Submission to the Standing Committee on Justice on Bill C-2, *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*

November 2004

Introduction

The Evangelical Fellowship of Canada has long been concerned with the protection of the vulnerable, particularly children. We were interveners before the Supreme Court of Canada in *R. v Sharpe*. We have made submissions to the Standing Committee on Justice on Bill-20, as well as to the Department of Justice, the Justice Minister on matters of child pornography, child prostitution and the age of consent [i].

Our concern for the protection of children stems from the biblical mandate to care for the vulnerable. In the Bible, the people of Israel and followers of Jesus were commanded to care for children. As well, our belief that God has created all people in His image and loves each person is the foundation for our belief in the worth of each human being. Flowing from this respect for human dignity is our desire to treat people as persons with inherent worth, not as objects or playthings.

Children are among society's most vulnerable persons. They need adults to protect, guide and provide for them. Children's size and impressionable nature make them vulnerable to abuse. A child's trust is violated when they are abused by adults.

Child pornography exploits the vulnerable, violates human dignity and is harmful not only to its participants but also to Canadian society as a whole. It has become clear across the country that Canadians are overwhelmingly in favour of strict, clear and strong legislation on matters of child protection. It is crucial that this government invest the time and energy, and apply the courage and wisdom necessary to enact comprehensive legislation that ensures the total and uncompromised protection of children under Canadian law. Children deserve nothing less than full protection from all forms of exploitation.

Summary

With the introduction of Bill C-2, the Government of Canada demonstrates an ongoing commitment to protect children and other vulnerable persons. We applaud this commitment, and these efforts.

There are indeed a number of aspects of this bill that are worthwhile. We applaud the broadening of the definition of child pornography to include audio formats and written material that describes "prohibited sexual activity with children where that description is the predominant characteristic of the work and it is done for a sexual purpose." We also applaud the bill's creation of a new prohibition against advertising child pornography. This brings the Criminal Code up to date in responding to the realities of internet communication and the promotion and advertisement of child pornography via email communication and on the World Wide Web. We also commend the government, and offer our support for the bill's provision that would make the intent to profit in commission of any child pornography offence an aggravating factor for sentencing purposes.

There are, however, a number of areas in which the bill falls far short of providing children with the legal protection they need from the federal government. While we commend efforts to narrow and clarify defences for child pornography possession, the bill does not go far enough to narrow available defences for possession of child pornography. The federal government can and should effectively eliminate all defences for personal possession of child pornography, including those of art and education, yet fails to do so.

The bill does not increase minimum penalties for child pornography convictions, and also fails to institute mandatory sentences, as has been done in the UK and the US.

And while the bill sets out to create a new category of prohibited sexual exploitation for individuals between the age of consent and 18, the bill is too weak, failing to raise the age of consent for adult-child sexual contact, despite the fact that Canada has one of the lowest ages of consent in the western world, and for this reason is considered a haven for pedophiles.

Defences

Making the Connection between Child Pornography Consumption and Violent Acts

This summer during court proceedings in the Holly Jones murder case, Michael Briere testified that he consumed child pornography on his home computer the day he killed Holly Jones[ii]. Immediately after the viewing the pornography, Briere left his home, abducted, raped and murdered the young girl. While this is the first time in Canada that such an explicit cause-and-effect relationship has been drawn between the consumption of child pornography and the sexual brutalization of a child, it is by no means an isolated event; this case serves to illustrate the prominent and destructive role that pornography plays in sexual predators' decisions to act out their twisted and deviant fantasies.

According to Ontario Provincial Police forensic psychiatrist Peter Collins, there is proof of a link between people viewing pornography and committing assaults. "There is a link between child pornography collectors and what we call contact offences. Data collected by the U.S. Postal Inspection Service . . . gives the figure of 36 per cent of the people they've arrested for child pornography [who] have contact offences against children."[iii]

Child pornography is inherently harmful to children, not only in its production, but also in its consumption. For this reason, fighting the proliferation of child pornography should not been seen as censorship but rather as the regulation of a potentially hazardous product. When addiction to pornography or loss of childhood innocence occurs, there is no true freedom of expression worth protecting. Thus, it is our position that Parliament must adopt a policy of "zero tolerance" for production and personal possession of child pornography.

Artistic merit: Child Protection and Charter Rights

In *R. v Sharpe*, there was a clear recognition that child pornography in all forms represents a risk of harm to children. And yet the Supreme Court held that artistic merit should be interpreted as including "any expression that may reasonably be viewed as art" and that, as noted above, "any objectively established artistic value, however small," would support the defence[iv].

In June 2004, Federal Justice Minister Irwin Cotler announced his plan to reintroduce a child protection bill that would give Canada one of the strongest pieces of legislation of its kind anywhere in the world. The bill was touted as one that would do better than "artistic merit" and "public good" defences to protect the rights and dignity of children. However, this bill merely uses different language to further the same concepts and does no more than existing law to close loopholes that allow for the possession and distribution of pornographic materials that contribute to the degradation and harm of children in the name of art.

While Bill C-2 proposes to remove the "artistic merit" defence from the Criminal Code, and thus to close that loophole in Canada's child protection laws, the "legitimate purpose" defence set out in this bill, by including a legitimate "artistic" purpose defence, simply re-inserts the artistic merit defence for the possession of child pornography using different language for the same concept.

During her appearance before the Supreme Court during *R. v Sharpe*, Cheryl Tobias, a lawyer fom the Department of Justice, noted that if pedophiles have a constitutional right to free expression, "it is dwarfed by the interests of children in our society." The right of a child to be safe and free from exploitation and degradation must not be undermined or somehow balanced against an individual's personal desire to create or possess child pornography. As Tobias noted, "We ought not sacrifice children on the altar of the Charter." It is our responsibility to protect our own citizens, especially our most vulnerable.[v]

Undue Risk of Harm

In addition to the legitimate purpose defence, Bill C-2 makes available a defence for child pornography-related acts where the act in question "does not pose an undue risk of harm" to children. The bill's inclusion of this defence is disturbing and presents a number of real obstacles to effective child protection.

Under this new provision, sufficient direction is not provided to the courts, leaving the courts with the weighty responsibility of deciding what standard of proof of child pornography's harm is required, leaving "undue risk of harm to children" open to interpretation on a case by case basis.

The harms of child pornography often can not be proved with empirical evidence on a case by case basis; however, an assessment of prevailing evidence clearly demonstrates that the material is inherently harmful both to children and to society as a whole. This "undue risk of harm" provision discounts this evidence, and makes the task of meeting "proof of harm" fraught with difficulty.

There is no merit whatever in the depiction of children in a way which degrades them. In fact, the harm done to children and to society generally by the creation and distribution of this type of material, regardless of how it is produced, cannot be ignored. Beyond the clear intent for this material to provide sexual gratification to the creator or viewer, child pornography is created to glorify, to encourage and to normalize the idea of sexual activity between adults and children. It simply opens the door to the further exploitation of children. Consequently, child pornography in all forms represents a grave risk of harm to children.

If an act fits within the parameters of the child pornography offences laid out in the Criminal Code, prevailing evidence shows that such material is inherently harmful to children. And since any harm to children of this kind is inherently "undue," this defence is unnecessary and even detrimental in the pursuit of justice and child protection.

It is dangerous to leave open the artistic merit loophole, and include an "undue harm" defence in order to take a "case by case" approach to child exploitation. Such a choice places our children in harm's way, while sheltering those who would seek to harm them. Effective child protection legislation must provide the absolute maximum protection to Canadian children.

Recommendations

We commend the government's efforts to narrow and clarify the test for child pornography defences, and the focus on legitimate purpose rather than public good or artistic merit. However, the bill's inclusion of a form of an artistic merit defence leaves a substantial loophole in the legislation that prevents it from providing children with the protection they deserve. We would posit that the definition of child pornography laid out in the existing legislation and including the amendments proposed in the bill, is sufficiently clear to make unnecessary all but a few defences for possession of child pornography, which are explained below.

If a case fits within the clearly defined boundaries of the possession offences laid out in the Criminal Code, and thus passes that first "test," there can no justification for including a second test that would validate personal possession of child pornography. We propose that the only possible defences that should be included in the Criminal Code, and thus the only "second test" that should be applied, relates to cases of possession within a professional context for the pursuit/administration of justice, medicine or science and education, for the express purpose of preventing and/or fighting child pornography.

The only defences that merit inclusion in the Criminal Code are those that offer protection to those working to fight child pornography; no defences can legitimately apply to cases of personal possession of child pornography, and should be eliminated. Thus, we call on the government to do away with all defences that justify the criminal possession of child pornography, including but not limited to artistic merit defences.

Sentencing

To address the problem of sentencing, Bill C-2 proposes amending the Criminal Code to increase maximum penalties for child pornography convictions from six to 18 months in jail. While we support the spirit of the amendment, we would propose that establishing mandatory minimum sentencing would be a far more effective, and in fact necessary, measure in order to influence actual sentencing practices.

Conditional sentences, in which offenders serve their time at home and not in prison under conditions that they not access restricted sites, are currently the norm for possession of child pornography. According to Mr. David Butt, one of Canada's leading experts on child pornography, with conditional sentences pedophiles find encouragement, and even inferred permission, for their own viewing of child pornography. In psychiatric terms, this is called "normalization" of deviant behaviour. Clearly, such sentences are ineffective in that they fail to adequately penalize those guilty of such offences, to deter those participating in this criminal behaviour, and to contribute to the correction and rehabilitation of pedophiles.[vi]

According to Mr. Butt, who is now a spokesman for the child advocacy group Beyond Borders, imposing tougher and mandatory minimum sentences for child pornography offences would be effective in curbing paedophilic behaviour because child pornography users tend to pay close attention to legal consequences. In fact, many pedophiles actually collect newspaper clippings that track the progress of other pornography-related cases in the courts.[vii]

When maximum sentences are increased, we rarely see a corresponding pattern in sentencing practices. What Canada needs now is the replacement of conditional sentences with mandatory minimum sentences for child pornography offences. While it

may be presumptive to state that such action will have the immediate effect of curbing paedophilic behaviour, we must begin now to close down the avenues that are being shown to play an important role in feeding and normalizing the criminal and immoral behaviour of pedophiles.

Mr. Butt suggests that Canada tackle the issue of child pornography the way impaired driving was addressed: a multi-pronged approach including stiffer sentences, societal disapproval through public-awareness campaigns and demands for corporate responsibility. We would welcome such an approach and challenge the federal government to take leadership in such an initiative.

Age and Sexual Exploitation

New Category of Prohibited Sexual Exploitation

Bill C-2 proposes to create a new category of prohibited sexual exploitation of a young person who is over the age of consent for sexual activity, criminalizing the "sexual exploitation" by pedophiles of children aged 14-18 regardless of consent. Under this new category, the courts would be urged to consider specific indicators of exploitation in order to determine the nature of the relationship, including the age of the young person, the difference in age between the young person and the other, the evolution of the relationship, and the degree of control or influence exerted over the young person.

As a measure to prevent exploitation, we commend this effort; it is valuable to focus on the wrongful conduct of the offender and not simply on the consent of the young person. However, this new category necessarily places child victims in a courtroom experience and requires them to provide details of their intimate relationships in order to ascertain whether exploitation has taken place. We are concerned that this provision will either further victimize exploited children or be ineffective. Instead of this new offence, a far more effective way to protect young Canadians from sexual exploitation would be to raise the age of consent to sexual activity to 18 years of age.

Raising the Age of Consent

As was the case with Bill C-12 and Bill C-20, Bill C-2 fails to raise the age of consent for sexual contact between children and adults, standing in sharp contrast with the views of the majority of Canadians. In 1997, in their submission to the Standing Committee on Justice and Legal Affairs during consideration of Bill C-27, the Canadian Association of Chiefs of Police lobbied for legislation to "define 18 years and over as the age of consent for sexual encounters with adults."[viii] In a 2002 Pollara poll, 80 percent of Canadians said they want to see the age of consent increased to *at least* 16 years.[ix] Despite the strong, widespread support for raising the age of consent, the federal government continues to fail in its duty to provide such a protection to Canadian children.

The current low age of consent makes Canada more open to problems related to child prostitution and child abuse. Pedophiles continue to lure vulnerable children through the internet; cross-border pedophile activity into Canada is rampant, and is enhanced by the fact that Canada's age of consent for sex is only 14 years, one of the lowest of all western nations. This offers pedophiles greater opportunity to lure and abuse vulnerable children in Canada, as well as greater room to justify and legally defend their abusive actions. And parents can do nothing about it.

The age of consent should be raised to 18, bringing our consent laws in line with our own legal definition of "child," as well as with the definition of "child" laid out in Article One of the United Nations Convention on the Rights of the Child, which Canada has ratified. According to Article One, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[x] Canada is also a signatory to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

As a country, we recognize that it is unacceptable and immoral to accept or condone sexual relationships between adults and children. It is time the age of consent in Canada be increased to reflect that.

Testimonial Aids for Children

Any reasonable initiative that will make courtroom experiences less traumatic for child victims and witnesses is commendable, as well. We support this provision of Bill C-2. However, we note that Bill C-2's new category of sexual exploitation discussed above necessarily places child victims in a courtroom experience and requires them to provide details of their intimate relationships in order to ascertain whether exploitation has taken place. We are concerned that this provision will either further victimize exploited children or be ineffective. A far more effective way to protect young Canadians from sexual exploitation would be to raise the age of consent to sexual activity to 18 years of age.

Conclusion and Summary of Recommendations

We are pleased that this legislation takes steps to improve the protection of children in Canada, and to reduce exploitation of them. We support the amendments that strengthen the child pornography provisions by adding a new, broader definition of pornography and a narrower test for defences.

At this time, we call on the Government of Canada to:

1. Eliminate all defences for possession offences, leaving exceptions only for possession within a professional context for the pursuit of justice, medicine or science or education, for the express end of preventing or fighting child pornography.

2. Establish mandatory minimum sentences for child pornography possession convictions, as has been done in the United Kingdom and the United States

3. Take leadership in promoting a multi-pronged approach to end child pornography to include tougher sentences, public-awareness campaigns and demands for corporate responsibility.

4. Raise the age of consent for adult-child sexual contact from 14 to 18.

Endnotes

[i] For more information on the EFC's work on this issue, please visit our Pornography Issue Summary and related resources at http://www.evangelicalfellowship.ca/social/issue_viewer.asp?Issue_Summary_ID=20.
[ii] An account of Briere's testimony is available at http://www.cbc.ca/stories/2004/06/17/canada/jones040617.
[iii] Blatchford, Christie, Steven Chase, Richard Mackie. "Get Tougher on Child-porn Users and Internet Providers, Critics Say." The Globe and Mail. June 18, 2004.
[iv] *R v. Sharpe,* [2001] 1 S.C.R. 45
[v] http://www.cbc.ca/news/background/childporn/
[vi] Ibid.
[vii] http://www.beyondborders.org/BB%20D%20BUTT%20Insert.pdf
[viii] http://www.parl.gc.ca/information/library/PRBpubs/prb993-e.htm
[ix] http://pollara.ca
[x] http://www.unhchr.ch/html/menu3/b/k2crc.htm