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## **Position paper: Bill C-16**

### **About the CLA**

The Criminal Lawyers' Association (CLA) is one of the largest specialty legal organizations in Canada, with nearly 2,000 members. We are a voice for criminal justice and civil liberties. The CLA is regularly consulted by governments and the media regarding issues that are important to the administration of criminal justice. We assist our members in every aspect of the practice of criminal litigation. The Association is governed by an executive and board of directors elected by the membership. The CLA is a regular intervener at the Supreme Court of Canada.

Many of our members have the unique experience of representing both accused persons and complainants in sexual assault cases, particularly with respect to pre-trial motions. Our position paper is informed by this dual perspective and expertise.

### **Overview of the CLA's position**

The CLA welcomes many of the proposed amendments included in Bill C-16, particularly those ensuring that the criminal law evolves with emerging technologies, those that reduce inefficiencies, improve outcomes, and bring harmony to the *Criminal Code* as a whole. The CLA endorses the following amendments specifically:

1. Amendments to sections 152 and 153 which provide greater legislative clarity;
2. Amendments to protect against the proliferation of “deepfakes”;
3. Increased emphasis on restorative justice measures; and
4. Joint consent applications regarding the admissibility of sexual activity evidence or records without requiring a hearing.

Unfortunately, some amendments do not address the problems Bill C-16 is purported to remedy and may in fact exacerbate them. Particularly, the CLA is concerned with the following amendments:

1. Service to complainants of applications at Stage One proceedings in section 276.01 and 278.31 applications (Proposed sections 276.01(5) and 278.3(3) *Criminal Code*);
2. Raising the threshold to obtain the production of therapeutic records, requiring the defence to show that the contents could raise doubt (Proposed section 278.12(3)(c) *Criminal Code*);
3. Amendments to the offence of criminal harassment which removes the subjective component (Section 264 *Criminal Code*); and
4. Amendments to the manslaughter sentencing regime to allow for a 10-year parole ineligibility period (Proposed section 236(2) *Criminal Code*)



**Service of applications to complainant's counsel at Stage One per proposed sections 276.01 and 278.3(3) Criminal Code**

**Recommendation: Remove the requirement for service of applications on complainants at Stage One, per sections 276.01(5) and 278.3(3).**

The CLA has concerns regarding the proposed requirement, under sections 276.01(5) and 278.3(3), that Stage One applications be served on complainants.

Applications under current section 276, regarding the admissibility of evidence of other sexual activity, and section 278.92, records in the possession of the accused, are well established as proceeding in two distinct stages. At Stage One, the accused applies for a hearing on admissibility. The application materials are provided only to the court and the prosecution. Only if the application is capable of being admissible does it proceed to Stage Two, at which point the complainant is provided with the application and is granted standing to make submissions on admissibility.

The proposed amendments would alter this framework by requiring service of Stage One applications on both the complainant and the prosecutor. The CLA is concerned that this change will have unintended and adverse consequences for the administration of justice, for two primary reasons. First, it will increase delay and cause procedural complexity. Second, it will not better the experiences of complainants navigating the criminal system.

***1. Increased delay and procedural complexity***

Canada's criminal justice system is under significant strain. Court dockets are increasingly congested, trials are becoming more complex, and matters are taking longer to reach completion. In sexual assault proceedings particularly, the proliferation of pre-trial motions—especially those relating to records and the complainant's prior sexual activity under section 276—already contribute to delay.

While the CLA recognizes the important role played by these procedural safeguards, we are concerned that requiring service of Stage One applications on complainants will further lengthen and complicate pre-trial proceedings. This concern is especially pronounced in relation to applications involving what is currently considered non-enumerated records, such as text messages and emails. Canadians have an enormous digital footprint. Much of their lives are lived online or through electronic communication, rather than in person. These communications, no matter how benign they may be, are routinely part of pre-trial motion applications. The number of text messages that may need to be used in a criminal trial can be extraordinary.

The Supreme Court of Canada defined "records" in *R v J.J.* as any document that "contains information of an intimate and highly personal nature that is integral to the complainant's overall physical,



psychological or emotional well-being.”<sup>1</sup> In practice, accused persons frequently bring Stage One applications for documents in their possession, like text messages, even where defence counsel is uncertain whether the material meets the definition of a record. This approach is consistent with the Supreme Court’s guidance that, “[w]hen it is unclear whether the evidence is a ‘record’, counsel should err on the side of caution and initiate Stage One of the record screening process.”<sup>2</sup>

Prior to *R v J.J.*, courts routinely heard motions for directions to determine whether a document constituted a record. Following *R v J.J.*, Stage One applications serve this gatekeeping function. Importantly, the current process allows counsel to canvass whether materials qualify as records without disclosing them to the complainant at the preliminary stage. This framework appropriately balances the privacy and dignity interests of complainants with the accused’s right to a fair trial.

Requiring service of Stage One materials on complainants would undermine this balance. It is likely to generate additional pre-trial litigation, including motions for directions before a Stage One analysis can even occur. This will result in longer pre-trial proceedings, increased delay, and costs to the system, without corresponding benefit to complainants or the justice system. Further, involving complainants at Stage One will increase costs to the provincial governments. The vast majority of statutorily appointed counsel in this regime are publicly funded by the provinces.

Ultimately, the CLA submits that the proposed service requirement at Stage One will have the unintended effect of increasing delay, costs, and procedural complexity, to the detriment of complainants, accused persons, and the administration of justice as a whole.

## ***2. Service at Stage One will not improve complainants’ experience in criminal system***

The CLA agrees that meaningful complainant participation in these applications is important. However, that objective is already achieved at Stage Two, where complainants are provided with the application materials and are granted standing to make submissions.

The CLA has extensive experience with complainants navigating these applications. In our experience, even when represented by experienced counsel, many complainants have difficulty understanding the legal purpose and technical nature of these applications. Requiring service of the application at both stages risks increasing stress and uncertainty for the complainant, without any corresponding procedural benefit.

This concern is particularly acute where the evidence sought to be adduced is clearly irrelevant or fails to meet the Stage One statutory threshold. In such circumstances, there is no practical or legal advantage in requiring complainants to engage with a complex statutory framework twice, especially when the

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<sup>1</sup> *R. v. J.J.*, [2022 SCC 28](#) at para 54.

<sup>2</sup> *R. v. J.J.*, [2022 SCC 28](#) at para 72.



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application will not proceed to an admissibility hearing under Stage Two. The current framework provides robust participatory rights for complainants at Stage Two. The CLA urges the government to maintain the current framework.

The CLA acknowledges that applications involving therapeutic records raise distinct considerations, and that there may be value in early notice to complainants in those limited circumstances. Accordingly, the CLA recommends that the proposed legislation be amended to remove the requirement for service of Stage One applications on complainants, except where the application relates to therapeutic records.

**Therapeutic records can only be disclosed when they can raise a reasonable doubt as to the accused's guilt per proposed section 278.12(3)(c) of the *Criminal Code***

**Recommendation: Remove the language requiring an accused to establish that a therapeutic record contains evidence capable of raising a reasonable doubt as to guilt as a precondition to production.**

The CLA has serious concerns with the proposed amendment to section 278.12(3)(c), which would require an accused to establish that a therapeutic record contains evidence capable of raising a reasonable doubt as to guilt as a precondition to production. This proposed standard mirrors what is commonly referred to as the “innocence at stake” test. That test has historically been reserved for two highly protected areas of criminal law: police informer privilege and solicitor-client privilege. Extending this threshold to therapeutic records represents a significant and unjustified departure from existing disclosure and production principles.

The CLA agrees that therapeutic records engage profound privacy interests and should attract a high degree of protection. The current statutory framework already reflects this reality, as do repeated judicial pronouncements emphasizing restraint in ordering their production. In practice, applications for the production of therapeutic records are relatively rare.

Nevertheless, there are exceptional cases in which therapeutic records are necessary to permit an accused to make full answer and defence, and to allow the trier of fact to arrive at a just and accurate verdict. Requiring an accused person to demonstrate that the therapeutic record contains evidence that could raise a reasonable doubt places an impossible burden on the accused to show that they can win their case on the merits based on a record they have never seen. The current state of the law already prevents fishing expeditions and balances protecting the complainant's dignity and privacy against the fair trial rights of an accused.

Requiring an accused to meet this threshold at the production stage risks undermining the right to a fair trial and sets the threshold unrealistically high. In the CLA's view, this provision is vulnerable to constitutional challenge and creates an increased risk of wrongful convictions. The CLA urges Parliament to retain the existing statutory framework governing applications for the production of



therapeutic records, which appropriately balances complainants' privacy interests with the accused's constitutional right to make full answer and defence.

**Amendments to the offence of criminal harassment removing the subjective component per proposed section 264(1) of the *Criminal Code***

**Recommendation: Maintain the wording of the offence of criminal harassment as it currently reads.**

Bill C-16 proposes to amend section 264(1) by removing the requirement that the complainant subjectively feared for their safety and replacing it with a purely objective standard based on whether the conduct could reasonably be expected to cause fear. The CLA has serious concerns with the removal of the subjective component of the offence because it is overbroad and inconsistent with the principle of restraint.

***1. The amendment raises concerns of overbreadth***

A purely objective standard raises significant concerns of overbreadth under section 7 of the *Charter*. Absent a requirement that the complainant actually feared for their safety, the amended provision risks capturing conduct that Parliament did not intend to criminalize. Criminal liability could attach even where no subjective fear was experienced, thereby expanding the offence to encompass behaviour that is unwanted, distressing, or socially inappropriate, but not genuinely threatening.

While such conduct may warrant social, civil, or regulatory responses, it has not traditionally attracted criminal sanction. The proposed amendment would significantly broaden the scope of criminal harassment and risks blurring the line between criminal conduct and behaviour that is merely annoying, awkward, misguided, or emotionally uncomfortable.

The CLA is also concerned that a purely objective standard may have disproportionate impacts on already vulnerable populations, including individuals living with mental health challenges, neurodivergent persons, and those with intellectual disabilities, whose behaviour may be more readily misinterpreted through an objective lens divorced from subjective impact.

***2. The amendment is inconsistent with the principle of restraint***

Second, the proposed amendment conflicts with the foundational principle of restraint in criminal law. In considering the expansion of criminal liability in sexual assault cases, the Supreme Court of Canada in *R v Hutchinson* nonetheless reiterated the importance of restraint:

But the law has long recognized that there are limits on how completely it may fulfil that objective through the blunt instrument of the criminal law. As the most serious interference by the state with



peoples' lives and liberties, the criminal law should be used with appropriate restraint, to avoid over-criminalization. [...] The companion of restraint is certainty. The criminal law must provide fair notice of what is prohibited and clear standards for enforcement.”<sup>3</sup>

Criminal harassment is an offence that is inherently contextual and relational. Not all wrongful acts are criminal, nor should all human differences and mistakes be criminalized. The criminal law punishes those who are morally blameworthy.<sup>4</sup> The CLA is concerned that these amendments risk capturing conduct that reasonable members of society would not expect—or wish—to be subject to the heavy hand of the criminal law.

The CLA urges Parliament to maintain the current definition of criminal harassment which strikes a careful balance between protecting complainants' safety and preventing the criminalization of conduct that is merely unwanted or socially uncomfortable.

### **Amendments to section 236 *Criminal Code* regarding manslaughter sentencing**

#### **Recommendation: Remove section 236(2), subsections (a)-(d), and section 745(c.1)**

The CLA is concerned that the combined proposed amendments to sections 236(2) and 745(c.1) represent a significant and troubling expansion of constructive murder through the back door of manslaughter sentencing. These amendments drastically alter the sentencing framework for manslaughter in a manner that risks undermining foundational principles of proportionality and restraint.

Manslaughter is an offence that captures an exceptionally broad range of conduct, spanning cases of very high moral culpability as well as circumstances approaching accident.<sup>5</sup> Historically, Parliament has recognized this breadth by preserving wide judicial discretion at sentencing and by reserving the most severe sentences for near murders, requiring a heightened level of moral culpability.<sup>6</sup>

Proposed section 236(2)(a) would require a sentencing judge to consider the imposition of a life sentence for manslaughter where the offence was committed in the context of a “pattern of coercive or controlling conduct” or while the accused was exercising “control, direction or influence” over the movements of the victim. While the provision does not mandate the imposition of a life sentence, it nonetheless introduces a new pathway by which manslaughter may attract the most severe penalty available under Canadian criminal law: life in prison.

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<sup>3</sup> *R. v. Hutchinson*, [2014 SCC 19](#) at para 18; See also *R. v. Mabior*, [2012 SCC 47](#); *R. v. Cuerrier*, [\[1998\] 2 SCR 371](#).

<sup>4</sup> *R. v. Martineau*, [\[1990\] 2 S.C.R. 633](#).

<sup>5</sup> *R. v. Laberge*, [1995 ABCA 196](#) at para 6; *R. v. Eneas* [1994] B.C.J. No. 262 (B.C.C.A.).

<sup>6</sup> Ottawa Citizen, [Young Inuk woman spared jail after killing mom; Ottawa judge leans on hope and Indigenous healing](#), July 20, 2021.



When read together with the proposed amendment to section 745(c.1), which would render individuals sentenced to life imprisonment pursuant to section 236(2)(a) to (d) ineligible for parole for a minimum of ten years, the practical effect is to extend a sentencing regime previously reserved for murder offences to an offence and offenders that are not equally blameworthy.

The CLA is particularly concerned with this expansion occurring in the context of concepts like “coercive or controlling conduct” and “control, direction or influence”—concepts that are framed in broad and imprecise terms. As drafted, this language risks capturing a wide array of relational dynamics that may not reflect the degree of domination or violence justifying such severe sentencing consequences. The interaction between these broadly-defined elements and the expansive scope of manslaughter liability raises serious concerns regarding overbreadth and vagueness, infringing section 7 of the *Charter*.

The CLA acknowledges that the discretionary language of section 236(2) does not result in a *de facto* mandatory minimum sentence. However, the CLA is concerned that the combined operation of sections 236(2) and 745(c.1) may nonetheless result in constitutionally disproportionate sentences. There is a risk that individuals who cause the death of an intimate partner in circumstances approaching accident or other situations of lowered moral blameworthiness could be exposed to life imprisonment with lengthy parole ineligibility, despite their reduced moral culpability.

The notion that longer sentences decrease recidivism and keep communities safer, including victims of intimate partner violence, is not supported by evidence.<sup>7</sup> There is no evidence that these sentencing amendments will have the desired effect of reducing intimate partner violence. In the CLA’s submission, these amendments represent a significant departure from long-standing principles of proportionality and individualized sentencing. This warrants careful reconsideration by Parliament.

### **Other proposed amendments**

The CLA also has concerns about the following amendments and would adopt the submissions of the Canadian Civil Liberties Association and the Canadian Bar Association:

1. A new Part of the *Criminal Code* regarding unreasonable delay and its remedies (section 11b *Charter* applications);
2. Amendments designed to protect mandatory minimum penalties;
3. The introduction of a new offence of coercive control and the introduction of this coercive control definition into constructive first-degree murder for femicide.

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<sup>7</sup> Canadian Civil Liberties Association, “[No longer prison sentences do not reduce crime](#)” (September 16, 2022).



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## Conclusion

The CLA welcomes many provisions proposed in Bill C-16, particularly those designed to protect the sexual integrity of complainants and reduce the proliferation of deepfakes. However, other provisions risk expanding the criminal law too far. Many of the proposed amendments will not achieve their purported goals. They will increase litigation and delay and undermine principles fundamental to our justice system. Public safety and fundamental justice are not competing values—both can and must be achieved.

The criminal law is, by its nature, a reactive response to social harm and is an imperfect tool for addressing the underlying causes of crime. Despite decades of amendments to the *Criminal Code*, there is little evidence that continual expansion of criminal liability or harsher sentencing has resulted in safer communities. The CLA cautions against the assumption that additional criminal law measures will enhance public safety. Experience demonstrates that long-term safety is better achieved through sustained investment in communities and social supports.