

CITY OF BURNABY

COMMUNITY POLICING COMMITTEE

*HIS WORSHIP, THE MAYOR
AND COUNCILLORS*

RE: RESPONSE TO FEDERAL CONSULTATION PAPER ON CHILD VICTIMS
AND THE CRIMINAL JUSTICE SYSTEM

RECOMMENDATIONS:

1. **THAT** Council support that the age of consent to sexual activity be raised from 14 to 16 years.
2. **THAT** Council support an amendment to the Criminal Code of Canada to clarify that apparent consent or acquiescence cannot be considered a mitigating factor in sentencing when a victim is under the age of consent.
3. **THAT** Council support that changes be made which would make support available to any victim who was under the age of 18 years at the time of the offense (rather than at the time of the hearing or trial).
4. **THAT** Council support that testimonial supports such as courtroom screens and closed-circuit television be made more widely available for child witnesses because it would be in the best interests of the child.
5. **THAT** Council support that the causing of severe emotional or psychological harm to a child be included in current Criminal Code offenses or any new offenses that deal with criminal abuse or neglect, and that the offenses be based on statutory presumptions that certain types of conduct result in emotional and/or psychological harm to children and youth.
6. **THAT** Council support that out-of-court (hearsay) statements made to third parties by children alleging crimes against them be admissible in court, provided the statements are made in circumstances supporting their reliability. A necessity test should be applied for use of out-of-court statements.
7. **THAT** Council support that a new Criminal Code offense concerning physical abuse of a child by an adult be established, and that it be deemed more serious than assault.

: COPY - CITY MANAGER
- DIR. PLNG. & BLDG.
- OFFICER-IN-CHARGE, R.C.M.P.
- CITY SOLICITOR

8. *THAT* a copy of this report be forwarded to:
- a. the Federal Members of Parliament for Burnaby;
 - b. the Attorney General for British Columbia;
 - c. the Community Issues & Social Planning Committee for information.
 - d. the Federal Department of Justice

REPORT

The Community Policing Committee, at its Open meeting held on 2000 March 09 received and adopted the *attached* report requesting Council respond to the federal consultation paper on Child Victims and the Criminal Justice System by approving and forwarding to the Federal Department of Justice the recommendations as set out in the report.

Respectfully submitted,

Councillor D. Evans
Chair

Councillor G. Begin
Vice Chair

TO: COMMUNITY POLICING COMMITTEE March 9, 2000
FROM: DIRECTOR PLANNING AND BUILDING OUR FILE: 17.317.1
SUBJECT: **RESPONSE TO FEDERAL CONSULTATION PAPER ON
CHILD VICTIMS AND THE CRIMINAL JUSTICE SYSTEM**

PURPOSE: To request that Council respond to the federal consultation paper on *Child Victims and the Criminal Justice System* by approving and forwarding to the Federal Department of Justice the recommendations set out below.

RECOMMENDATIONS:

1. **THAT** Council be requested to support and forward the following recommendations to the Federal Department of Justice before 2000 March 31:
 - a. that the age of consent to sexual activity be raised from 14 to 16 years;
 - b. that the Criminal Code of Canada be amended to clarify that apparent consent or acquiescence cannot be considered a mitigating factor in sentencing when a victim is under the age of consent;
 - c. that changes be made which would make support available to any victim who was under the age of 18 years at the time of the offense (rather than at the time of the hearing or trial);
 - d. that testimonial supports such as courtroom screens and closed-circuit television be made more widely available for child witnesses because it would be in the best interests of the child;
 - e. that the causing of severe emotional or psychological harm to a child be included in current Criminal Code offenses or any new offenses that deal with criminal abuse or neglect, and that the offenses be based on statutory presumptions that certain types of conduct result in emotional and/or psychological harm to children and youth;
 - f. that out-of-court (hearsay) statements made to third parties by children alleging crimes against them be admissible in court, provided the statements are made in circumstances supporting their reliability. A necessity test should be applied for use of out-of-court statements;
 - g. that a new Criminal Code offense concerning physical abuse of a child by an adult be established, and that it be deemed more serious than assault.

2. **THAT** a copy of this report be forwarded to:
 - a. the Federal Members of Parliament for Burnaby;
 - b. the Attorney General for British Columbia;
 - c. the Community Issues & Social Planning Committee for information.

REPORT

1.0 BACKGROUND

At its meeting of 1998 June 22, Council adopted the fifteen recommendations forwarded by Burnaby's Task Force on the Sexual Exploitation and Prostitution of Children and Youth. In approving the recommendations, Council agreed, among other things, to:

- continue its efforts to encourage the Federal Government to increase the age of consent for sexual activity from 14 to 16 years;
- request the Attorney General for British Columbia to strike a working committee to review existing Federal and Provincial legislation and various Provincial policies relating to court procedures, with a view to facilitating changes which would assist in securing prosecutions against exploiters, and render the criminal justice system safer and more comfortable for child and youth witnesses.

The City of Burnaby corresponded with both senior levels of government on the Task Force recommendations. The Province responded to Council's request for a legislative working committee by noting that the interministerial Assistant Deputy Ministers' Committee on Prostitution would recommend changes to legislation, policies and procedures as feasible. The Federal Government responded to the age of consent request by advising that the Federal Minister of Justice would consult widely in late 1999/early 2000 on proposed changes to the Criminal Code of Canada and the Canada Evidence Act which would improve protection for children from extreme harm from adults. The Federal response noted that proposed changes to the age of consent, and to Federal statutes and procedures to improve the experience of child witnesses in criminal proceedings would be included in the consultation process.

The Federal Government released its consultation paper, *Child Victims and the Criminal Justice System*, in late November 1999. The paper presents a number of proposals for legislative changes, ranging from the creation of further child-specific criminal offenses such as child homicide, to changes intended to facilitate the testimony of child witnesses in criminal proceedings. The deadline for comments on the proposals in the consultation paper is 2000 March 31.

This report discusses and makes recommendations regarding those proposed legislative changes which are pertinent to the two Task Force recommendations noted above, as well as to Task Force work generally. It is suggested that the Committee request Council to support and forward the recommendations to the Federal Department of Justice before 2000 March 31.

2.0 RELEVANT QUESTIONS POSED BY THE CONSULTATION PAPER

The consultation paper poses a series of questions about proposed changes to Federal legislation intended to protect children from extreme forms of abuse, neglect and exploitation. While the paper notes that the complex social and legal issues relating to child pornography and child prostitution fall outside the scope of the consultation, some of the proposed changes have implications for children and youth in the sex trade. The questions pertinent to the work of the Task Force are noted and discussed below.

2.1 Questions Pertaining to the Age of Consent

Question #1: Should the age of consent to sexual activity be changed? If so, what would be an appropriate age?

The age of consent to most forms of sexual activity is 14 years. This minimum age was set, in part, to avoid criminalizing consensual sexual activity between young people who are both this age or a little older. The law contains a “close-in-age” exception for young people 12 or 13 years of age who engage in consensual sexual activity with persons in their own age group (less than two years older).

Task Force members are concerned that the current age of consent is too low to provide children with effective protection from sexual exploitation by adults. Raising the age would provide children and youth with an additional measure of protection until they reach a higher level of maturity and understanding about the issues involved in engaging in sexual activity. It would also be more consistent with the treatment of children in other activities, such as leaving school, driving and getting married. Sixteen is deemed a reasonable age, as it would protect 14 and 15 year olds, while allowing 16, 17 and 18 year olds the opportunity to make responsible and informed choices about sexual activity.

It is suggested that the Committee request Council to reiterate its support to the Federal Department of Justice for raising the age of consent to sexual activity from 14 to 16 years.

Question #2: Is there a need to amend the Criminal Code to clarify that apparent consent or acquiescence cannot be considered a mitigating factor in sentencing where consent is specifically stated not to be a defence to a charge involving a child victim?

The implied corollary of a legal age of consent to sexual activity is that those below that age cannot give consent or be construed to have given consent. Under current law, an adult having sex with a child under the age of 14 years can be charged with sexual assault, whether or not it appeared that the child consented to sex. Recently, however, a Canadian appeal court reduced the sentence of an offender in his twenties who had been convicted of sexually assaulting a female babysitter under the age of 14 years. The decision was based on the court's conclusion that even though the girl could not consent in law, she was, nevertheless, a willing participant. The appropriateness of treating a child's apparent consent or lack of resistance as a mitigating factor for sentencing raises concerns for Task Force members because it seems to ignore the purpose of prohibiting sexual activity with a child under the age of consent.

Task Force members support an amendment to the Criminal Code to clarify that apparent consent or acquiescence cannot be considered a mitigating factor in sentencing when a victim is under the age of consent. Such a clarification would even be more important if the age of consent is raised to 16 years.

2.2 Questions Pertaining to the Proposed Working Committee's Review of Federal and Provincial Legislation, Policies and Procedures

The Task Force recommendation regarding the creation of a Provincial working committee to review Federal and Provincial legislation, policies and procedures specified a number of specific areas for review. Those specified areas which are relevant to proposals in the consultation paper include:

- a. review of case management and court procedures in cases involving sexually exploited children and youth in order to ensure that involvement in the criminal justice system is safe and comfortable for children and youth;
- b. review of Section 810 of the Criminal Code to determine whether "personal injury" could include psychological as well as physical harm resulting from sexual exploitation;
- c. review of the criminal rules of evidence and the admissibility of hearsay and circumstantial evidence in cases involving children and youth witnesses.

Question #3: Would it be appropriate to provide that any delay in the trial or preliminary hearing will not deprive a child witness of needed support?

This proposal relates to review area a. outlined above, which focuses on making the court process more child- and youth-friendly.

The Criminal Code enables a judge to allow a support person to be close to a child while testifying in cases where the child is under the age of 14 years at the time of the trial or preliminary hearing. However, it is not unusual for a young witness to have reached the age of 14 before the trial or hearing commences, and thus to become ineligible for a support person. Task Force members are concerned that many sexually exploited children over the age of 13 suffer ongoing damage from their abuse, which may take years to heal. They may be able to navigate a court process only with a support person. Task Force members believe that any victim who was under the age of 18 years at the time of the offense - rather than at the time of the hearing or trial - should be offered support.

Task Force members support changes which would make support available to any victim who was under the age of 18 years at the time of the offense (rather than at the time of the hearing or trial).

Question #4: Should testimonial supports be more widely available to child witnesses?

This proposal relates to review area a. outlined above.

Testimonial supports such as the ability to testify from outside the courtroom through closed circuit television or from behind a screen or other device that prevents the witness from seeing the accused are available to child and youth witnesses under certain conditions. The accused, for instance, must be charged with a specified assault or sexual offence. In addition, the witness must be a child under the age of 18 at the time of the trial or preliminary hearing, and the judge must be convinced that without the support, the witness would be inhibited from giving a full and candid account of the circumstances.

For adolescents, trauma surrounding the court process may focus not only on fear of the accused, but also on the shame and embarrassment involved in making the kinds of public disclosures required during courtroom proceedings. This type of trauma, however, is often seen by the courts as insufficient reason to grant supports. To address this situation, a possible amendment to the Criminal Code could clarify that testimonial supports are also to be made available when it is in the best interests of the child or that such supports should be the norm for all witnesses under 18 years of age.

Task Force members support the wide availability to child and youth witnesses of testimonial supports such as courtroom screens and closed circuit television because they are in the best interests of the child.

Question #5: *Is there a need to include the causing of severe emotional or psychological harm to a child in current Criminal Code offenses or any new offenses that deal with criminal abuse or neglect?*

This proposal relates to review area b. outlined above, which focuses on including psychological harm in the definition of “personal injury”.

Burnaby’s Task Force on the Sexual Exploitation of Children and Youth defines sexual exploitation as the sexual abuse of children and youth under the age of 18 in the sex trade. The Federal consultation paper cites research which demonstrates that the most severe and long-lasting damage to children by sexual abuse may involve psychological injury, the full effects of which may not be evident until long after the offense. In light of the difficulties in proving the emotional harm and its connection with sexual abuse, a number of options for changes to the Criminal Code are outlined in the consultation paper. The Code could, for example, set out the types of evidence that indicate emotional harm. Alternatively, it could use definitions that focus on the conduct of the abuser. Or it could establish statutory presumptions that certain types of conduct result in emotional harm, which could be used along with any evidence of actual harm that could be introduced.

Task Force members support the inclusion of severe emotional or psychological harm to a child in current Criminal Code offenses, and any new offenses that deal with criminal abuse or neglect, and the establishment of statutory presumptions that certain types of conduct result in emotional and/or psychological harm to children and youth.

Question #6: *Should out-of-court statements made to third parties by children alleging crimes committed against them be admitted to prove the truth of the statements, provided the statements are made in circumstances supporting their reliability? Should there be an additional requirement to show “necessity”?*

This proposal relates to review area c. noted above, which focuses on the admissibility of hearsay and circumstantial evidence.

Traditionally, courts have not admitted out-of-court- or “hearsay” statements because they were not considered to be reliable evidence, given that the victim was not under oath and there was no process of cross-examination. However, courts have allowed hearsay statements in some cases involving very young children, and in some cases where a witness does testify but recants a previous out-of-court statement. In such cases, the “necessity” test has been applied, through which it must be demonstrated that the child or youth is incompetent to testify, can no longer recall the details of the circumstances, or is otherwise unable to give a full and candid account.

Task Force members support the admissibility of out-of-court (hearsay) statements made to third parties by children alleging crimes committed against them, provided the statements are made in circumstances supporting their reliability. There should be a requirement to show necessity in the use of hearsay statements.

2.3 Other Relevant Questions

Question #7: *Is there a need for a new Criminal Code offense concerning severe physical abuse of a child?*

This proposal does not relate to any of the Task Force's recommendations to Burnaby Council in 1998. Nevertheless, given the level of violence that sexually exploited children and youth are exposed to, and the real danger of that violence ending in death, Task Force members deemed it appropriate for discussion.

Physical abuse has many forms, including the sexual abuse and exploitation suffered by children and youth in the sex trade. Such children are also subject to violent physical abuse, in the form of beatings, from both pimps and customers.

The existing Criminal Code defines assault as an offense. A new provision could, however, enable the criminal law to be more specific in addressing and defining extremes of behaviour and harm, and to develop appropriately serious penalties to help protect children. New provisions could offer different categories of offense or penalty depending on the severity of the harm inflicted or on the age difference between the person who commits the offense and the child or youth. Task Force members view this latter criteria regarding difference in age as particularly important.

Task Force members support the establishment of a new Criminal Code offense, more serious than assault, concerning physical abuse of a child by an adult.

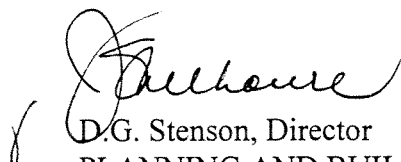
3.0 SUMMARY AND RECOMMENDATIONS

The Federal consultation paper on *Child Victims and the Criminal Justice System* outlines a number of proposals for changes to Federal legislation which could help to protect children from extreme forms of abuse, neglect and exploitation. Burnaby's Task Force on the Sexual Exploitation and Prostitution of Children and Youth has reviewed the consultation paper, with particular reference to the proposals which are pertinent to its 1998 recommendations to Burnaby Council and to its work in general.

In order to ensure that the court system is safe and comfortable for child and youth witnesses and that prosecutions can be secured against those who sexually exploit children and youth, the Task Force recommends that:

- a. the age of consent to sexual activity be raised from 14 to 16 years;
- b. the Criminal Code of Canada be amended to clarify that apparent consent or acquiescence cannot be considered a mitigating factor in sentencing when a victim is under the age of consent;
- c. changes be made which would make support available to any victim who was under the age of 18 years at the time of the offense (rather than at the time of the hearing or trial);
- d. testimonial supports such as courtroom screens and closed-circuit television be made more widely available for child witnesses, because it would be in the best interests of the child;
- e. the causing of severe emotional or psychological harm to a child be included in current Criminal Code offenses or any new offenses that deal with criminal abuse or neglect, and that the offenses be based on statutory presumptions that certain types of conduct result in emotional and/or psychological harm to children and youth;
- f. out-of-court (hearsay) statements made to third parties by children alleging crimes against them be admissible in court, provided the statements are made in circumstances supporting their reliability. A necessity test should be applied for use of out-of-court statements;
- g. a new Criminal Code offense concerning physical abuse of a child by an adult be established, and that it be deemed more serious than assault.

It is suggested that the Committee request Council to support and forward the above recommendations to the Federal Department of Justice before 2000 March 31.


D.G. Stenson, Director
PLANNING AND BUILDING

JS/dh/sa

cc: City Manager
Deputy City Manager, Corporate Services
Director Parks, Recreation & Cultural Services
OIC- Burnaby RCMP
City Solicitor