presumed to have the capacity to testify. Section 16.1 will also clarify that the new test for the receipt of a child's evidence is that the child is able to understand and respond to questions. A child under the age of 14 will not be required to take an oath or make a solemn declaration. Instead, a child will be required to promise to tell the truth. No inquiry will be permitted into a child's understanding of the nature of such a promise, and the evidence given by the child shall have the same effect as if it were taken under oath.

J. Coming Into Force

Clause 27 is aimed at coordinating the timing of Bill C-20 amendments with those contained in Bill C-17 (*The Public Safety Act, 2002*), while clause 28 provides that Bill C-20 will come into force by order of the Governor in Council.

COMMENTARY

The Minister of Justice described Bill C-20 reforms, including the creation of a new offence of voyeurism, as an important first step in fulfilling the Minister's "public commitment to ongoing review and reform of the criminal law to ensure that it meets the concerns and needs of Canadians." The Minister further characterized the bill as responding to "key commitments in the 2002 Speech From the Throne," to protect children from exploitation, to increase penalties for abuse and neglect, and to be more sensitive to the needs of children participating in criminal justice proceedings, either as victims or witnesses.

While few Canadians would find fault with these goals, recent events and public response suggest a serious lack of consensus on the best way to achieve them. For example, some police and parents argue that nothing short of a ban on sexual contact between adults and youth under 16, or even 18, will protect young persons from sexual predators who may attempt, for example, to lure them into prostitution. Others argue that raising the legal age of consent would do nothing to address the more pressing need to provide counselling and legitimate employment opportunities for children already involved in the sex trade. Criticism has also been directed toward Bill C-20 procedural amendments that some say could unfairly compromise the ability of an accused to conduct his or her own defence.

In the aftermath of the British Columbia Supreme Court decision in *R.* v. *Sharpe*, the Official Opposition called on the Government to introduce legislation to raise the legal age of consent to "at least sixteen" and to "prohibit the creation or use of sexually explicit materials exploiting children or materials that appear to depict or describe children engaged in sexual activity."(16) During debate on the motion, several members suggested that the "artistic merit" defence should be subject to clearly defined limits, if not abolished. Others specifically advocated expanding child pornography offences, to catch "more than those materials that

(16) A motion introduced on 23 April 2002, by Larry Spencer, MP (Regina–Lumsden–Lake Centre).

actively promote illegal acts with children." While it seems that Bill C-20 amendments have incorporated the latter two suggestions, it remains to be seen whether law enforcement authorities, interest groups and the public, generally, will find the bill sufficiently responsive to the evolving needs of children and other vulnerable persons.

Some criticism of the bill has been levelled at the fact that the definition of child pornography will still include fictional depictions of children engaged in sexual activity. This is seen as making the bill vulnerable to a challenge under the *Charter of Rights and Freedoms*.(17) The Canadian Conference of the Arts has expressed fears that the proposed definition of child pornography may infringe upon the freedom of expression of artists in Canada. A similar concern has been expressed by The Writers' Union of Canada and PEN Canada.(18) At hearings before the Commons Justice Committee, representatives of arts groups attacked Bill C-20, saying that it could make criminals of some artists and force them to show how their work serves the public good – a term they called "vague" and "subjective."(19)

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(17) ***The London Free Press*, 11 December 2002, p. A9.**

(18) ***Le Devoir [Montréal]*, 22 August 2003, p. B2.**

(19) ***The StarPhoenix [Saskatoon]*, 9 October 2003, p. C15.**