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Chair

The Honourable Paul DeVillers

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (0905)

[*Translation*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): Welcome to this meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

We are commencing our study of Bill C-2, an Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act.

Today we welcome the Honourable Irwin Cotler, Minister of Justice.

Welcome, Mr. Minister. Before starting your presentation, perhaps you could introduce the officials here with you.

Hon. Irwin Cotler (Minister of Justice): Thank you, Mr. Chairman.

The three officials with me are experts in the field.

[*English*]

Catherine Kane is our senior counsel with respect to victim issues, Carole Morency is our senior counsel with respect to criminal law policy, and Lisette Lafontaine is yet another senior counsel on these matters. So we have here, as I say, a range of expertise that will be of great benefit to this committee.

The Chair: Mr. Minister, if you would like to commence your presentation, please go ahead.

Hon. Irwin Cotler: Thank you, Mr. Chairman.

I want to express to you and to the committee my appreciation for this opportunity to speak to the committee today as you begin this review of Bill C-2, an act to amend the Criminal Code in the matter of the protection of children and other vulnerable persons, and the Canada Evidence Act.

You may recall from my previous appearance before this committee that upon my appointment as Minister of Justice and Attorney General for Canada, I identified the protection of vulnerable persons as one of my compelling priorities. Indeed, the test of a just society is how it protects the most vulnerable amongst us, and in particular women and children.

[*Translation*]

This priority and the Government of Canada's commitment to it is reflected in the October 2004 Speech from the Throne and is at the very heart of Bill C-2.

Bill C-2 takes, as its starting point, Canada's existing expansive criminal law protections and builds on these to propose even more - for children and other vulnerable persons, as both victims and witnesses. These enhancements reflect many sources of input and information - from jurisprudence, consultation with Provincial and Territorial governments as well as with the public, and importantly, the legislative process for Bill C-2's predecessors - former Bills C-22/C-20 from the two previous Sessions of Parliament.

[*English*]

This committee then will be familiar with former Bill C-12. It had been passed by the House of Commons and was awaiting second reading in the Senate when it died on the order paper, reflecting the support for the underlying principle and scope of Bill C-2's predecessor. The government also recognized that there were some continuing criticisms of that package, that more could be done for improvements with respect to child pornography, with respect to enhancing sentences in cases involving the abuse, neglect, and exploitation of children.

This is exactly what Bill C-2 does. It builds upon the experience of this committee. It builds upon the experience of discussions and critiques that have taken place since the presentation of Bill C-12 to incorporate the best of the suggestions that have been made and make this a more effective piece of legislation.

In that regard, Bill C-2 proposes a series of substantive criminal law reforms that seek to, first, further strengthen existing prohibitions against child pornography; second, provide increased protection to youth against sexual exploitation by persons who would prey on their vulnerability; third, enhance specific sentencing provisions relating to offences, including abuse and neglect, committed against children to ensure that sentences in these cases better reflect the serious nature of these offences;

[*Translation*]

fourth, facilitate testimony by child victims and witnesses and other vulnerable persons through a number of measures, including by providing consistency and clarity regarding the use of existing testimonial aids and by providing that child witnesses are competent witnesses; and create two new “voyeurism” offences to address the surreptitious viewing or recording of others in specific situations where there is a reasonable expectation of privacy.

● (0910)

[*English*]

I will address now the constituent elements of each of these reforms, beginning with child pornography.

Bill C-2 proposes the child pornography reforms that follow—most of which, it is important to note, are new with respect to former Bill C-12. The notion that this is simply a restatement of Bill C-12 is reflected mainly by those who may not have properly appreciated Bill C-2 in its contrast to Bill C-12.

This legislation will broaden the definition of child pornography to include audio formats, as well as written material that has, as its dominant characteristic, the description of unlawful sexual activity with children, where that description is provided for a sexual purpose. It will prohibit advertising child pornography. It will triple the maximum penalty, on summary conviction, for all child pornography offences, from 6 to 18 months.

[*Translation*]

It will make the commission of any child pornography offence with intent to profit an aggravating factor for sentencing purposes.

[*English*]

Finally on this issue, it replaces the existing defences of artistic merit; education, scientific, or medical purpose; and public good with a two-part, harms-based, legitimate-purpose defence. Under this particular proposed reform, a defence would only be available for an act that has a legitimate purpose related to the administration of justice, science, medicine, education, or art, and does not pose an undue risk of harm to children.

This brings me now to the second major substantive reform proposed—a new category of prohibition in regard to the sexual exploitation of young persons.

[*Translation*]

Bill C-2 also proposes to provide greater protection to youth against sexual exploitation from persons who would prey on their vulnerability. Under this proposal, courts would be directed to infer that a relationship with a young person is exploitative of that young person by looking to the nature and circumstances of that relationship, including the age of the young person, any difference in age, the evolution of the relationship, and the degree of control or influence exerted over the young person.

[*English*]

In other words, the focus of Bill C-2 is on the exploitative conduct of the wrongdoer, not on whether the young person, or victim, consented to that conduct. No less important, the focus is also on the specific indicia of exploitation to which I referred, tailored to meet the specific needs and vulnerability of each young person, because a young person's vulnerability is influenced by more than just his or her chronological age.

I would also note that Bill C-2 does not criminalize consensual sexual activity in which youth typically engage.

Mr. Chairman, your committee has my written response to the question Mr. Comartin asked during my appearance on main estimates. As this letter notes, the reality is Canadian youth are engaging in sexual activity, ranging from kissing to sexual intercourse, from as young an age as 12 years. Indeed, some 15-year-olds are even legally married. While there may be different views on an appropriate age for young persons to begin to engage in sexual activities, the fact of the matter is this does happen, and Bill C-2 does not seek to criminalize that consensual activity.

The third major reform has to do with sentencing in cases involving child victims. Bill C-2 also corresponds to concerns that continue to be expressed by many, both within and outside the criminal justice system. It is that when it comes to our children, the most vulnerable group in society, we must ensure a strong and effective response by the criminal justice system to the abuse of children. That point was made in exchanges before this committee, and that point continues to be made in discourses on these matters. It includes ensuring sentencing outcomes in these cases that are just and consistent with the Criminal Code sentencing principles and objectives. These sentencing objectives are set out in section 718 of the Criminal Code; I know they are well known to you. They are denunciation; general and specific deterrents; separation of offenders from society, where necessary; rehabilitation of offenders; reparation of harm to victims and the community; and offender responsibility for the harm committed.

● (0915)

[*Translation*]

Bill C-2 proposes a significant reform respecting these sentencing objectives respecting the weight to be given to these objectives in cases involving the abuse of children. It requires sentencing courts to give primary consideration to the objectives of denunciation and deterrence of such conduct. In addition, it makes the abuse of any child an aggravating factor for sentencing purposes.

[*English*]

In addition to the sentencing reforms related to child pornography, here again you have a broad, effective, and tailored sentencing framework. Bill C-2 proposes to triple the maximum penalties on summary conviction from six to 18 months for child-specific sexual offences, as well as for child abandonment and failure to provide the necessities of life, and to increase the maximum penalty on indictment from five to 10 years for sexual exploitation of a young person and from two to five years for child abandonment and failure to provide the necessities of life.

The combined message of these reforms for sentencing courts and for those who would seek to harm our children is unmistakable. These offences are to be treated with the seriousness they warrant. This must be reflected in the sentencing outcome.

The fourth reform is that of the facilitation of testimony of victims and witnesses, a reform that will enhance, for example, the ability of children and other vulnerable victims and witnesses to provide a complete, clear, and accurate account of events, while at the same time respecting the rights and freedoms of the accused.

[*Translation*]

Mr. Chairman, this part of Bill C-2 speaks to the importance of ensuring that the whole of the criminal justice process reflects and realizes, in meaningful ways, the Government's commitment to protect child and other vulnerable victims and witnesses.

[*English*]

As we can appreciate, Mr. Chair, these persons have already been victimized. The criminal justice process must seek to avoid compounding that experience, however unintended. Many related reforms have been enacted in recent years to improve the experience of victims and the justice system. Bill C-2 proposes further improvements and refinements in that regard.

In particular, Bill C-2 proposes to facilitate testimony through the use of testimonial aids in three categories of cases: in cases involving a child victim or witness under the age of 18 years or a victim or witness with a disability; in cases involving victims of criminal harassment; and in cases involving other vulnerable adult victims and witnesses.

In the matter of child victims, Bill C-2 proposes to amend the applicable test for the use of testimonial aids. These aids would be available on application, unless they would interfere with the proper administration of justice.

In cases involving victims of criminal harassment where the accused is self-represented, the Crown would be able to apply for the appointment of counsel to conduct the cross-examination of the victim. In these cases, the court would be required to appoint counsel, unless doing so would interfere with the proper administration of justice.

In cases involving any other vulnerable victim or witness, such as, for example, victims of spousal abuse or sexual assault, the Crown could apply for the use of any of the testimonial aids or the appointment of counsel to conduct the cross-examination for self-represented accused. In these cases, these adult witnesses would have to demonstrate that based upon the surrounding circumstances, including the nature of the offence and any relationship between them and the accused, they would be unable to provide a full and candid account without the testimonial aid.

● (0920)

[*Translation*]

Bill C-2 also proposes to amend the Canada Evidence Act to eliminate the mandatory competency hearing and to eliminate the distinction between sworn and unsworn testimony for children.

Under Bill C-2, the competency of a child under 14 years to testify would depend upon the child's ability to understand and respond to questions rather than on the child's ability to articulate his or her understanding of what it means to swear or promise to tell the truth. It would then be up to the trier of fact - just as it is in every other case - to determine what weight to give the evidence.

[*English*]

This brings me to the final reform, and that is the reform in regard to voyeurism. Bill C-2 seeks to modernize the criminal law's response to the new ways in which acts of voyeurism are being committed today. The “peeping Tom through the window” offender, as he or she has been known from even just a few years ago, has largely been replaced today by persons who, with the advent of the Internet and the miniaturization of cameras and recording devices, can now peep and record that viewing through a camera smaller than a pen that is hidden in a room miles away.

Bill C-2 proposes to create a new offence that will criminalize the surreptitious observation or recording of a person when there's a reasonable expectation of privacy in three specific situations. It would be an offence to observe or record a person under these circumstances if it is done for a sexual purpose or when it constitutes a serious breach of the sexual privacy of the person. Bill C-2 also proposes to prohibit the publication or distribution of any recording made as a result of an act of voyeurism, including, for example, over the Internet.

In conclusion, Mr. Chairman, Bill C-2 in its entirety proposes new and, I believe, welcome criminal law reforms. These reforms are to be read together with other related measures, such as the national strategy to protect children from sexual exploitation on the Internet, which was launched by the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness in May 2004 and includes the newly launched national tip line, Cybertip.ca, which we unveiled at the recent federal-provincial-territorial meeting of ministers of justice. I believe the national strategy, together with Bill C-2, our existing Criminal Code protections, and Cybertip.ca provide Canada with one of the most comprehensive frameworks for the protection of children and other vulnerable persons.

I'm also pleased to note that at this recent meeting of provincial and territorial ministers, my counterparts reiterated their support for Bill C-2 and urged me to support its expeditious passage. They share my view, which is that Bill C-2 will be good for law enforcement, good for the administration of justice, and, most important, it will be good for children, the most vulnerable of the vulnerable.

Thank you, Mr. Chairman.

The Chair: Thank you, Minister Cotler.

We'll now go to questioning by members.

We'll start with Mr. Thompson on behalf of the Conservative Party for five minutes.

Mr. Myron Thompson (Wild Rose, CPC): Thank you for being present today, Minister.

I can't help but sit here and wonder why child pornography has always been a major issue with me and my other colleagues going back as far as 1993-94, yet here we are almost a dozen years later and we still don't have anything in place that really protects our children against child pornography. That's 12 long years to absolutely deal with what I think is a no-brainer. Now the minister has come up with a proposal in Bill C-2. I don't know whether to congratulate him and say it's a job well done or what.

When I look at this omnibus bill, I see a number of things in here that I think are very good for Canada, very good for our justice system. But in order to make this bill pass, you have to swallow the whole works. I cannot swallow the proposed section on child pornography, where it indicates in law that:

> No person shall be convicted of anoffence under this section if the act that isalleged to constitute the offence
>
> (a) has a legitimate purpose related to theadministration of justice or to science, medicine, education or art....

I don't know how many times we talked about getting rid of artistic merit. Then they changed the words. They played with words and came up with "public good". I think most of us would sit around and say, "For Pete's sake, what possible public good can come out of child pornography?"

Now I look at the words that we've played with and we've come up with "legitimate purpose", and I have to ask the same question: what kind of a legitimate purpose are we talking about? Do you not believe for a moment that every person who is arrested for or charged with possession of child pornography would not seek to be defended under "legitimate purpose", that our courts would be filled with everybody you arrest because they would claim to have some legitimate purpose, be it art, education, or whatever?

When you take on this strategy of wiping out an evil such as child pornography, I cannot believe for a moment that we would play with words at all, yet I've seen this happen time and time again with every bit of legislation that's come down. And now we throw this section into what is not a bad bill—there's some pretty good stuff in there—as if to say to our children, "I'll put a little sugar in with your medicine and you'll swallow and it will go down a whole lot easier." I just do not understand why a particular problem that is as serious as child pornography cannot be withdrawn from a bill of this nature and be set up on its own merit, to let Parliament take action that would absolutely destroy this evil stuff before it continues to destroy our children.

It has been pointed out to me by numerous people in the penitentiaries and in law enforcement that child pornography is definitely a precursor to violence against our children. Of course, there are no studies or records of that because it isn't something anybody has taken on. I would encourage that as something we should do. But I've travelled across this country and been to many penitentiaries and I've visited with people who were in prison because of violence against a child. Almost to a person, they indicated to me very strongly that they were hooked on or became addicted to child pornography long before they were arrested and ended up in prison, that it did play a role in their lives. So I cannot for the life of me understand why we would want to allow any kind of defence for any person who is in possession of this evil stuff.

Because of this legislation, once again our police departments across the land that confiscate hundreds or thousands or even millions of items of child pornography will spend hours going through each piece to determine whether or not there is any art in any of this material. Subjecting our police forces to that kind of insane drudgery just absolutely makes no sense.

● (0925)

I see no problem with protecting bona fide teachers, bona fide police officers, or bona fide medical professionals who are using this material. There's no problem with them explaining that away, but we are going to open the door and allow every person who has possession of child pornography a defence. Once again, I'm saying we must close the defences to child pornography for that position.

The Chair: Thank you. You have now used up the five minutes. I didn't hear a question to the minister.

Mr. Myron Thompson: Yes, I asked several in there.

The Chair: Okay. If the minister heard them, then maybe he could answer them. Again, with our rules it's five minutes that should include both the question and the answers.

Mr. Myron Thompson: I thought we had five minutes each, I'm sorry. I'll get it straight one day.

The Chair: So for the questions the minister heard...?

Hon. Irwin Cotler: Mr. Chairman, I appreciate the essence of the honourable member's remarks and also his commitment to this issue. Therefore, I want to say in the beginning of my response that child pornography remains child pornography; a crime remains a crime. The evil of which he spoke is the evil that we seek to address in this legislation. The purpose of this legislation, in its core, is to protect, as I said, the most vulnerable amongst us, and in particular from this predatory evil that the honourable member described.

Under Bill C-2's proposed defence, of which he spoke, an accused charged with a child pornography offence will only have a defence if the act in question has a legitimate purpose related to one of the specified fields, of which he spoke and which he acknowledged would be appropriate for defence purposes—namely, the administration of justice, science, medicine, education, or art, and I will get to that issue in a moment because that's the one on which he has focused—and, I have to add, if that act does not pose an undue risk of harm to children.

Under this proposed defence, material that has been found to constitute child pornography as it is defined by the Criminal Code remains child pornography. The availability of a defence does not change things. Instead, the question before the court would be whether the act charged in relation to that material.... For example, possessing or distributing child pornography satisfies the two-pronged test. In this way, Bill C-2 remains what might be called a harms-based test, as we had in former Bill C-12, but with one fundamental difference. The test is clearer, the test is narrower, the test is more focused, and the test has a particular reference, even if it is being done for a legitimate purpose, as to whether it also causes undue harm or poses an undue risk of harm to children.

This is the test that was used by the Supreme Court of Canada in upholding the constitutionality of the child pornography provisions in 2001, one that we believe will not only be better understood...but for purposes of being able to certify that this legislation comports with constitutional requirements, the absence of such a defence would impugn the legislation. Therefore, the very protection that the honourable member seeks in regard to combating child pornography will fall along with that legislation.

So it's important to bear in mind that the availability of a defence under our existing child pornography laws was a key factor in the Supreme Court of Canada decision to uphold the constitutionality of our overall child pornography prohibition. This is because the definition of "child pornography" is broad. It includes a wide range of material, including, and this is not always appreciated, material that depicts a sexual abuse of a real child as well as material that depicts a sexual abuse of an imaginary child.

So when you have a broad scope with respect to the nature of the offence, which is intentional in this legislation—and we have further broadened it for the purposes of the protection of this evil against children—then whether we're talking about a photograph of the sexual abuse of a real child or a computer-generated picture or composite of an imaginary child, or even about written text that advocates a sexual abuse of the child, the real question here will be whether it results in a reasoned risk of harm to children.

Under Bill C-2 no defence—and I want to emphasize this, no defence—is available for either a real or an imaginary depiction where the material in question poses an undue risk of harm to children.

Finally, Mr. Chairman, Bill C-2 proposes this new-pronged, harms-based, legitimate-purpose defence in a manner that will only be available for an act that has a legitimate purpose related to the administration of justice, science, medicine, education, or art, and as I said, does not pose an undue risk of harm to children. Under this test it will not be enough to show some artistic value, as was the situation in the Sharpe case. And the legislation here refines that approach. Under Bill C-2 a defence will not be available even if there is some artistic value. This is in direct response to the member's concern, where the use of that material poses an undue risk of harm to children, and that is the harms-based rationale that is new in this legislation.

● (0930)

The Chair: Thank you, Mr. Minister.

[*Translation*]

Mr. Marceau.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you very much, Mr. Chairman. Thank you for your presentation this morning, Mr. Minister.

Mr. Minister, you mentioned—and I think you'll find a consensus around the table on this—that the sexual exploitation of children is one of the most loathsome crimes you can find in our country. You mentioned the increase in maximum sentences in cases in this area in Bill C-2, without apparently considering the possibility of setting minimum sentences for these crimes, which are probably among the worst you can find.

If an amendment were introduced in the context of this committee's work, would you be prepared to accept the setting of minimum sentences for people convicted of child pornography?

● (0935)

Hon. Irwin Cotler: I want to answer your question because I've thought about the subject. It's also a subject that was raised at the Justice ministers' meeting. We referred this question for review by a committee that will be reporting in June. I've thought about it since you asked me the same question. I mentioned my openness in this regard because one of my principles is to be open to every recommendation that might be made to improve this bill. I've reflected on the subject, and I want to share with you a summary of my thoughts and study.

First, Canada shows restraint in the use of minimum sentences when it's preferable to have an individualized sentencing process. That means that the courts then have discretion to impose a sentence proportionate to the severity of the offence and the offender's behaviour, while adjusting the sentence to aggravating or mitigating circumstances. The principle of proportionality is very important. It's at the heart of our approach and also gives the judge discretion in this regard.

But there are other considerations. Minimum sentences are at odds with the sentencing principles set out in sections 718 and 718.2 of the Criminal Code. More particularly and more precisely, minimum sentences are at odds with the proportionality principle I referred to in my presentation. Minimum sentences may encourage plea bargaining; there have been studies on this subject. Experience has also shown us—and this is very important—that, in our experience, minimum sentences are treated as maximum sentences at the time of sentencing instead of being viewed as minimums. So we can wind up with the opposite of what we want.

The use of minimum sentences also results in substantial costs for the provincial and territorial correctional services and for the Correctional Service of Canada. American research that has been done on this subject shows that minimum sentences do not encourage accuseds to plead guilty, thus increasing the number, length and accumulation of court cases.

Lastly, the use of minimum sentences may—and I don't mean definitely—compromise the constitutional guarantee in this regard under section 12 of the Canadian Charter of Rights and Freedoms. There are examples of judgments to this effect and I can share them with you at the end of the meeting.

In conclusion, we have to have an appreciation of the experience of the studies and the approach we've taken as the Minister of Justice. As I said, I'm open in principle, but I think that, in light of these studies and of this thinking, your suggestion entails problems.

● (0940)

Mr. Richard Marceau: But there are already 29 offences of this kind in the Criminal Code.

Hon. Irwin Cotler: Yes.

● (0945)

Mr. Richard Marceau: So, if there are 29 of them, which is an appreciable number, the question is really one of judgment as to whether the tests that are applied and that already permit a minimum sentence for 29 Criminal Code offences couldn't apply in this context. This becomes a question that, I think, is more a matter of political judgment. I assume we'll see these various assessments in the context of the amendments I'll move in this case.

I prefer to ask more questions and get more answers than to ask long questions and make lengthy comments.

Your legitimate purpose—the defence—affects the arts. You obviously received submissions from the artistic community, since I received some. That community wasn't afraid of being convicted of child pornography so much as being charged on the basis of what certain artists might say. When in doubt, a police officer will be more tempted to lay a charge than to refrain from doing so.

How do those artists answer? For example, the Union des écrivaines et écrivains québécois came to meet with us and explained that their president, if my memory serves me, had written a book in which various persons, in a context and for a purpose that were very proper, recounted their first sexual experiences, which, for a number of characters, had occurred before the age of 18. The main theme of the book was thus the first sexual experiences of the artists involved in the book.

Based on the test you propose, would a work such as this be a work of child pornography? If so, would the defence allow the writers who wrote this kind of work avoid being convicted?

Hon. Irwin Cotler: I'll try to answer your question.

First, it is true that the Criminal Code now provides for 29 offences for which there is a minimum sentence. However, if we review the history of those minimum sentences, we can see that they have not arisen from a policy of principle, but rather from ad hoc amendments made by committees, for example. So that doesn't mean we have to retain this approach, rather than a principled approach, for another class of offences. That's the only thing I wanted to share with you here: a principled approach.

I've known of offences that fell into eight classes: impaired driving, driving with a blood alcohol level over .008, treason, a number of offences related to the use of firearms and similar offences.

I believe the decision to provide for minimum sentences for this class of offence must be based on principles, not merely on an exchange of views on amendments. I respect the approach you've taken. As I've previously said, we'll see, but I think that, in a principled approach, we must limit ourselves to this question for the reasons I've already given.

You mentioned the legitimate purpose and the concern of artists. I must say that I was a defender of artists in a previous life. So I can understand their concern. Yesterday I reread the Supreme Court decision in Sharpe and, at the same time, all the decisions cited in it concerning freedom of expression. You can see in those cases that the court refers at length to the importance of freedom of expression and the protection of that freedom.

I can't comment on the specific book you referred to. However, I can say that the Supreme Court and all the case law broadly protect freedom of expression as a fundamental value of our Constitution and of our free and democratic society.

One of my officials might be able to add something to my comments.

The Chair: Carole.

Mrs. Carole Morency (Senior Counsel, Criminal Law Policy Section, Department of Justice): Allow me to answer in English.

[*English*]

With respect to the book you refer to, I did look at the book after the witness appeared at the last committee. Again, the test the minister has outlined is that the issue before the court is always whether the work in question meets the definition. I believe that was your question.

You have to look at what's being proposed, which is that the work, the written material in the new definition being proposed, must have as its predominant characteristic a description of prohibited sexual activity with children, and that predominant characteristic description is provided for a sexual purpose. The book cited as an example does not fit within that definition. It does provide some descriptions of accounts, not necessarily of children engaging in unlawful sexual activity, not the graphic descriptions, not the predominant characteristic, and also not seemingly for a sexual purpose.

Again, reflecting back on the Supreme Court's decision, as the minister has said, the court did interpret those terms. The first answer to the question is that material would not meet the definition being proposed. But in another work, the question would always then be, if it does meet the definition, the next task for the court to consider is whether a defence would be available along the lines of the minister's description.

The Chair: We're going to have to move on.

[*Translation*]

Mr. Richard Marceau: That's not very clear. A court may determine that, but a police officer who saw the work might be inclined to lay charges, thus putting the artist at risk of being needlessly prosecuted.

The Chair: Thank you.

Mr. Comartin.

[*English*]

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Mr. Minister, for being here.

I'd like to address some comments and questions to the voyeurism section. At the outset, I'm having real difficulty understanding why the defence is in there. Let me put it in these terms. The section, as I read and interpret it, is one that would require a calculated although surreptitious act on the part of the accused, if I can put the scenario, in planting devices in a washroom, bedroom, or place where it would be expected that the victim would be exposed.

I can't understand, if you have that type of mentality, *mens rea*, of the accused, why you would have a defence of public good. I cannot —and perhaps I'm just not being creative enough—put my mind to the scenario that would invoke a public good. I think that's even coupled with the fact that you're prohibiting and making a crime the printing and re-publication of that type of material gathered surreptitiously in that fashion.

In proposed subsection 162(7), you've even included that the motives of the accused are irrelevant. I think when I add that all up, I cannot understand the logic of having the defence of public good in this section. I'd like your comments on that.

Hon. Irwin Cotler: Thank you, Mr. Comartin. I will provide opening comments and then allow you to benefit from the expertise of my officials.

Let me begin by saying that the defence of public good was included in this legislation to ensure that the offence of voyeurism would not capture legitimate activities, which would then convert the voyeurism offence into one that was over-broad and contrary to the charter. I might add that this is the only specific defence for this offence of voyeurism. As you know, there's no artistic or scientific merit defence.

The public good defence has been in existence for a long time. It's well understood by the courts, and we deemed it to be effective and appropriate in the context of voyeurism.

I will turn it over now to Lisette Lafontaine, who is our expert in these matters, for further elaboration.

● (0950)

Mr. Joe Comartin: If you could, Madam Lafontaine, paint me a scenario where this defence could be used, because I can't conceive of one.

Ms. Lisette Lafontaine (Senior Counsel, Criminal Law Policy Section, Department of Justice): First, I agree with you we don't expect this defence to be used very much, but as the minister said, it was made more as a precaution. When you draft an offence you know what kind of conduct you want to capture, and you try to define your offence around that. But there is always the danger that you will capture conduct that should not be criminal and that will fall under the net of the offence.

With a defence of public good, we avoid having people convicted when they did not act in a way that was intended to be criminalized. So this is why this defence would do it. You mentioned that the motives of the accused were not to be taken into consideration. That is because the defence of public good is an objective test. Does it serve the public good, and not only did the accused intend to serve the public good? So his motives would be irrelevant. It's an objective test. Does it serve the public good?

I'm not sure I can give you a particular case where it could be used. All I can say is that the offence would prevent all registration or observation in a hotel room. So if you were doing this for the purpose of, I don't know, a cover-up, preventing a cover-up, it could presumably be used in a case like that. But as I said, it's not expected that this defence would apply in many situations.

The Chair: Thank you, Mr. Comartin.

Now we have Ms. Neville for five minutes.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you very much, Mr. Chairman.

Minister, thank you.

I'd like to focus on the area of sexual exploitation and the whole matter of raising the age of consent. As you well know, there are many out there who are advocating that the age of consent be raised from 14 to at least 16. I would like to hear how you believe the section of the act dealing with sexual exploitation will in fact cover the concerns that many raise. I'd like to know what is being done in other countries, because it is frequently cited that many other countries have a higher age of consent. What is the difference in other countries?

I'd like to know your comments on criminalizing the ordinary sexual activity of young people. I'd also like a response to proposals put forward by other parties that if we built in an age difference that was okay, the age of consent could be raised to 16.

Hon. Irwin Cotler: Thank you, Ms. Neville.

This whole question of the age of consent continues to concern people, and it is an issue that needs to be appreciated in context. When it is selected out of context, one cannot have an appreciation either of the rationale for this legislation or for its particulars in the matter of consent.

Maybe because it's taken as a given it needs to be restated, because one has to begin with this threshold principle, which is that non-consensual sexual behaviour, regardless of age, is sexual assault. One has to appreciate that very threshold principle to begin with.

Also, something that is often forgotten is that we do have an age limit of 18 with respect to express offences in the Criminal Code. I'm referring now to child pornography, to which we referred earlier; to the question of child prostitution; to the situation which we saw in the judgment of the Supreme Court in the Audet case, where a person is in a position of authority or trust, or the victim is in a position of dependency; and finally, in that regard, we get to the particular question of the age of consent now being 14 years of age and the rationale for that. When we get to that question, as I said, you have to first go through the issues I just mentioned to contextualize it.

It's interesting—and I looked into the history of this, and I must say that I was a bit surprised—because it's always said that it was the Mulroney government that put forward 14. Sometimes a myth takes on a certain characterization of legend and fact. The point is that it's been at the age of 14 since 1890, so it's been with us for a long time. The rationale today with regard to that has to do with the fact that we do not wish to criminalize consensual sexual activity, which can range anywhere from kissing to sexual intercourse, among young people.

In response to Mr. Comartin's question to me at the time of the estimates, I shared with you, Mr. Chairman, the empirical data that we now have on sexual activity of young people, and we don't wish, as I said, to criminalize a large category of that kind of typical activity, which, as I said, can be nothing more than kissing. If the state has no place in the bedrooms of the nation, it certainly has no place in any encounter among young children at all times, for the purpose of criminalizing that kind of, what is in many cases, innocent sexual activity.

However, we are not unmindful of the particular concern regarding predatory practices with regard to young people. That was the rationale in the context of everything I have said for the creation of a new specific category of sexual exploitation when one is dealing with young people between the ages of 14 and 18. While we don't want to criminalize the regular kind of—if I can use the term—benign sexual activity that takes place, we do want to address predatory, exploitative situations whereby the vulnerable, between the ages of 14 and 18, are vulnerable to that kind of predatory practice and sexual exploitation. That's why we have said that having regard to all the nature and circumstances of the case, such as the age of the would-be offender, the age of the victim, the evolution of the relationship, whether it has been on the Internet, and the like, and having regard to all the indicia therein set forth in the legislation, it is then open for the court to infer that indeed a predatory practice or exploitative situation that deserves to be prohibited has been established.

● (0955)

The Chair: Thank you.

We have to move on.

Ms. Anita Neville: I need one more part answered.

The Chair: Okay, very briefly.

Ms. Anita Neville: Minister, can you comment on the age of consent in other countries and what that means?

Hon. Irwin Cotler: Yes, very quickly, I looked into this as well. I think the data is quite revealing in this regard. Canada's age of consent falls in line with that of like-minded countries. Mexico is 12 years under federal law, Japan is 13 years under federal law, Spain is 13 years, Germany is 14 years, Austria is 14 years, Italy is 14 years, and France is 15 years. I can go on.

The other thing is when you have the situation of the United Kingdom, for example, which is 16 years of age, but it's specifically with respect to the prohibition of sexual intercourse. We are at 14 years because of the concern that we would be criminalizing a broad range of sexual activity of the kind that we have shared with you in the report in response to Mr. Comartin's question.

We're trying to arrive at a result here. We do not criminalize a whole range of sexual conduct amongst young people, but we do criminalize predatory, exploitative sexual behaviour involving vulnerable young people between 14 and 18 years of age. At the same time, we again remember that any non-consensual sexual activity, regardless of age, remains a crime, and we have specific age 18 offences, as I've described.

● (1000)

The Chair: Thank you very much.

Mr. MacKay.

Mr. Peter MacKay (Central Nova, CPC): Thank you, Mr. Chair.

I certainly want to thank the minister and his officials for being here.

As an aside, Minister, I know you're quoting selectively in some cases when you refer to some countries, for example, in purposes such as these. We can just as easily point to other countries for all kinds of other purposes, including same-sex marriage, for example. There are very few countries in the world that have gone this route. We won't go there today.

Hon. Irwin Cotler: I'm always prepared to go there when you wish.

Mr. Peter MacKay: You can be very selective when you give countries as an example that Canada should or should not follow.

I was troubled, I must admit, by some of your references, in particular to the principle. We have to be based on principle. I would suggest to you that everybody around this table, in fact all members of Parliament, completely share the noble purpose of doing everything we can to prevent and eradicate child pornography. That's a given.

In fact, one of the main concerns, I would suggest, that has caused this bill to be reincarnated now three times is the concern over loopholes and the interpretation the courts have in some cases—and Sharpe most notably—put on “artistic merit”. It then went to “public good”. We now have “legitimate purpose”.

I would suggest a definition something like “professional capacity”, or “a person working in a professional capacity” may be more strict in terms of its interpretation of any possession of child pornography.

You're right when you talk about children being the most vulnerable citizens, which leads to, I guess, a broader question of why we have included voyeurism at all in this legislation; why we couldn't have carved that out—and perhaps this legislation would have passed more quickly—rather than complicate it in an omnibus bill, which seems to be your government's wont in many cases.

However, I have a specific question about proposed paragraph 163.1(1)(c), which deals with the written material being described as “for a sexualpurpose, of sexual activity with a personunder the age of eighteen years”.

I would suggest to you that the removal of that description “sexual purpose” is feasible. It would go a long way to lessening the burden for the prosecution. It would no longer require the *mens rea* of the offence involving sexual purpose, and this would very much improve the investigation and processing of related offences, as police wouldn't have to establish the purpose here.

This, I guess, is akin to strict liability, or in some cases you could see it, if you're not prepared to go that far, as a reverse onus, where at least the element of proof that it wasn't being used for a sexual purpose would rest with the defendant.

That is my first question. The other question deals with the amendments around sentencing.

You've already spoken of this issue of minimum sentences in some cases being a maximum. I'm not sure I completely follow your rationale there. You said at one point this might lessen the ability of the Crown or the police to enter into plea bargain arrangements. Again, I don't follow that logic. If we had mandatory minimum sentences, then it might in some cases put more onus on the police to seek pre-charge advice.

But if it is really about deterrence, and if it is about sending a message that the justice system, that you as a government, that we as a country treat these offences with the most seriousness, why wouldn't we want to have in place a minimum sentencing threshold for persons who choose to engage in this type of illicit activity—which again, we all agree, has such a detrimental effect on the life of a child, that even the making of this type of material has a detrimental effect—rather than simply focusing on the spreading and the sale or distribution?

If it is truly about tightening this legislation, sending a message of deterrence—which ironically I heard you talk about the other day in committee, related to the review of the terrorism bill.... There is a value in deterrence, which doesn't often get talked about except in courtrooms and around the country in the actual justice system. We in the theoretical world of Parliament don't seem to like to talk about deterrence and sending a message, which is a legitimate purpose of sentencing, as well as rehabilitation, as well as protecting the public.

If it is about eradicating the harm, I would suggest that these are areas we can look at and can improve this legislation in, and I would very much like to hear your comments on those two proposals.

● (1005)

The Chair: Mr. Cotler.

Hon. Irwin Cotler: Thank you, Mr. Chairman.

Thank you for those questions. I'm going to try to answer.

You made reference to the Sharpe case and you made reference to the words “for a sexual purpose”, matters that in fact are not unrelated because the whole issue arose as a result of the Sharpe case.

If you recall, Mr. Sharpe was convicted of having child pornographic images but was acquitted on charges relating to written materials he had authored. The acquittal was based on the fact that the written materials in question did not fall within the existing definition of written child pornography because they did not “advocate or counsel” prohibited sexual activity with children. In the alternative, the court held, Mr. Sharpe would have been able to avail himself of the defence of artistic merit.

We sought to address these two concerns in this legislation. One of them was addressed by expanding the definition of pornography. In that definition, to which you refer, Bill C-2 proposes to broaden the definition of written child pornography to also include written material that describes prohibited sexual activity with children where that written description is a dominant characteristic of the work and is done for a sexual purpose. The idea here was to expand the definition of pornography, in this instance to in fact facilitate the work of the prosecutors, and at the same time to address—or redress, if you will—the lacunae that had developed as a result of the Sharpe case. This also accounts for the legitimate-purpose defence, responding to that concern regarding artistic merit.

Let me now go into the other question you raised on the matter of mandatory minimum sentences and the issue of deterrence, because your question is important. First, I want to say this legislation specifically directs the court, with regard to issues of sentencing, to take matters of denunciation and deterrence as primary considerations with respect to the issue of child pornography offences. So we are providing a particular direction to the courts and expressly referring to issues of deterrence and denunciation.

There's still the whole question of mandatory minimums, the subject of your question and that of Monsieur Marceau. I made reference—without going into it—that the existence of mandatory minimum penalties leads to plea bargaining. Let me give you an example that I hope will more directly address your concern. A study of section 85 of the Criminal Code found that two-thirds of the charges involving a one-year minimum were withdrawn, dismissed, or discharged. Experience had also shown that mandatory minimum penalties become, as I said, the sentencing ceiling for the offence rather than the minimum.

Let me just also conclude my remarks with respect to Mr. Marceau's question by mentioning some important studies I didn't have a chance to refer to but that I believe are not unimportant. The Canadian Sentencing Commission in its 1987 report—as have most Canadian commissions done that have considered the issue in the past 40 years—recommended the abolition of mandatory minimum sentences except for murder and treason, for the reasons I've mentioned.

Research into the effectiveness of mandatory minimum sentences has shown that—this is from the Law Reform Commission of Canada and is directly on your point—they do not have any obvious special deterrent or educative effect and are no more effective than less serious sanctions in preventing crime.

Finally, I might add, this was confirmed in a comprehensive study commissioned by the Department of Justice in 2001 that found that there is no correlation between crime rate and severity of punishment.

Leaving all that aside, your point is well taken on the issue of deterrence, and that is why we specifically introduced this in the matter of denunciation and deterrence in our legislation.

● (1010)

Mr. Peter MacKay: This is just a question to leave with your department; I don't expect you to be able to answer this. Has the department commissioned any studies focused on the nexus or the connection between the possession of child pornography and sexual aggression towards children? Are there any studies you're aware of? That's something you could perhaps get back to us on.

Then there's the issue of the application of conditional sentences being eliminated and perhaps of your openness to having conditional sentences or mandatory minimum sentences considered as part of this bill. I would suggest statutory release should also be considered in the Corrections and Conditional Release Act.

The Chair: Thank you.

I'll have to ask you to get that information to the committee if there's anything available.

Hon. Irwin Cotler: Just before I call upon my officials to respond, I'll say the particular point of conditional sentencing was also an issue. It came up at our federal-provincial-territorial meeting of ministers of justice. The response, something that was supported by all, was for conditional sentencing as a matter of principle and policy.

However, there have been—and we know them—graphic examples of where conditional sentencing has been inappropriately applied. Therefore, we referred the matter to our FPT sentencing group for them to look at when they look at the mandatory minimums, indeed at the same time they look at the whole question of sentencing in a principled way.

On the question of studies, I'll ask Carole if she has a response on that.

The Chair: Reply very briefly, or, if you could, provide that to the committee.

Mrs. Carole Morency: We are not aware of any research that is available right now that shows a nexus between persons accessing or possessing child pornography and the commission of child sexual abuse. There is information out there that would suggest that whether somebody is a pedophile and may sexually offend against children is perhaps connected to their consumption of child pornography, but as to which one causes the other, we're not aware of any research. But we can undertake to follow up to see if there's anything more recently available.

The Chair: Thank you very much.

We do have to move on.

Madame Bourgeois.

[*Translation*]

Ms. Diane Bourgeois (Terrebonne—Blainville, BQ): Thank you, Mr. Chairman.

Good morning, Mr. Minister, Mesdames.

I'd like to go back to the question of works of art in relation to child pornography. Perhaps I misunderstood when it was referred to earlier. We have artists, we have writers and we have journalists who earn a living by writing articles published in newspapers specializing in the reporting of events with numerous details. I'm thinking of the crime sheets. They're apparently much in demand. I'd like someone to explain to me in concrete terms what guarantee, what security could be given to these persons who earn a living from their occupation.

You referred to the importance of protecting freedom of expression. Moreover, the new paragraph 163.1(1)(c) of the Act states:

> (c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of 18 years that would be an offence under this Act;

However, the legislative summary of the Parliamentary Information and Research Service of the Library of Parliament states:

> ... 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.

What's being done for people who make a living from their occupation as journalists and who report what has happened in a detailed manner? What protection do they have, in concrete terms? These aren't people who incite sexual relations with children, but who describe in a very detailed manner what has happened.

Hon. Irwin Cotler: You wonder what kind of guarantees can be given to people, and more particularly to artists who have concerns over their freedom of expression. The only thing I can answer—then I'll hand over to departmental representatives—is that there has to be a fair appreciation of the Act.

Paragraph 2(b) of the Canadian Charter of Rights and Freedoms provides protection for freedom of expression. There's also the case law. I'm not just talking about Butler, Sharpe and the other major judgments of the Supreme Court of Canada, but about the entire history of our case law that protects freedom of expression. In another context, I myself share the fears of writers in... because I write a lot.

I don't have any concerns on this issue when I see the protection provided under the Charter, in the case law and in practice. Nor can I say there's no reason for concern. As a general rule, however, I believe there are major protections in this area in the Act, in the case law, in practice and in the expertise of our departmental representatives. It's a political question, a question of principle.

Carole may want to add something.

● (1015)

[*English*]

Mrs. Carole Morency: Just to go back to the point, the test is always, does it meet the definition? A journalist who is reporting on the trial of a person accused of sexually abusing a child will not normally report in a newspaper article the types of criteria that would meet the definition, the predominant characteristic of that description, or the description of the unlawful sexual activity and what actually happened, in that amount of detail and whether it were provided for a sexual purpose. A journalist reporting on a sexual abuse trial will say, for example, that a 10-year-old child was sexually abused by the accused and that the charge is this or that and won't normally go into detail. But to the extent that there may be a more generic description, it's not going to be offered for a sexual purpose, which the Supreme Court has declined in the case of Sharpe, to say reasonably intended to sexually stimulate some observers. So it doesn't meet that threshold to begin with.

[*Translation*]

The Chair: Thank you, Ms. Bourgeois.

Mr. Comartin, over to you.

[*English*]

Mr. Joe Comartin: Thank you, Mr. Chair.

Just for the purposes of the committee, the letter the minister referred to in response to a request at a previous meeting of the committee has been circulated, but only as of late yesterday or this morning. But you should have that in your offices.

Mr. Minister, I just want to pursue that issue, to some additional degree, with regard to provincial legislation on marriage and the ages that the provincial legislation allows young people to marry. You made some passing reference to that. How many provinces or territories have legislation allowing youth under 16 to marry, either with the permission of their parents or guardians, or the courts?

Hon. Irwin Cotler: I'll try to respond to that.

Although the federal government, as we know, has jurisdiction over the formal capacity to marry, all provinces and territories have occupied the field and legislated a minimum age for marriage as part of their legislation relating to the solemnization of marriage, which is within provincial jurisdiction.

In Quebec, for example, the Civil Code reflects the minimum age of 16 years as prescribed by the federal law, the Civil Law Harmonization Act. The minimum age to marry with parental consent is 16 years in all jurisdictions, except Nunavut and the Northwest Territories, where the age is 15 years. All jurisdictions, except Quebec, Yukon, and Newfoundland and Labrador, allow exceptions to this rule, generally by allowing a young person under the age of 16 years—it's 15 in Nunavut and in the Northwest Territories—to marry with a judicial order or the written permission of the minister. Usually the word is "expedient", as it's in the interests of the parties to do so because the female is pregnant. But none require that the parties be close in age.

Similarly, just as an adjunct here, the federal Immigration and Refugee Protection Act does not consider any person under the age of 16 years to be a spouse or a common-law person of a foreign national.

That is a brief description of the age of consent with regard to the solemnization of marriage.

● (1020)

Mr. Joe Comartin: So if we were to raise the age to 16, are we then in a constitutional conflict with the provinces?

Hon. Irwin Cotler: No, because we are talking about two different things. One is speaking about the age of consent for civil purposes in the matter of the solemnization of marriage, which is within provincial jurisdiction, but here we are talking about the age of consent for criminal law purposes with respect to offences relating to sexual exploitation and predatory or criminal conduct, or other aspects relating to the age of consent, when it's 18, involving child pornography and child prostitution, or where persons are in a position of trust and authority and the victims are in a position of dependency—or 14 years when it's a question of consensual sexual activity amongst young people. It was 12 years, but it was raised to 14 in 1890.

So we are talking about the genre of activity of a prohibited character from a criminal law perspective, which is distinct from us talking about consent for solemnization of marriage, or driving licences, or the like. Those are really of a different genre or category.

Mr. Joe Comartin: We could end up with the anomaly of children being able to marry and being charged under the Criminal Code at the same time.

Hon. Irwin Cotler: You can have that situation at this point, but by keeping the age of consent at 14 years of age, then you do not criminalize a broad range of sexual activity as it's been described. And you don't have the state authorized to poke into the lives of young people with respect to a whole range of activities that are now regarded as regular activities, such as kissing and the like.

The Chair: Thank you, Mr. Comartin.

Mr. Macklin.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much, Mr. Chair.

Thank you, Mr. Minister and officials for being here today.

When we think of child pornography these days in terms of where the public is on this issue, they certainly seem to be guided to a great extent by the concern that was expressed by the judge who dealt with the Sharpe decision and the comments he made at the time. I wonder if you could take this opportunity to portray to us, if this law as you propose it was in place, how would it change the way in which the Sharpe decision was decided?

Hon. Irwin Cotler: If we look at the law in relation to the Sharpe case, let us say that these proposals were in place at the time, in 2002. Would the outcome in the Sharpe case have been any different? That gives us a way of appreciating the importance and application of this law to that kind of retrospective.

I would say that if the proposal had been in place, the outcome would have been different. If you recall, as I indicated, Mr. Sharpe was convicted of the possession of child pornographic images, but was acquitted with respect to charges relating to written materials he had authored. The acquittal at the time was based on the finding that the materials in question did not fall within the existing definition of written child pornography because they did not advocate or counsel prohibited sexual activity with children. In the alternative, as I indicated in my response to Mr. MacKay, the court held that Mr. Sharpe would have been able to avail himself of the defence of artistic merit.

The important thing with respect to this legislation and how it would have applied in the Sharpe case is that Bill C-2 proposes to broaden the definition of written child pornography to also include written material that describes prohibited sexual activity with children, where that written description is a dominant characteristic of the work and it is written for a sexual purpose. That would have caught what Mr. Sharpe was doing in that case.

Secondly, Bill C-2 proposes a two-pronged, harm-based, legitimate-purpose defence. Under this test, it would not be enough, as Mr. Sharpe did in his case, to show some artistic value. Under Bill C-2, and this is the key point, a defence will not be available even if there is some artistic value, as asserted by Mr. Sharpe in his case, where the use of that material poses an undue risk of harm to children. The harm-based rationale in this legislation of the undue risk of harm to children, which was not present in the Sharpe case, along with the broadened definition of the offence and the narrow and more clear characterization of the defence, the two together, would have changed the outcome in the Sharpe case.

● (1025)

Hon. Paul Harold Macklin: I'd like to also get a sense from you.... When you're dealing with your provincial and territorial counterparts, I guess you get feedback. Have they given you any feedback on this proposed legislation as to how they feel about where we're going?

Hon. Irwin Cotler: The issue of the protection of the vulnerable, particularly the protection of children, and in this instance the matters relating to the protection of children from child pornography and from predatory practices, the facilitation of witness and victim testimony, the constituent elements of this legislation, including the voyeurism offences and the like, met with, I would say, not only a positive response but even an enthusiastic response among my counterparts. I would say that one clearly could discern support for this legislation. It was specifically referred to in the discussions we had with the FPT ministers. I don't ever like to speak for everyone at all times, but I think that would reflect the clear consensus that was reflected in their remarks.

Hon. Paul Harold Macklin: I'd like to turn to another area, which is the facilitating of testimony. I don't think we've discussed that today. Although the thrust of the bill is, as you mentioned earlier, child victimization, there are certainly a lot of adult victims who I think one can characterize as being revictimized by the way in which our justice system functions; for example, sexual assault victims and spousal abuse victims. How is this bill going to truly make a difference for those people in terms of how they testify and appear before our justice system?

Hon. Irwin Cotler: The legislation and our discussion today are focused, and properly so, on the protection of the most vulnerable with regard to child pornography and predatory sexual exploitative conduct. But there are also a lot of adult victims who are revictimized by the criminal justice system, particularly sexual assault victims and spousal abuse victims. Bill C-2 includes a set of reforms that are intended to benefit them as well, including in particular sexual assault victims, victims of criminal harassment, and domestic violence victims, who are, as I indicated, vulnerable to revictimization as a result of their experience as a witness, the nature of the offence, their relationship with the accused, or their own particular circumstances. The law is intended to protect them at the same time as we seek to also protect the rights of the accused.

In other words, in this legislation we aim to extend the testimonial aid to adult victims in some circumstances that recognize how and when this balance must be struck. Testimonial aids and protections, which are currently only available to young victims under 18, will be available to adult witnesses where it is necessary for them to give a full and candid account of the acts complained of. The court will consider the nature of the offence. It will consider the relationship between the witness and the accused, the age of the witness, and other factors in determining, for example, whether to allow a support person to accompany the witness, whether to permit the witness to testify by closed-circuit TV or from behind a screen, and whether to prohibit a self-represented accused from personally cross-examining the witness. So there are a range of protections here with regard to adult witnesses and victims in the circumstances and for the purposes I mentioned.

I might add that the Criminal Code already provides for publication bans to protect the identity of victims and witnesses and exclusion of the public from the courtroom in certain circumstances. These protections may also be particularly beneficial for victims of domestic violence or criminal harassment.

That, I think, gives some framework whereby the legislation will facilitate not only witness and victim testimony by those under 18, but victim and witness testimony by adults in the instances I mentioned of cases of sexual harassment, criminal harassment, sexual assault, and domestic violence.

● (1030)

The Chair: Thank you, Mr. Minister.

Thank you, Mr. Macklin.

Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chairman.

Thank you, Mr. Minister, for being with us today.

Your opening remarks were that the test of a just society is how they protect the most vulnerable—for example, our children. I would agree. We need to look seriously at this legislation, Bill C-2, and what it proposes. Will it indeed protect our children? I have concerns that it will not.

You've also mentioned Bill C-2 builds on previous bills and recommendations, even from this committee.

The Federation of Canadian Municipalities, the Canadian Association of Chiefs of Police, and a majority of Canadians believe the age for adult-child consensual sex should be raised from 14 to 16. I would agree. That appears to be the international standard. Why would this government not increase the ages, as recommended by the Federation of Canadian Municipalities, which represents municipalities right across Canada? It was a unanimous decision. They presented this motion to the federal government for a number of years, and even this last year. The Canadian Association of Chiefs of Police represents police forces across Canada. The police on the front lines are seeing our young people being attracted to and victimized by and drawn into child pornography and prostitution. There is a concern the age of 14 provides loopholes in the law to have our children being drawn into this type of very serious and detrimental action.

That's one of my questions.

Also, Mr. Minister, I'd like you to comment on conditional sentencing and minimum sentencing. My colleague, Mr. Marceau, was asking questions on minimum sentencing. One of the comments you made was that it increased the cost for incarceration. I think the principle you talked about was the responsibility of our federal government to provide safety and security for Canadian citizens. Our children being the vulnerable citizens, we need to provide that protection to them.

The courts do have, and should have, discretion, but they also should be setting guidelines. To say we're going to be tripling the penalties from six months to 18 months does not give me comfort. I think there need to be minimum guidelines. The maximum of 18 months is not satisfactory, when we see sentences are traditionally one-third of sentence and then they're released back into the community. This is the norm. Eighteen months is really only six months in the norm that would be served for an offence under child pornography.

Regarding conditional sentences, I have some very serious concerns that persons found guilty, and convicted, would be serving their sentences at home.

I have a recent.... I'll just read this—

● (1035)

The Chair: We will allow some time for the answers.

Mr. Mark Warawa: In my riding of Langley, a 22-year-old pedophile—and I'll keep his name quiet out of respect for the family—has recently been given a conditional sentence to live in his home, which is right next door to his five-year-old and six-year-old victims.

These victims are continually being victimized by the presence of the person who committed that offence against these children living right next door. I don't believe that should be happening.

We also have Alexander Bathgate, who was just recently released into a neighbouring community. Bathgate had three prior criminal convictions on sexual offences against young children. He was released into the community. With a fear he would reoffend, the police let the community know. He stole a car, escaped, and was caught in Saskatchewan.

I believe, Minister, we are failing in our test to provide a just society. We're not protecting our citizens; we're not protecting our children. I'd like you to comment on that.

Thank you.

Hon. Irwin Cotler: You have given me an opportunity by asking the core question, will this protect our children? In fact, that is the core purpose of this legislation. You have given me an opportunity to share something I may have shared before. If I have shared this before with the committee, I apologize for repeating it, but I continue to make reference to this.

The most profound human rights lesson that I was ever taught was the one taught to me by my daughter when she was 15 years of age. She is now 25. She said to me, “Daddy, do you want to know what the real test of human rights is? Always ask yourself at any time, in any situation, in any part of the world, whether it's good for children. Is what is happening good for children? That's the real test of human rights, Daddy.” That has always been my guide and inspiration since long before I ever came to this temporary post, and that is really the inspiration behind this legislation: will it be good for children?

That brings me to the particular points you brought up on the age of consent and why we don't raise it from 14 to 16—and you also made reference to the Federation of Canadian Municipalities. I don't want to belabour or burden the point, but my answer to this always is that we need to appreciate this specific question through the response that includes, one, that non-consensual sexual conduct, regardless of age, is a sexual assault; two, that with respect to specific categories of exploitative conduct involving young people, child prostitution, child pornography, or any kind of relationship of trust and authority and dependency, already the age is set at 18; and three, for the reasons I've mentioned and won't repeat, we have established a new category of sexual exploitation for young people between the ages of 14 and 18, and we have the age at 14 now with respect to all other forms of sexual activity because we don't want to criminalize that sexual activity given the experiences, as we know, with respect to young people today. So through the use of the Criminal Code, we seek to protect where it is necessary to protect in situations of predatory conduct involving vulnerable young people, but we do not want to have the Criminal Code entering into all relationships of all young people at all times.

On the matter of conditional sentencing, as I said, it has received general support as a matter of principle in our federal–provincial–territorial meeting of ministers of justice, but we acknowledge some of the examples that you gave and that were brought up at that meeting. Therefore, we said that what we need to do is take a look at why and where the conditional sentences are being inappropriately utilized and see what we can do to address those areas. That's why we sent this issue to a sentencing working group. But where conditional sentencing was misused, we did not want to thereby somehow blunt the whole approach to where it indeed should be used.

Finally, on the issue of sentencing itself, this legislation doesn't just enhance penalties in a series of areas, although that is important. We don't just increase the maximum penalty for all child pornography offences on summary conviction from six to 18 months; we also make the commission of any child pornography offence with intent to profit an aggravating factor for sentencing purposes. We increased the maximum penalties on summary conviction for child-specific offences from six to 18 months. We have doubled the maximum penalty on indictment for sexual exploitation of a young person from five to 10 years. We've increased the maximum penalty on indictment for failure to provide the necessities of life and for abandonment of a child from two to five years. But the most important thing—and this is something that tends to be glossed over but needs to be emphasized—is that in all cases—I repeat, all cases—involving the abuse of children, the legislation requires—once again I repeat, requires—sentencing courts “to give primary consideration to the objectives of denunciation and deterrence of such conduct” as set forth in paragraphs 718.01 of the Criminal Code. Finally, in all cases involving the abuse of children, it makes the abuse of any child an aggravating factor for sentencing purposes.

So there is a whole approach to sentencing not only with regard to enhancing the time with regard to the penalties involved, but also with respect to a specific direction to the courts as to the importance —and it has been properly mentioned here by my colleagues—of both denunciation and deterrence.

● (1040)

The courts are now required to regard this as a primary consideration when sentencing in this regard. I think that's one of the only places that I know of where this has even been done in the Criminal Code, in fact, to indicate the importance of this legislation and this purpose.

The Chair: Thank you, Minister Cotler.

Mr. Maloney.

Mr. John Maloney (Welland, Lib.): Thank you, Mr. Chair.

Minister, I listened to your response to Mr. Macklin's question on testimonial aids. With the broadening of the protective aids for a witness giving testimony, I certainly appreciate the sensitivity with young children now that we're expanding it to everyone. How do we reconcile that with our concept of an open court scrutiny by the public and the operation of our court system being open to all?

Even for little things like assessing the demeanour of a witness, body language, etc., how do we reconcile the two? We have an individual who is charged with a very serious offence. He certainly has a right to full answer in defence and to be protected as well. How do we reconcile the two?

Hon. Irwin Cotler: I think the whole approach of this legislation is to seek the reconciliation of the two. I've had the benefit of discussions with my officials, but I haven't allowed you to have the benefit of their expertise enough this morning. So I would turn it over at this point to Catherine Kane because this is something that she has been particularly able to address.

Ms. Catherine Kane (Senior Counsel/Director, Policy Centre for Victim Issues, Department of Justice): Thank you.

There are a number of provisions, as the minister noted, that expand the facilitation of testimony provisions, but we have tried to be very careful in crafting legislation to respect the right of the accused to make full answer in defence.

Basically, the provisions are already in the Criminal Code. We have unpacked the provisions of the Criminal Code that have been added to over the years to make the experience better for victims and witnesses. They have traditionally focused on young persons under 18 years of age, and in some cases under 14 years. In the new enactment of these provisions we've made it clear that we are focusing on three categories, those under 18 years of age, those who are vulnerable adult witnesses, and, in a special category, criminal harassment victims, for the provisions that we referred to as facilitating or testimonial aids. For example, the use of screens so that somebody can give evidence from behind a screen or closed-circuit TV doesn't deny the accused an opportunity to see that person. It's the witness who doesn't see the accused. They can hear them and they have simultaneous communications. There's no chance that the rights of the accused would be impacted on in any way in terms of counsel being able to cross-examine that person, hear testimony, or, for that matter, see the demeanour.

Somebody could be accompanied by a support person, but the support person has no ability to influence or speak to them during the testimony. It's really only for comfort, somebody familiar and near them when they're giving testimony.

The publication ban provisions already exist in the Criminal Code. There are some strict criteria for what the court needs to take into account, the salutary and deleterious effects of the ban, and so on. Those provisions are guided by case law that has underlined the importance of freedom of expression as well as protecting the interests of victims and witnesses.

On the protections against personal cross-examination, again, it's the balance between the right of the accused to defend himself, which is part of the right to make full answer in defence, as well as the protection of the witness. There may be cases where the judge will deny the appointment of counsel in such circumstances, but this legislation will give the courts some guidance on what factors to take into account, such as the nature of the relationship between the accused and the offender, the age of the witness, the nature of the offence, and other relevant circumstances.

In our view, we think we have provided the courts with sufficient guidance, yet we have not tipped the scales in favour of either protection of victims or denial of rights for the accused. Each case will be determined on its own. There's plenty of flexibility built into those provisions.

● (1045)

Mr. John Maloney: Thank you for that full answer.

To follow up, how do you define a vulnerable witness, a vulnerable adult witness?

Ms. Catherine Kane: We don't define that term in the legislation. That's only what we've used in common parlance to signify the group that, we want to make clear, can avail themselves of these protections.

We indicated factors for the court to consider that one could say relate to a person's particular vulnerability, but they're not vulnerable because of who they are. They're basically vulnerable because of that range of factors, the nature of the offence that has been committed, the relationship with the accused, and so on.

The categories are really for those under 18 and those over 18 who are adults. Within those categories of adults you have criminal harassment victims who have carved out special protections with respect to personal cross-examination by a self-represented accused.

Mr. John Maloney: I'm still trying to wrap my head around the public good of voyeurism, which you mentioned in the context of your discussion with Mr. Comartin, I believe it was. Can someone enlighten me, perhaps, Madam Lafontaine, about what public good can there be with any type of voyeurism?

Ms. Lisette Lafontaine: As I said earlier, we don't foresee any circumstance like that, but it could possibly happen, and it's more as a matter of precaution to avoid that the offence would be found so broad that it contravenes the charter. If we had had something very specific in mind that we didn't want to catch, we would have excluded it from the offence, but the defence is there more to cover unforeseen circumstances.

The Chair: Thank you very much.

Go ahead, please, Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Ms. Lafontaine, it seems to me, in view of the talent of the legal experts at your department, that, if you haven't managed to find a single reason why there might be a ground of defence, there's no reason to keep it. I don't understand that.

Furthermore, with regard to voyeurism, I don't see why you've retained the notion of defence of the "public good", whereas, for child pornography, you've replaced "public good" with "legitimate purpose". When I was briefed by the officials from your department on October 12, 2004, I was told that the public good and legitimate purpose were quite similar.

Ms. Lisette Lafontaine: The first reason why we've retained "defence of the public good" is that it applies particularly well in the context of this offence. The defence has been altered in the case of child pornography, but for other reasons.

One important point should be noted. As the minister mentioned, the public good defence is the only defence that applies to the offence of voyeurism, whereas, in the case of child pornography, artistic merit and certain scientific purposes must be considered.

That's not considered in relation to voyeurism. Provision is only made for a public good defence if, in certain cases, it's absolutely necessary for the public good to conceal a camera at a specific location. That's the case, for example, when a hotel room is used for a purpose that has nothing to do with the behaviour that may be anticipated, but that could be used, for example, to observe... Hotel rooms are not just used for sleeping and meeting people; they're also used for trafficking and other purposes. Normally, the police could do it.

There might be other reasons such as, for example, the distribution of pictures. That's the case of pictures taken then forwarded to the CBC or other media. In an extreme case, there could be a cover-up, and the only way to reveal the matter would be to publish those pictures. Those are extreme cases.

● (1050)

Mr. Richard Marceau: What you're explaining isn't voyeurism.

Ms. Lisette Lafontaine: No, and it shouldn't be, but it's included in the definition of the offence. Voyeurism includes the act of placing a camera in a hotel room and filming someone who, in his or her situation, is expecting privacy.

Mr. Richard Marceau: I'm not convinced, but I assume we're going to have the time to study this in committee.

Mr. Minister, despite the fact you're opposed to minimum sentences, you will have noted that, if the Conservatives, who seem to be in favour of this, support me in my efforts, Bill C-2 will contain minimum sentences for child pornography offences. I hope your department will be prepared to implement the bill thus amended, because four plus two equals six, which means that the necessary amendments would be passed in committee.

I'm just saying that it's time for you to start preparing because that will apply to this bill.

The Chair: Are you giving an opinion?

Mr. Richard Marceau: I'm so transparent that, for the sake of good relations, I'm saying right now what's going to happen.

Hon. Irwin Cotler: I wouldn't want to try to predict the future of this process. Nor do I want to say that I'm opposed to every proposal. After considering and studying the reports I've shared with you, I invite my colleague Mr. Marceau to do the same. We're now conducting a study of all these elements together. As I said at the outset, if we can improve this bill, I'll show some openness.

The Chair: Thank you, Mr. Minister.

[*English*]

We have five minutes left, and the room needs to be taken over by another committee.

We have Mr. Moore and Mr. Breitkreuz, so you'll have to share the five minutes between you in order to get in.

We also had on the agenda some future committee business. We'll have to put that off until Thursday. I know Mr. Comartin and Mr. Breitkreuz have motions, so we'll have to deal with those on Thursday.

Mr. Moore.

Mr. Joe Comartin: Mr. Chair, just with regard to my motion, I wanted it on Thursday in any event.

The Chair: Fine. Thank you.

Mr. Moore.

Mr. Rob Moore (Fundy Royal): Thank you for this opportunity.

I want to raise a point on the bill as a whole. I have a constituent in my riding who for 10 years now has been working extensively on the issue of voyeurism. I know she's had correspondence with you, Mr. Minister. I believe her daughter was being victimized because someone was photographing her. She feels very much that she's a victim, but she also feels she's being doubly victimized because there's no provision specifically to deal with it. She's frustrated, and I said I thought there would be broad support across the different parties for voyeurism provisions.

I have noticed that whenever this bill or the previous incarnations have come before committee there hasn't been much debate on the voyeurism provisions specifically. It's always gone back to child pornography and what we feel are defences that are too broad. I want to make just a couple of points.

There is a definition in the Criminal Code for child pornography. It shows the explicit sexual activity of people under 18. The dominant characteristics for sexual purposes are the sex organs, and so on, of young people. I think it's lost in the debate sometimes that there is a definition of child pornography. When people think of artistic merit they think of Anne Geddes photos, and those types of things, or a legitimate purpose for art. That's not what we're talking about. We're talking about something that has a very specific description.

When we look at the reasoning of the Supreme Court in the Sharpe decision, when they dealt with artistic merit they said “any expression that may reasonably be viewed as art” and “any objectively established artistic value, however small”. This is the same court that will be interpreting and applying this as broadly as possible, because it's a basic theory when we're dealing with criminal law that the defences have to be interpreted broadly when it comes to the legitimate purpose for art. I think that's the holdup of this.

Why can we not take the voyeurism provisions out of this and deal with that more expeditiously? Also, when we have this definition of child pornography.... This isn't about police officers; this isn't about scientists or medical professionals doing research; it's specifically about art. Why, with that description, do we have a defence in there that will be applied as broadly as possible and we could see the same results as in the Sharpe case?

Thank you.

● (1055)

Hon. Irwin Cotler: Mr. Chairman, I just want to say that we think the provisions with respect to voyeurism are important provisions. We also believe that the purpose of the bill, as it is described in its title, is the protection of children and other vulnerable persons, and therefore we regard all the constituent elements of the bill—there are five substantive criminal law reforms, of which voyeurism is one.... They all deal with the question of the protection of the vulnerable, and that's why they've been put forward together in that regard, particularly in the matter of protecting the most vulnerable of the vulnerable, namely children.

With regard to children and with regard to child pornography, I think we may not be fully appreciating that we are seeking, in the matter of child pornography, to do, among other things, two very fundamental reforms.

One is to broaden the definition of what constitutes written material for purposes of child pornography, which addresses that which was not present in the Sharpe case. It will now include written material that describes prohibited sexual activity with children where that written description is a predominant characteristic of the work and is written for a sexual purpose, which would have brought what Mr. Sharpe did within this definition as now expanded.

At the same time, the legislation narrows the defence of child pornography, as I indicated earlier, and therefore the defence that he adduced of artistic merit would not obtain, as I indicated in my response to Mr. Macklin, in this case.

So the combined convergence of the broadening of the offence and the narrowing of the defence would exclude the Sharpe case, and the Supreme Court under the present legislation would have come to a different outcome in that case.

Finally, to conclude, I want to say that the whole approach with regard to child pornography, not only broadening the offence as I've described, or narrowing the defence to a harms-based, legitimate-purpose defence, but also.... We have new offences with regard to advertising pornography, with regard to audio formats; we have enhanced penalties. In summary, Mr. Chairman, the approach to child pornography reflects the approach to this legislation as a whole: to protect the most vulnerable of the vulnerable, namely our children, from the most predatory of practices, such as child pornography, and from all forms of sexual exploitation, neglect, and abuse.

● (1100)

The Chair: Thank you very much, Mr. Minister.

Mr. Moore, it's eleven o'clock and we're going to have to clear the room.

Thank you, Mr. Minister, for your attendance with your officials.

We're adjourned until Thursday.

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