



# OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

## GUIDELINE FOR FEDERAL PROSECUTORS

August 15, 2012

### **COMING INTO FORCE OF THE SAFE STREETS AND COMMUNITIES ACT<sup>1</sup> (Amendments to the *Criminal Code* - creating mandatory minimum penalties)**

#### **Purpose**

[1] The purpose of this Guideline is to advise federal Crown counsel of the coming into force on **August 9, 2012**, of certain amendments to the *Criminal Code* that add mandatory minimum penalties (MMPs) for particular offences involving the sexual exploitation of children. The amendments are contained in the *Safe Streets and Communities Act* (“the Act”), formerly Bill C-10. These amendments apply only to offences committed after the coming into force date of these provisions.<sup>2</sup>

[2] The Act also creates two new hybrid offences (Sections 171.1 and 172.2 of the *Criminal Code*). Section 171.1 makes it an offence to provide sexually explicit material to a child. Section 172.2 creates an offence to agree or make arrangements with another person by means of telecommunications to commit a sexual offence against a child.

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<sup>1</sup> <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5124131&File=62>

<sup>2</sup> These provisions are contained in Part 2 of the Bill and came into force on August 9, 2012.

## Impact on Prosecutions

[3] Crown counsel are reminded that they are obliged to present all available provable facts to the court, in a firm but fair manner, in order to ensure the integrity of the prosecution throughout the litigation process.<sup>3</sup> Crown counsel must also conduct plea and sentence negotiations in a manner consistent with the policies set out in the PPSC Deskbook. In particular, the Deskbook states that an agreement to withhold from the court facts that are provable and relevant, and that aggravate the offence is not acceptable.<sup>4</sup>

[4] In keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed.

[5] If an offence with an MMP has a reasonable prospect of conviction, such an offence may only be stayed or withdrawn under a plea agreement with the consent of the Chief Federal Prosecutor (CFP) or his/her delegate. The prior consent shall only be given where the basis for the plea is set out in a written memorandum that demonstrates, to the satisfaction of the CFP or his/her delegate, how the proposed course of action is in the public interest.

[6] If the reason for the stay or withdrawal is due to the threshold for prosecution (a reasonable prospect of conviction) not being met, such consent is not required. In such circumstances, Crown counsel must provide a written memorandum to the CFP or his/her delegate that explains the decision and ensure that the memorandum is placed on file.

[7] Where it is not feasible for counsel to obtain the CFP's consent beforehand to stay or withdraw or agree to a plea to a lesser offence on a charge with an MMP, Crown Counsel must provide the CFP, as soon as practicable after doing so, with a written memorandum demonstrating how the proposed course of action was in the public interest and why it was not feasible to seek consent beforehand.<sup>5</sup> Counsel must also ensure the memorandum is placed on the file.

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<sup>3</sup> See *Boucher v. The Queen*, [1955] SCR 16 at 23-24: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. **Counsel have a duty to see that all available legal proof of the facts is presented:** it should be done firmly and pressed to its legitimate strength but it must also be done fairly."

<sup>4</sup> See PPSC Deskbook Part V, Chapter 20: Proceedings at Trial and on Appeal, in particular para. 20.3.4(c).

<sup>5</sup> Such circumstances must be understood as exceptional. Crown counsel are expected to make efforts to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may only stay, withdraw or agree to a plea to a lesser offence on a charge with an MMP in circumstances where, after making reasonable attempts to contact the CFP or his/or her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

## **Conclusion**

[8] It is important for Crown counsel to refer to Tables A and B below in order to know whether an MMP attaches to offences involving the sexual exploitation of children.

[9] Under the new MMP regime, it will generally be inappropriate for Crown counsel to take a plea to a lesser offence, stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

**Table A**

<b>NEW OFFENCES AND NEW MANDATORY MINIMUM PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN</b>						
			<b>Current Maximum Penalty</b>		<b>New proposed mandatory minimum penalties</b>	
	<b>Offence</b>	<b>Criminal Code Section</b>	<b>On Summary Conviction</b>	<b>On Indictment</b>	<b>On Summary Conviction</b>	<b>On Indictment</b>
1.	Incest, against a person under 16 years of age (indictable offence)	<b>155</b>	n/a	14 years	<b>n/a</b>	<b>5 years</b>
2.	Bestiality	<b>160 (3)</b>	6 months	10 years	<b>6 months</b>	<b>1 year</b>
3.	<b>New:</b> Providing sexually explicit material to a child (hybrid offence)	<b>171.1</b>	n/a	n/a	<b>30 days</b>	<b>90 days</b>
4.	Internet luring (hybrid offence)	<b>172.1</b>	18 months	10 years	<b>90 days</b>	<b>1 year</b>
5.	<b>New:</b> Agreeing/making arrangements with another person, via telecommunication, to commit sexual offence against a child (hybrid offence)	<b>172.2</b>	n/a	n/a	<b>90 days</b>	<b>1 year</b>
6.	Exposure	<b>173(2)</b>	6 months	n/a	<b>30 days</b>	<b>90 days</b>
7.	Sexual assault, against a young person under 16 years of age (hybrid offence)	<b>271</b>	18 months	10 years	<b>90 days</b>	<b>1 year</b>
8.	Sexual assault with a weapon, <sup>1</sup> against a young person under 16 years of age (indictable offence)	<b>272</b>	n/a	14 years	<b>n/a</b>	<b>5 years</b>
9.	Aggravated sexual assault, <sup>2</sup> against a young person under 16 years of age (indictable offence)	<b>273</b>	n/a	life imprisonment	<b>n/a</b>	<b>5 years</b>

<sup>1</sup> There is a mandatory minimum penalty for this offence if a restricted or prohibited firearm is used in connection with organized crime (5 years for first offence; 7 years for second or subsequent offence).

<sup>2</sup> There is a mandatory minimum penalty for this offence if a firearm is used (4 years).

**Table B**

<b>INCREASED MANDATORY MINIMUM PENALTIES FOR EXISTING SEXUAL EXPLOITATION OF CHILDREN OFFENCES</b>						
	<b>Offence</b>	<b>Criminal Code Section</b>	<b>On summary conviction</b>		<b>On indictment</b>	
			<b>Current Penalty</b>	<b>Proposed Increased Mandatory Minimum Penalty</b>	<b>Current Penalty</b>	<b>Proposed Increased Mandatory Minimum Penalty</b>
1.	Sexual interference (hybrid offence)	<b>151</b>	MMP 14 days and max. 18 months	<b>90 days</b>	MMP 45 days and max. 10 years	<b>1 year</b>
2.	Sexual touching (hybrid offence)	<b>152</b>	MMP 14 days and max. 18 months	<b>90 days</b>	MMP 45 days and max. 10 years	<b>1 year</b>
3.	Sexual exploitation (hybrid offence)	<b>153</b>	MMP 14 days and max. 18 months	<b>90 days</b>	MMP 45 days and max. 10 years	<b>1 year</b>
4.	Bestiality in the presence of or by a child	<b>160(3)</b>	No MMP and max. 6 months	<b>6 months</b>	No MMP and max. 10 years	<b>1 year</b>
5.	Making child pornography	<b>163.1(2)</b>	MMP 90 days and max. 18 months	<b>6 months</b>	MMP 1 year and max. 10 years	<b>(No change)</b>
6.	Distributing child pornography	<b>163.1(3)</b>	MMP 90 days and max. 18 months	<b>6 months</b>	MMP 1 year and max. 10 years	<b>(No change)</b>
7.	Possession of child pornography (hybrid offence)	<b>163.1(4)</b>	MMP 14 days and max. 18 months	<b>90 days</b>	MMP 45 days and max. 5 years	<b>6 months</b>
8.	Accessing child pornography (hybrid offence)	<b>163.1(4.1)</b>	MMP 14 days and max. 18 months	<b>90 days</b>	MMP 45 days and max. 5 years	<b>6 months</b>
9.	Parent/guardian procuring sexual activity where victim is under 16 (indictable offence)	<b>170(a)</b>	n/a		MMP 6 months and max. 5 years	<b>1 year</b>
	Parent/guardian procuring sexual activity where victim is 16-17 (indictable offence)	<b>170(b)</b>	n/a		MMP 45 days and max. 2 years	<b>6 months</b>

This document is a guideline issued pursuant to s. 3(3)(c) of the *Director of Public Prosecutions Act* to federal prosecutors and persons retained to act as federal prosecutors within the meaning of s. 7 of the Act.

10.	Householder permitting sexual activity where victim is 16-17 (indictable offence)	<b>171(b)</b>	n/a	MMP 45 days and max. 2 years	<b>90 days</b>
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