

May 12, 1999

Mr. John Maloney, M.P.
Chair, Standing Committee on Justice and Human Rights
House of Commons
180 Wellington St., Room 621
Ottawa Ontario K1A 0A6

Dear Mr. Maloney,

Re: Bill C-79 (*Criminal Code* amendments, Victims of Crime)

I am writing to you as Chair of the National Criminal Justice Section of the Canadian Bar Association, in regard to Bill C-79 (*Criminal Code* amendments, Victims of Crime). The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. Among the Association's primary objectives are seeking improvements in the law and the administration of justice, and it is in the context of those objectives that we offer the following comments on Bill C-79.

The National Criminal Justice Section acknowledges that we must increase victim satisfaction with the criminal justice system. We recognize that legislative changes can assist in ensuring the participation of victims of crime within that system. Certainly, victims are entitled to a meaningful voice. However, as a society we must simultaneously attend to the needs of victims and treat all people, including those convicted of horrible crimes, justly. Focussing primarily on vindication rather than healing runs the risk of skewing that balance while still leaving victims dissatisfied with the way they have been treated. In our view, the adversarial system has failed to address the real needs of victims: closure; an understanding of the causes of the offence; and a sense of security that they will not be harmed again. While legislation may formalize the enhanced participation of victims in the system, it can do little to address these broader needs. In this letter, we have identified some technical points in Bill C-79 that we believe require further refinement. We also highlight the limitations of what Bill C-79 can reasonably be expected to accomplish, and suggest an alternative approach.

Victims' Interests on Granting Bail

The Bill's provisions requiring those granting bail or imposing conditions on release to consider the interests of victims are unobjectionable. Victims' safety and security cannot reasonably be overlooked. While we would hope that these factors are currently considered in any event, we see no disadvantage to specifically requiring their consideration in the legislation.

Support for Vulnerable Witnesses

It is desirable to have a child supported by another person when giving evidence during criminal proceedings, as currently permitted by subsection 486(1.2) of the *Criminal Code*. Bill C-79 would expand that subsection to allow a support person for a witness with a mental or physical disability. Some precautions must be taken to ensure that such support persons do not 'coach' or otherwise unduly influence the vulnerable witness. This goal could be achieved either by statute, policy directive or educational initiative, but should be addressed.

It seems somewhat artificial to permit counsel to be appointed solely for the purpose of cross-examining a child witness. The witness will often be the victim of the crime and his or her evidence will be at the heart of the litigation. While it may make more sense to require the Court to appoint counsel to conduct the entire case, this could potentially lead to abuse if accused persons deliberately refrain from retaining counsel to ensure state-funded counsel. In any case, consideration should be given to the practical ramifications of this amendment.

Victim Fine Surcharge

More structure should be included in the sections permitting an increase in the victim fine surcharge. For the purposes of the totality or global sentence principle, this surcharge is easily characterized as part of the sentence. It is conceivable that it could result in high victim fine surcharges for the wealthy, coupled with a diminution in imprisonment. This might have the positive result of reducing prison populations. However, it runs the risk of creating a system where we imprison the poor and permit the wealthy to buy their way out of jail. Certainly, this principle is not supportable.

Definition of "Victim"

The term 'victim' is defined very broadly under article 17(3) of the Bill, which changes the application from "the person.." to "a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence." We question how remote the suffering as a result of the crime can be for a person to be defined as a victim of the offence. For example, should this include extended family members, such as grandmothers or cousins? Should friends be also included within the definition? Certainly, if we are guaranteeing an enhanced role in the criminal justice system and greater respect to victims of crime, we must also consider the scope of that role.

Parole Hearings

At parole hearings, lawyers have no formal status and are characterized only as “assistants.” There is already no opportunity for assistants to challenge Correctional Service of Canada officials after they make their representations to the Board. In our view, such problems would be compounded if victims made oral presentations at parole hearings, especially if offenders are not given the opportunity to test victims’ assertions through questioning.

Restorative Justice

Apart from these specific issues related to Bill C-79, we have some more general observations. In our view, the current victim services delivery model does little to deal with the real needs of victims. The practical mandate of victim services is typically very basic. In some provinces, for example, it provides only education and a very modest level of support for victims. Further, it is only available to victims who have suffered from a limited menu of offences. Even if victim services were able to provide comprehensive counselling, we believe that more holistic approaches to supporting victims are often required. Victims’ issues can be enormously complex and very individualized. The impact of relatively minor offences can sometimes be greater than that of more serious offences, given the very different emotional strengths, social supports, compassion and insight of each person prior to being victimized.

For victims to have truly constructive participation in sentencing and parole decisions, we must provide an improved process for coming to terms with the offence. The existing system does little in this regard. Police services provide rudimentary support, if any. Crown attorneys are frequently overburdened. Victims too often end up feeling ignored, marginalized, and entirely frustrated with the justice system. This frustration, coupled with lingering feelings of loss, confusion, betrayal, hurt and anger, can lead to participation primarily motivated by a desire for revenge. Without sufficient support and flexibility within the current system to deal more appropriately with these feelings, there is a danger of creating undue imbalance between the competing societal interests of fairness to the offender and respect for the victim. By effectively making victims a third party in the adversarial process, victims may increasingly define themselves as winners or losers depending on the outcome. If the offender does not receive the expected penalty, the system will appear to have failed the victim yet again. Rather than increase public confidence, faith in the justice system may falter even further. In sum, we run the risk of promising more than the system is capable of delivering because of institutional limitations.

When properly and carefully administered in suitable cases, models of restorative justice provide a better opportunity for victims to be heard. Restorative justice recognizes that victims’ feelings, concerns and suffering need to be acknowledged. The real essence of restorative justice is the face to face meeting amongst the victim, offender and community members, permitting a greater understanding of the offender’s motivation for committing the offence. This forum allows victims to receive the support of their community. It allows them to communicate their feelings to the offender. Hopefully it may permit them some closure for the harm they have experienced.

Thank you again for the opportunity to add these comments to the Committee's deliberation of Bill C-79.
We would be pleased to elaborate should further clarification be required.

Yours truly,

Isabel Schurman
Chair, National Criminal Justice Section