



February 1, 2022

Via email: lcjc@sen.parl.gc.ca

The Honourable Mobina S.B. Jaffer
Chair,
Standing Senate Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa, ON K1A 0A6

Dear Senator Jaffer:

Re: Bill S-210 – *An Act to restrict young persons' online access to sexually explicit material.*

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section (CBA Section) about Bill S-210, *An Act to restrict young persons' online access to sexually explicit material* which was introduced on November 24, 2021. It proposes amendments to the *Criminal Code*.

The CBA is a national association of 36,000 members including lawyers, notaries, academics, and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section consists of a balance of prosecutors and defence lawyers from all parts of the country.

Bill S-210 is designed to protect children from exposure to "sexually explicit material" as it is defined in subsection 171.1(5) of the *Code*:

(5) In subsection (1), *sexually explicit material* means material that is not child pornography, as defined in subsection 163.1(1), and that is

- (a) a photographic, film, video, or other visual representation, whether or not it was made by electronic or mechanical means,
 - (i) that shows a person who is engaged in or is depicted as engaged in explicit sexual activity, or
 - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a person's genital organs or anal region or, if the person is female, her breasts;
- (b) written material whose dominant characteristic is the description, for a sexual purpose, of explicit sexual activity with a person; or
- (c) an audio recording whose dominant characteristic is the description, presentation or representation, for a sexual purpose, of explicit sexual activity with a person.

The Bill has two important components. The first makes it an offence for organizations to make sexually explicit material available to young persons on the internet. The second enables a designated enforcement authority to prevent sexually explicit material from being made available to young persons on the internet in Canada. Since many pornography websites accessible to Canadians are hosted in other jurisdictions, rather than attack those pornography providers with difficult if not impossible cross-border prosecutions, the Bill shuts out those entities from the Canadian market.

Bill S-210 criminalizes the conduct of organizations as defined in section 2 of the *Code* (as opposed to individuals). The Bill therefore targets businesses who profit from distributing pornography.

The CBA Section supports the overall goal of the Bill which is to protect children from serious harm arising from increased accessibility to internet pornography. The Senate has heard testimony from various experts, including pediatricians, sexologists, and health researchers, who link the increased exposure of children to internet pornography to specific harms such as the development of pornography addiction, the reinforcement of gender stereotypes and the development of attitudes associated with a predisposition toward sexual violence¹.

While we generally support Bill S-210 and its purpose, we raise the following concerns about its implementation and offer recommendations for improvement.

The Age Limit is Arbitrary

In Bill S-210, a young person means an individual who is under 18 years of age. The baseline age of consent to sexual activity in Canada is 16 years.² The *Criminal Code* allows children as young as 12 to engage in sexual activity in certain circumstances. It is therefore discordant with the *Code*'s overall legislative scheme to permit an older young person to engage in sexual activity while making it simultaneously illegal to distribute documents depicting sexual activity to those same young persons³. The CBA Section suggests that the Bill be amended to forbid organizations from distributing pornography to young persons under the age of 16.

The Defence of "Legitimate Purpose" is Overbroad and Confusing

Subsection 6(2) of the Bill outlines the defence of "legitimate purpose". It states that "No organization shall be convicted of an offence under section 5 if the act that is alleged to constitute the offence has a legitimate purpose related to science, medicine, education or the arts".

We suggest that this language is confusing and overbroad. The word "legitimate" is a synonym for "lawful" and can only mean, within the context of legislation, that which is and that which is not "legitimate" according to its words.

The listed qualifying descriptors of "science," "medicine," "education", and "the arts" cover a large swath of human experience. While the CBA Section agrees with the overall contention that exposure (and especially prolonged or ongoing exposure) to pornography is harmful to children, it sees possible practical interpretive issues related to the wording of the section.

¹ [Online.](#)

² In circumstances where the age gap between sexual partners is less than two years and there is no position of trust, authority or dependency or exploitation, the law allows for young persons as young as 12 years old to engage in sexual activity.

³ Section 151 of the *Criminal Code*, R.S.C. 1985, C-46,

For example, in many instances a document can be both artistic and pornographic. And if it is both, determining whether it is also “legitimate” may be an entirely subjective inquiry. This interplay leaves the public with little or no notice of which precise conduct is defensible by the act.

Since the word “legitimate” offers no guidance as to the proper application of these provisions and as the qualifying descriptors are broad and engage topics that are both construed broadly and experienced highly subjectively, we believe the defence of “legitimate purpose” as set out in subsection 6(1) of the Bill should be replaced.

The CBA Section recommends amending the Bill to make the defence more precise. We suggest the Bill specify that the legitimate purpose defence could never apply to the transmission, for the entertainment or sexual gratification of the viewer, of pornographic material depicting sexually abusive behaviour. This would narrow the ambit of the defence to a clearer standard.

Privacy

One of the desired effects of the Bill is to force pornography distributors to implement prescribed age-verification method(s) to limit access to sexually explicit material made available for commercial purposes, to persons who are at least 18 years of age.⁴ The Bill’s preamble claims that “online age-verification technology is increasingly sophisticated and can now effectively ascertain the age of users without breaching their privacy rights”. The Bill, however, contains no specifics on how the government will practically balance privacy and protection. Instead, it mentions the development of “regulations for carrying out the purposes and provisions” of the Bill.

The CBA Section is a strong proponent of privacy protection for Canadians and is sceptical that the appropriate balance is possible absent evidence to the contrary. Age-verification requirements may authorize the Canadian government to either collect or supervise the collection of private and sensitive information. An obvious by-product of such age-verification measures would be the creation of a data set that links personal identifying data to data revealing that an individual accessed internet pornography as well as the specific sexual proclivities and interests of that individual.

Bill S-210 contains no measures that ensure data will not be collected or retained by the government. If this data must be collected, the Bill should explicitly say so and be amended to include legislative provisions that ensure the personal data of Canadians won’t be improperly retained, accessed, or otherwise misused. The mishandling of this information could have grave consequences for the mental health, dignity and personal integrity of those private citizens who access the age-verification process.

The CBA Section asks that the Bill be therefore amended to ensure that adequate privacy safeguards are included.

We hope these observations will be helpful.

Yours truly,

(original letter signed by Julie Terrien for Tony Paisana)

Tony Paisana
Chair, Criminal Justice Section

⁴ Subsection 6(1) of the Bill.