

POCKET CRIMINAL CODE 1977: IMPLICATIONS FOR COUNSELLORS

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Abstract

Counselling in good faith requires a knowledge of both the ethical and legal requirements that affect the counselling process. This article highlights sections of the Criminal Code of Canada and related federal legislation that directly influence the work of mental health professionals — particularly school counsellors. Potential trouble spots are identified to provide the counsellor with a factual basis for helping clients, and to warn the counsellor of ways he could become personally involved in the process of the criminal justice system. Suggestions are made to assist the counsellor in meeting his responsibilities in a manner consistent with his legal and ethical duties.

Résumé

La consultation, menée de bonne foi, fait appel à une connaissance des exigences tant légales qu'éthiques qui affectent le processus de la consultation. Cet article souligne les sections du Code Criminel du Canada et de la législation fédérale connexe qui touchent directement le travail de nos professionnels — surtout ceux oeuvrant dans les milieux scolaires. On relève les secteurs qui pourraient devenir problématiques et on avise le conseiller des façons dont il pourrait devenir impliqué dans le processus du système de justice criminel. On suggère au conseiller des modalités pour s'acquitter de ses responsabilités conformément à ses impératifs légaux et éthiques.

The 1977 *Pocket Criminal Code* denoted as "The Companion Volume to the Police Officer Manual", is composed solely of federal laws related to crime, evidence, identification of criminals and criminal records, narcotic controls and the Canadian Bill of Rights. It might seem strange that such a resource book should have implications for counsellors, but as one editor put it — "the material is relevant, important and should be published".

The contents of this volume probably affect counsellors in their day to day activities more than any single text book they have studied during their academic training — yet few readers of this article will have ever even seen the book. Counsellors often study materials relating to schools, colleges, and job opportunities; vocational and educational interest scales; personality tests, etc., in order to be informed and well equipped with current facts. Counsellors may have seen articles or reprints of a few sections from the Criminal Code (e.g., the Food and Drug Act, or the Narcotics Control Act) but few have read the original version of the context.

The contents of the Criminal Code affect the school counsellor in two principle ways: 1. As a source of information to help students become

aware of the plethora of rules which govern their everyday lives; and 2. As a reminder of how the counsellor can become personally involved in criminal activity during the counselling process. Many of the 594 pages of the book have minimum relevance for counselling so the following paragraphs highlight provisions that in the author's opinion should be seriously considered by the average counsellor in a school or agency setting.

The Criminal Code in General

Chapter C-34 (Revised Statutes of Canada, 1970) as amended sets forth the provisions of the Criminal Code. Section references which follow are to that Code. These rules, together with provincial and municipal regulations, govern our day to day activities. Most people are aware that murder, theft, robbery or driving under the influence of alcohol are crimes, but few people realize that it is also a crime to "intend to commit an offence" and then to do anything (or omit doing something) toward that end — even though it would have been impossible to do so under the circumstances (S. 24). Thus getting into your own car while drunk and intending to drive home is technically a crime even though someone else has

removed your keys from the ignition. And ignorance of the law is no excuse (S. 19)!

Not only is the person who commits an offence guilty, but anyone who does or fails to do something for the purpose of assisting, or who encourages a crime to be committed, becomes a party to that crime (S. 21). Further, when a person counsels another to do something which constitutes a crime, the counsellor is also guilty if a crime results from the counselling situation (S. 22). Finally, a counsellor could become an accessory after the fact if the counsellor receives, comforts or assists a criminal in making his escape, knowing he has been a party to an offence (S. 23). All of these provisions suggest that the counsellor must use extreme caution when students or clients discuss their past or projected activities. Students frequently discuss activities such as shoplifting, illegal drug usage, running away from home, illegal sexual activity, and similar offences with their counsellor under the illusion that they have a confidential (secret) relationship. While the counsellor under the law does not have to "report the crime" to the authorities, he must be careful not to become involved in one of the ways mentioned above. For example, it would be foolhardy for the counsellor to encourage a student under the age of 16 (or any age, for that matter) to do anything which would be a violation of the Criminal Code, any federal or provincial statute or any municipal by-law (e.g., curfew regulations). The counsellor would be liable under Section 33(1) of the Juvenile Delinquents Act to a two year prison term.

Protection of Persons Administering and Enforcing the Law

While schoolteachers, parents or others standing *in loco parentis* may use force by way of correction (S. 43), counsellors probably do not have this protection (Eberlein, in press-a). In addition, all persons (not only police officers) are justified in using as much force as necessary to prevent the commission of an offence (S. 27) or in preventing a breach of the peace (S. 30). Excessive force, however, makes the person criminally responsible (S. 26). For example, police officers are now being charged with the use of excessive force in the discharge of their duties. In the past, educators have faced the same charge; however, the frequency today is much less than it was due to the decreasing use of corporal punishment in the schools.

Every individual is able to defend himself against an unlawful assault (S. 34) and also can attempt to prevent assault against himself or any one under his protection (S. 37), provided only necessary force is used.

Counsellors should consider intervening in situations which could lead to trouble, including

conflicts where persons could be hurt or property damaged. Counsellors often have foreknowledge of these events and while there is no *duty* to act, there is authority to act directly or through the public officials in an effort to prevent crime. Such affirmative action often requires courage.

Offences Against Public Order

Besides Treason and Seditious, it is also against the law to riot or participate in an unlawful assembly. The latter needs only three or more persons assembled in such a manner as to cause others to fear a "tumultuous" disturbance of the peace or to provoke such a disturbance (Ss. 64-69). Most of the student riots of the 1960's were violations of these sections and counsellors could have been involved either by direct participation or by aiding or abetting some of the more militant members who participated. Students often have "causes" in which they feel very strongly, and counsellors would do well to firmly suggest peaceful means of making student positions clear. It is known that R.C.M.P. and other officials have mingled with demonstrators in so called "peaceful demonstrations," observing and sometimes taking pictures.

Section 82ff deals with firearms (in addition, new regulations dealing with control and registration of firearms and coming into effect both in 1978 and 1979). There are specific rules about the dangerous use of firearms (S. 86) and delivering a firearm to a child under age 16 (S. 87). Since regulations are specific and detailed, counsellors who get involved with these questions by students should examine the relevant sections with care.

Offences Against the Administration of Law and Justice

Sections 108 and 109 deal with bribery of public officials and especially those officials with whom the counsellor would come into contact when a student gets into trouble with the law. Any attempt to interfere with the administration of justice or to protect from detection or punishment a person who has committed or *who intends to commit* an offence by offering any money or other valuable consideration is liable to a 14 year prison term. Seemingly innocent acts committed in the course of the counselling relationship in an effort to help the student could run afoul of these statutes. Care must be taken to keep contacts with public officials above board and to ensure that no attempt is made to obstruct justice by offering anything of value to an official or a possible witness (S. 127).

It is also a crime to mislead justice by giving false evidence (Perjury, S. 120), to fabricate anything with intent that it shall be used as evidence (S. 125), or to prepare a false affidavit (S. 126). Perhaps the first and third points are

obvious but many counsellors have been tempted to change, write or rewrite their case notes and interview notes if it would appear that they might be called on to testify in a court proceeding. This kind of activity is exactly what is contemplated by Section 125.

The section on obstruction of justice (S. 127) is quite broad in scope, in that it covers any effort to "obstruct, pervert to defeat the course of justice." Since counsellors are often called upon by officials (even though they may not be considered as court witnesses) there is a strong need to be careful and truthful in all dealings with police and other officials. A counsellor does not have to reveal evidence and can decline to answer questions unless actually before the court. There is a duty, however, not to mislead or to lie to officers in the conduct of their investigation. A counsellor must be careful not to be guilty of public mischief (S. 128) such as by falsely indicating by words or actions that someone may have committed an offence. Incidentally, anyone who publicly advertises a reward for the return of lost or stolen goods and indicates that no questions will be asked if the goods are returned is guilty of an offence (S. 131). Does this include the school teacher who tells his class that no questions will be asked if the student who took another student's purse will return it?

Rape and Indecent Assault

The most serious crime against the person other than homicide or aggravated assault is rape. Section 143 defines rape basically as sexual intercourse without consent. Even with consent it is a violation of Section 146 if the girl is under age 14, or between 14 and 16 and a female of "previous chaste character". The essential elements which the crown must prove are (1) intercourse, and (2) lack of consent. If the female first resists and then changes her mind she may have consented. If consent was obtained by fear or fraud, however, the consent may not be valid. To be real consent it must be voluntary and cannot be the result of fear of actual bodily harm. Nor is consent synonymous with submission; mere submission does not necessarily imply consent. When obtained by fraud there is no consent at all. Since it is the responsibility of the jury to determine the issue of consent or non-consent, trials often revolve around this issue.

When rape cannot be established, the lesser, included offence, of indecent assault (S. 14) may be established. This includes a hostile act or threat under circumstances of indecency. The most common form against a female is touching or attempting to touch her private parts. Again, consent is a defence. Other crimes of this tenor include a male over 18 seducing a female of "previously chaste character" between the ages of 16 and 18 (S. 151); acts of gross indecency unless

done privately by a married couple or two consenting adults over 21 (S. 157); householders who knowingly permit a female under 18 to be on the premises for illicit sexual intercourse (S. 167); adultery, sexual immorality, habitual drunkenness or other forms of vice in the home of a child (S. 168); indecent acts in a public place (S. 169); administration of drugs or liquor to a female in order to "stupefy or overpower" in order that anyone may have illicit sexual intercourse "S. 195".

Counsellors could become involved in these cases either because of their relationship with the victim of such an assault, or with a child from such a home, or because of their relationship with one or more students charged in a case. There have also been cases where male counsellors have been charged with one of these crimes. One can only warn that the least touching of even a fully clothed female of school age could bring a charge. If other students testify that a counsellor habitually touched them without consent, there is a good chance the counsellor could be convicted.

Other Provisions of the Criminal Code

Suicide is no longer a crime in Canada (S. 225, repealed 1972, C. 13, S. 16), but it is still a crime to counsel a person to commit suicide or to aid or abet a person to do so (S. 224). Since counsellors often become involved in potential suicides it is important not to encourage, countenance, uphold or support a student in his desire to commit suicide. It is better to actively intervene so as to get help for the student from a proper referral source. Few counsellors in the school setting have sufficient training to directly handle cases of this type.

Defamatory libel is defined as material published without lawful justification or excuse that is "likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it was published: (S. 262). It may be expressed directly or by insinuation or irony. Counsellors must use care in phone calls and letters and to a lesser extent when talking (not gossiping) with teachers and school authorities. Counsellors would probably have a qualified privilege under Section 278 when giving information to a person who has an interest in the subject matter providing it is: 1. reasonable in the circumstances, 2. relevant to the subject matter, and 3. true (or if not true, made without ill will and based on reasonable grounds).

Abortion. Section 251 makes it a crime for any pregnant female who intends to procure her own miscarriage to use or permit any means to be used to carry out that intent. (There is not an exception when certain rules are followed for a therapeutic abortion.) When counsellors have pregnant

students as clients, care must be used not to counsel in such a way that the student will seek an illegal abortion. If the counsellor uses common sense there should be no problem.

Obscene material. Section 159 defines obscene material as "undue exploitation of sex" or as a combination of sex and violence. This section makes it an offence to be in possession of such material for the purpose of circulating it. The problem for the counsellor is how to deal with students who may be violating this section of the Code.

Mischief. A common problem in school and with students is covered by Section 387 which forbids the destruction or damage of property and the obstruction, interruption or interference with the lawful use and enjoyment of property. What does a counsellor do when information is obtained in confidence that mischief has or is about to occur? He has an ethical responsibility to prevent the crime if possible while preserving a confidential relationship. Failure to disclose the fact that an offence has been committed, even in one's presence, does not make a person an accessory after the fact. As a result, the counsellor is faced more with an ethical than a legal dilemma.

Other Statutes

Drugs. The sections of the Food and Drug Act dealing with drugs are included in the 1977 *Pocket Criminal Code* along with the entire Narcotic Control Act. Controlled drugs such as Amphetamines, Barbituric Acid, and restricted drugs such as LSD are dealt with under the former while Opium, Cocaine, Cannabis, etc., are under the latter. Procedures are set forth for proving violations for trafficking in a controlled drug, possession or trafficking in a restricted drug in the former, and for possession or trafficking in narcotics under the latter. Since penalties are severe, it is recommended that counsellors who have students involved in the drug scene become aware of some of the legal requirements as well as the practices of the local authorities.

Evidence. Of particular interest to counsellors are two provisions of the Canada Evidence Act. Section 30 details "Business records to be received in evidence." It is probable that any and all notes kept by the counsellor would come under this heading and the procedures set out in this section would apply. Section 5 sets out the right of the counsellor (or any witness) to refuse to answer questions tending to incriminate himself. The witness is not excused from answering. Upon

objection he may be compelled to answer, but the answer may not then be used against him in any criminal trial or other criminal proceeding.

CONCLUSION

Some students will come to counsellors for help after their first brush with the law — often as a fairly innocent participant in a "fun activity". A better awareness of the law as well as juvenile procedures in the local area will help the counsellor understand the anxieties and fears of these students. Other students become repeat offenders and are sent to counsellors. These present a greater challenge and the counsellor needs to be wary of becoming so involved with the student that he loses objectivity about the seriousness of the student's behaviour patterns. Accidental approval of delinquent behaviour will help neither the student nor the work of the counsellor.

Counsellors should not fear the law but they should respect it. Technical violations, whether by students or counsellors, are usually ignored. Society does not have time to prosecute everyone who breaks the law. Few charges under the Canadian law will probably be laid directly against counsellors, but counsellors may become involved in a student's legal situation. Direct charges will usually be laid only at the instigation of a parent or by an older child seeking revenge. A variety of defences are available so that no conviction will usually occur against a counsellor acting in good faith. But even the chance of a criminal trial should sober the few counsellors given to counselling beyond their abilities, who use doubtful (and perhaps unethical) techniques, who give excessive direction to clients, or who attempt to physically control their clients' behaviour. The best protection for a counsellor is to operate within the ethical constraints of his profession since these are rigorous enough to offer adequate guidelines for his own behaviour.

Footnote

1. Published by the Carswell Co. Ltd., 2330 Midland Ave., Agincourt, Ont. Some of the material in this article has been previously published in Eberlein (in press-b).

References

- Eberlein, L. The Canadian counsellor and school discipline. *Canadian Counsellor*, in press-a.
- Eberlein, L. The Criminal Code and the Alberta counsellor. *The Alberta Counsellor*, in press-b.