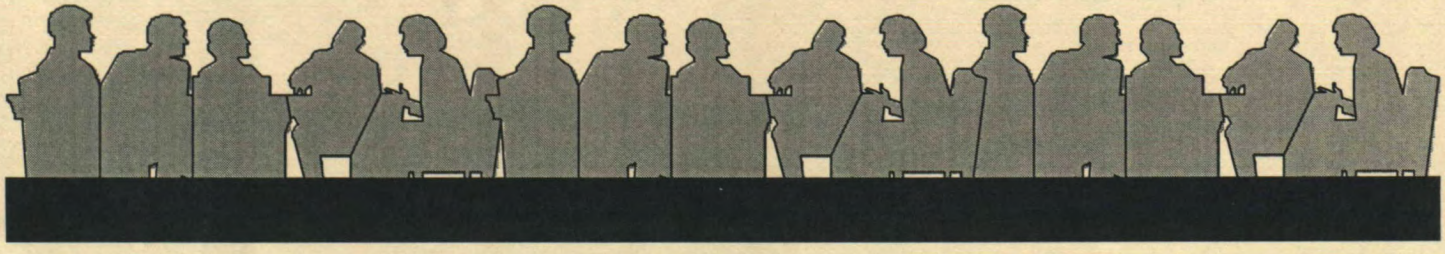
Child Victims

and the Criminal Justice System

A Consultation Paper

The Department of Justice Canada
Family, Children and Youth Section

November 1999



Department of Justice Canada
Ministère de la Justice Canada

Canada

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INTRODUCTION

The last two decades have seen a remarkable change in public recognition of the scope and extent of child abuse, neglect, and exploitation and the harms they cause. This growing awareness has been reflected in changes to the criminal law and process in Canada. The government has introduced special child-specific offences to protect children from extreme forms of harmful conduct, and measures have been developed to make it easier for children to testify in court. These approaches reflect the general agreement that child victims and witnesses need to be treated in a manner consistent with the particular needs of their age and development.

These efforts have been helpful, but many believe that the response of the justice system could be more effective. There will always be some people who seek out vulnerable children to satisfy their own dangerous impulses, frustrations, or need to dominate, in spite of the law and the disapproval of the vast majority of Canadian society. It is essential that we continually re-examine the situation, to search for ways to improve the justice system to give our children and young people the protection they need and deserve. That is why we are conducting this consultation.

This consultation paper examines possible changes to the *Criminal Code* and the *Canada Evidence Act* that might provide improved protection for children from serious harm by adults. It examines three areas which raise a wide range of issues for possible reform:

- creating further child-specific offences, such as child homicide and criminal neglect;
- sentencing to improve protection for children from those who might re-offend;
- facilitating children's testimony and providing for assistance for child witnesses, as well as issues relating to age, including age of consent.

Specific questions follow the discussions of the various issues, and we invite you to consider these questions and provide us with your comments and views.

Developing and maintaining effective measures to protect children comprehensively from serious injury and death at the hands of adults requires the best efforts of the provinces and territories and the Government of Canada working together. Providing services to children in need of protection is the responsibility of the provinces and territories; ensuring that appropriate offences and penalties are available is the responsibility of the Government of Canada. Through the *Criminal Code*, the Government of Canada provides strong support for provincial and territorial initiatives to protect children.

The responsibility for protecting our children, though, is shared by all Canadians. The law has long recognized that parents have the primary role in supporting, protecting and educating their children, and has defined parental duties to take into account the

needs of children, as well as the fact that as children grow older, they become less dependent on their parents. Although the Department of Justice will be consulting broadly with experts in many child-related fields and disciplines, it is equally important that we hear from all Canadians who are concerned about the safety and well-being of our children.

Please take the time to review the discussions and questions that follow and send your comments, by March 31, 2000, to the address at the end of this paper. Thank you.

BACKGROUND

In 1984, the Committee On Sexual Offences Against Children and Youths (the Badgley Committee) released its landmark report on the application of the *Criminal Code* and the *Canada Evidence Act*. Although the Committee was appointed by the Government of Canada, all provinces and territories co-operated with its National Child Protection Survey of Child Sexual Abuse, one of a number of surveys in the report.

The Badgley Committee noted that the special status of children in Canada is based primarily on three policy considerations, namely:

> the special needs of children who, by reason of their age and level of maturity, need the care and guidance of others in order to develop into healthy, responsible adults; the substantial vulnerabilities of children to persons older and in many ways more powerful; and the actual or presumed incapacity of children to perform certain legal acts in daily life.

While children therefore lack some legal powers enjoyed by adults, it also follows that all members of society have special duties and responsibilities toward children. The nature and extent of these duties may vary according to the relationship; nonetheless, in the words of the report, "a child's legal status is in one sense absolute in that it affects all persons with whom the child has dealings."

The Committee also noted that the state confers special status on children:

> to promote the welfare and protection of young persons in two complementary ways: the legal incapacities and disabilities which the child possesses are imposed primarily for his or her own protection, while the various legal duties and responsibilities imposed on others towards the child raise the social interests in the nurturance and protection of children to a legal plane and, it is hoped, thereby strengthen them.

Four years later, the Government of Canada affirmed these duties toward children by amending the *Criminal Code* and the *Canada Evidence Act* to introduce substantial new protections, notably child-specific sexual offences and provisions to help children testify in court. Later research by the Department of Justice showed that these amendments had been effective in improving protection for children, and additional amendments followed in 1993.

Nevertheless, since that time, a number of alarming incidents have given rise to further concern about the safety of children. Adults use various means to approach and have sex with children, as well as those fourteen years of age or older, who are over the general minimum age of consent to sexual activity. Adults have killed children in a number of jurisdictions by direct physical attacks and through the most horrendous

forms of neglect. Some children have also been the victims of severe, long-lasting, and often permanent physical and emotional harms and injuries. Such crimes seem particularly disturbing at a time when the law and society have come to expect higher standards of conduct toward children and young people by persons they should be able to trust, such as family members and guardians, and others in positions of authority and influence.

In response, suggestions and formal recommendations have been made in various forums for changes to both the *Criminal Code* and provincial child welfare legislation, since protecting children is a joint area of responsibility. The Government of Canada is responsible for ensuring that, as far as possible, the *Criminal Code* provides protection for children from extreme forms of abuse, neglect and exploitation. The provinces and territories have the exclusive responsibility for providing the care and services necessary to ensure children's welfare and safety. Suggestions for reform have come from a wide range of sources in response to reported cases of grievous injury and death of children. Among those recommending greater protection for children are judges, Crown prosecutors, defence lawyers, police, health care workers (including those active in the mental health field), hospital child abuse teams, public health nurses, academics, social workers and others directly concerned with child protection. Recommendations have come from judicial inquiries, coroner's inquest juries, child fatality review committees, and other review bodies.

In 1997, to determine how these concerns might best be addressed, federal Justice officials consulted in a number of provinces and territories with officials representing direct service areas in the health, social services and criminal justice sectors, as well as with a number of experts outside government. There was general agreement that the Government of Canada, the provinces and territories should co-operate on a multidisciplinary, multisectoral basis to address linkages between *Criminal Code* issues and the early warning, prevention and enforcement stages of child protection. A federal-provincial-territorial project team was set up to improve the exchange of information among government agencies on risks to children, and similar projects are being considered.

It was also made clear that the *Criminal Code* should be used to support provincial and territorial efforts to protect children by targeting extreme behaviours that cause devastating harms and even death to children. The basic issue for the Department of Justice is whether there is a need for further criminal law protections for children against serious harm by adults, and whether improvements can be made to protect against all types of offences. The essential questions and their implications are set out in the following pages. (A technical background paper is available from the Department of Justice on request.)

It should be noted, though, that not all criminal activities through which adults deliberately exploit and seriously harm children are dealt with here. Child pornography and child prostitution, for instance, raise complex social and legal issues which fall

outside the scope of this consultation. As well, the child pornography provisions of the *Criminal Code* are currently before the courts in several criminal prosecutions, while child prostitution has been comprehensively examined by the Federal-Provincial-Territorial Working Group on Prostitution in their *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (December 1998). Similarly, because it is specifically concerned with issues of extreme violence, this consultation does not address the defence of the use of reasonable force for correction on the part of a parent or teacher. (This defence is also currently the subject of constitutional challenge in the courts.)

AREAS FOR CONSULTATION

I. CREATING FURTHER CHILD-SPECIFIC CRIMINAL OFFENCES

The criminal law supports and complements provincial child protection laws by targeting and deterring conduct and harm that pose the greatest risk to children. However, the present criminal law may not provide adequate protection against such extreme conduct as severe emotional and psychological harm, "non-violent" neglect, and "unintentional" homicide. A related concern is whether creating a new crime of failure to report suspected crimes involving children would serve to increase their safety.

Criminal Physical Abuse of a Child

One approach might be to create a specific offence targeting the severe physical abuse of a child, such as conduct which results in physical disabilities that could be permanent. At first glance, a new offence might seem unnecessary since the *Criminal Code* already includes such offences as assault. However, a new provision could 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 against those who might re-offend. Many states in the United States have adopted this approach to the severe physical abuse of a child, even though they also have laws of general application prohibiting some or all of the conduct involved.

The various American statutes indicate the wide range of issues and elements that could be considered. Many states have created different levels of offence depending on the severity of the harm inflicted. Some vary the seriousness of certain sexual offences depending on the age difference between the person who commits the offence and the child.

Is there a need for a new *Criminal Code* offence concerning severe physical abuse of a child?

Criminal Neglect of a Child

Every year in Canada, there are numerous highly publicized cases of families or caretakers neglecting a child and causing serious harm or even death. It has been suggested that some courts are less likely to treat cases of extreme neglect as seriously as cases that involve direct physical violence. Such concerns raise the question of whether the criminal law is adequate to deal with neglect that seriously harms children or puts them at risk of serious harm.

Most forms of neglect are no doubt more appropriately dealt with under provincial law, and some forms of neglect may justify criminal negligence or manslaughter charges. But an offence that deals specifically with severe or criminal child neglect could more directly address the risks faced by children, and it would send a clear message that "non-violent" neglect may, in some situations, be as serious as physical violence. It could also supplement provincial child welfare initiatives aimed at entrenching neglect and risk of neglect as grounds for finding that a child is in need of protection. Section 215 of the *Criminal Code*, although it does not specifically target neglect, is a possible charge in these cases. That section defines a duty on the part of a "parent, foster parent, guardian or head of a family" to provide necessaries of life for a child under the age of 16, and makes it a crime for such a person to fail, without lawful excuse, to carry out the duty. The maximum penalty for failure to provide the necessaries is two years' imprisonment, even in cases where the child suffers serious harm.

Should the *Criminal Code* include an offence for extreme forms of child neglect?

If so, should the offence carry a higher maximum penalty than is currently provided for failure to provide necessaries?

Criminal Emotional Abuse of a Child

Research studies have suggested that the most severe and long-lasting damage to children caused by sexual abuse may involve psychological rather than observable physical injury. Inquest juries and inquiry reports have suggested that the focus of the current criminal law on physical harm is insufficient and that the law should more effectively recognize emotional harm or severe psychological harm.

Many criminal statutes in the United States specifically address the infliction of emotional harm by defining abuse in terms of causing mental or emotional damage to a child or placing a child in a position where his or her mental or emotional health is endangered. In some states, emotional abuse is a separate offence, while in others it is part of the general definition of abuse.

Even if the criminal law were to deal more comprehensively with the severe emotional or psychological abuse of children, there would still be difficulties about evidence. In most cases, courts require specific evidence that the victim actually suffered the alleged harm. Emotional harm is often difficult to prove, since its full effects may not become apparent until long after the act took place, and it is often difficult for a child to describe the harm. Proving that emotional harm was caused by a specific act may require the testimony of psychologists or psychiatrists. On the other hand, in some circumstances the connection might be virtually self-evident. Some

courts in Canada have suggested that they are prepared to assume that emotional harm has been caused by sexual assault and certain kinds of abuse inflicted on a child, particularly where there has been a pattern of continuous or long-term abuse. The Supreme Court of Canada has held that emotional harm may be a component of the offence of sexual assault causing bodily harm, but that it must be proved by the prosecution.

In light of the difficulties in proving the harm and the connection, another approach might be to set out the type of evidence that indicates emotional harm, to use definitions that focus on the conduct of the abuser, or to establish statutory presumptions that certain types of conduct result in emotional harm, in addition to any evidence of actual harm that could be introduced.

Is there a need to define a separate offence in the *Criminal Code* to prohibit severe emotional abuse or the causing of severe emotional or psychological harm to a child?

and/or

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

Child Homicide

Murder and manslaughter are both forms of homicide, but while murder requires a specific intent to kill, which is often difficult to prove, manslaughter does not. In one recent case, a coroner's inquest jury recommended the adoption of a child homicide offence which would not require a specific intent to kill – a child-specific form of manslaughter. This recommendation assumed that such an offence could result in more convictions and lengthier sentences than the current types of manslaughter.

Under some special child homicide statutes in the United States, when a child dies from abuse, prosecutors must show only that the offender physically abused the child and that the abuse caused the child's death. Others require proof of some form of recklessness, gross negligence, or extreme indifference to human life.

The possibility of creating offences of criminal child physical abuse and criminal neglect of a child has already been discussed. Should either of these result in death, the child homicide offence could be charged. Whether or not a new child-specific homicide offence would result in more convictions and lengthier sentences, it could

focus attention on society's condemnation of abusive conduct or neglect that results in the death of a child.

Is there a need for a new offence of child homicide?

Failing to Report Suspected Crimes Against Children

Prompt reporting of abuse to the appropriate provincial authorities is an essential component of child protection. Most provinces have statutory provisions requiring that child abuse be reported to child welfare authorities, or in a few cases, to the police instead. In some, there is no penalty for persons who are not professionals.

However, there is at present no federal *Criminal Code* requirement to report cases of suspected criminal offences involving child victims, such as the suspicious death of a child. Even so, a considerable number of such reports are made directly to the police by members of the public and by professionals who work with children.

Most provinces have protocols requiring child protection authorities to inform police if they learn of possible crimes. However, there is concern that criminal offences may not be reported to police in some situations – for example, where the offender has left the home or where the parents have agreed to co-operate in therapy. Conversely, police may be reluctant to pursue complaints where the family in question is already under the supervision of child welfare authorities. The importance of setting out responsibilities and reinforcing protocols for co-operation between the child protection and criminal justice systems has been emphasized by all levels of government.

Some have suggested that children could be better protected by making it a criminal offence to fail to report offences to the police, in addition to requirements to report to child welfare authorities. A provision could state that anyone who has reasonable grounds to believe that a crime involving child abuse or neglect has occurred or is about to occur must report this to the police. Other options would be to limit the duty to report to cases involving child victims under a given age or to cases involving specific *Criminal Code* offences.

Making the failure to report a criminal offence might help remove doubt and confusion for professionals and other individuals, by making it clear when to report crimes against children.

Is there a need for an offence of failing to report suspected criminal offences involving abuse or neglect of children to the police?

II. SENTENCING TO PROTECT CHILDREN

Creating new offences is one of the methods by which the criminal justice system can support attempts by provincial law to protect children and young persons. Another visible and direct method is for the criminal law to assist courts by giving them the means to sentence offenders appropriately and to ensure that jurisdictions co-operate in using all available methods to prevent re-offending. Sentences appropriate to the crimes and conduct of offenders can also send powerful messages of denunciation that may deter others.

In recent years, the *Criminal Code* sentencing provisions have been reformed to include a clear statement of the purpose and principles of sentencing. As well, courts now have a greater range of sentencing options to deal more appropriately with the range of situations before them.

Prohibition Orders

For example, under section 161 of the *Criminal Code*, a court can make a separate order of prohibition, preventing an offender who has been found guilty of a sexual offence against a child under fourteen from having contact with children or holding a job that might put the offender into a position of trust or authority in relation to children. The prohibition order may last for life. The courts can also make orders to delay the granting of parole to offenders who commit crimes against children. Correctional authorities may delay the release from prison of certain offenders who commit crimes against children if there is reason to believe they will commit further, similar crimes.

Long-Term Offenders

In September 1996, the government introduced new initiatives to strengthen the sentencing and correctional schemes in dealing with individuals presenting a high risk of violent re-offending. These measures were proclaimed in force in July and August 1997. Research had shown that over ninety percent of successful Dangerous Offender applications involved sex offenders, but that procedure was used in relatively few cases. There was a need for a sentencing option that would allow intensive supervision of sex offenders after they had completed their term of imprisonment. The new Long-Term Offender procedure targeted sex offenders generally and sex offenders against children specifically, adding a period of supervision up to ten years after release from prison and completion of any period of parole.

Peace Bonds

Strictly speaking, a peace bond is not a type of sentence, because it is granted by a court without having to charge or convict the person against whom it is made. However, the goals of deterrence and protection may be advanced by making provision for applications to the court even without charges or a conviction. In appropriate circumstances, where there is good reason to fear that someone may commit a sexual or personal injury offence against a child, courts may impose conditions regulating the behaviour and activity of the person.

Addressing the Needs and Interests of Children in Sentencing Policy

Concerns have been raised about whether current sentencing policy adequately addresses the needs and interests of children. The current sentencing scheme might be modified in one or more of the following ways:

- to specifically emphasize the importance of denunciation and deterrence of crimes against children;
- to provide the courts with additional tools to require longer-term supervision and mandate the availability of treatment for offenders who pose a continuing danger of re-offending against children;
- to recognize the frequency and seriousness of child abuse in the home and at the hands of parents and caretakers;
- to recognize that in cases involving familial child abuse or breach of trust, it is not unusual for the offender to be "of previous good character" or to lack a prior criminal record, and accordingly the courts should place less emphasis than usual on these factors when sentencing offenders in such cases;
- to require the courts to emphasize the emotional and psychological harms caused to children in assessing the gravity of the offences and the conduct involved.

Would any of these suggestions help address the needs and interests of children in sentencing?

Are there other ways in which the current sentencing scheme might be modified to address the needs and interests of children?

Reference to Children in Fundamental Purpose and Principles of Sentencing

The general provisions of the *Criminal Code* listing the fundamental purpose and principles of sentencing (sections 718 and 718.1) are intended to include the protection and safety of children, even in the absence of a specific reference. However, these general statements do not draw attention to child protection and safety as fundamental goals and objectives.

An amendment to the statement of purpose and principles could make it clearer that, where the victim is a child, sentencing courts should consider one or more other defined objectives, such as the protection of the victim and other potential victims from the offender; the deterrence of offences against children; the denunciation of crimes against children; or the supervision and provision of opportunities for treatment of offenders who commit offences against children. In appropriate cases, the sentencing courts could be required to consider these or other potential objectives in addition to those already defined.

Another option would be to amend the fundamental principle of sentencing in section 718.1 to deem offences by adults against children that cause harm to the victim to be inherently grave and the degree of the offender's responsibility to be correspondingly grave. This would better recognize the responsibility that all adults in our society have toward children because of their vulnerability as they develop.

Would more direct references to children help the courts to focus directly on the needs of child victims when crafting their sentences?

Would defined objectives help sentencing courts to arrive at appropriate sentences where child victims are involved?

Would the proposed measures be strengthened by an amendment to the sentencing principles to consider all offences of adults against children to be inherently grave?

Other Sentencing Principles - Section 718.2

Section 718.2 of the *Criminal Code* sets out "other sentencing principles" to be taken into account by the sentencing court. The following are considered aggravating factors in the commission of the offence: evidence that the offender abused the offender's spouse or child (but currently not any other child); and evidence that the offender abused a position of trust or authority in relation to the victim. Research has identified a number of more specific aggravating factors that could assist a court in sentencing. These include:

- evidence of repeated or continuing physical or emotional injury to a child in the home in the commission of an offence;

- evidence that an offender who was a child's caretaker committed an offence involving physical violence against another person in the home in the presence of the child;

- (in the case of an adult offender) the age of the child victim, to be given progressively more weight in the case of younger children.

Should these additional aggravating factors be considered in sentencing?

Are there any other aggravating factors that should be taken into consideration?

Expanding the Courts' Powers to Structure Conditions in Sentencing

The deterrence of offences against children requires a range of responses far more complex than simply imprisoning offenders or giving harsher sentences. Recent reforms have recognized, and experience has demonstrated, that the goals of deterrence and protection may be better advanced in some cases by making treatment available during incarceration and providing for supervision for longer periods after release.

If an offender is not a candidate for Long-Term Offender status, the court may still wish to ensure continuing supervision and the availability of treatment upon release from prison in the interest of protecting the child or other children. However, the judge may not make a probation order, including one requiring supervision and making treatment available after incarceration, unless the sentence is less than two years. The curious result is that longer-term supervision and availability of treatment may be ordered by courts in cases where the offender is *not* considered to pose a danger to the community, but not where the offender *is* considered to be a danger to the community but does not meet the criteria for being designated a Long-Term Offender.

This situation might perhaps be addressed by amending the *Criminal Code* to enable a court to order probation, community supervision, or access to appropriate treatment along with a sentence of more than two years where such an order is required for the purposes of child protection. In such cases, a further amendment could provide that the period of probation, supervision or treatment may last for up to five years, for example.

As an alternative to imposing probation at the time of sentencing, or in addition to it, the judge could make a specific order that the parole board must take into account factors disclosed during the trial that suggest that continued protection of the child victim is necessary. These factors would have to be taken into account in any parole decision. The order would recognize and specify any special needs for protection of the child involved in the case, such as where the offender is likely to return to the home.

III. IMPROVING THE EXPERIENCE OF CHILD WITNESSES AND FACILITATING THEIR TESTIMONY IN CRIMINAL PROCEEDINGS

Another possible area for expanding the law's protection of children – the treatment of children as victims and witnesses before the criminal courts – has been a major focus of legislative reform and judicial innovation over the past decade. This area includes the issue of competency to testify, testimony outside the courtroom or behind screens, the use of videotaped evidence, hearsay statements, and other assistance.

Legislative initiatives have responded to growing recognition of the possible adverse effect of trauma on the children's memory, on their ability to clearly articulate their recollections of events, and on the accuracy and completeness of their testimony in court. In turn, these problems can impair the ability of the courts to discover the truth, and may lead to greater difficulty in convicting an offender.

Legislation has been enacted to allow children to testify with support persons present, to prohibit their being cross-examined by an accused, to allow them to testify outside the courtroom or behind screens, and to allow the use of videotaped evidence of children describing the acts on which the prosecution is based.

The judiciary has recognized that criminal cases involving harms to children have special features: the offences are often committed in private, so there are seldom witnesses other than the child, and there is rarely other independent confirming medical evidence. As a result, the outcomes of many trials depend almost exclusively on the court's assessment of the child's credibility and the ability of the child to provide as full and accurate an account as possible. The courts have come to appreciate that, in such cases, the best, most complete, and most accurate account may be a description of the events which the child gave to another person closer to the time of the event in question. A series of judicial decisions has allowed evidence of the child's previous narrative to be given, where the circumstances suggest that it is likely to be reliable.

These changes have gone a long way toward improving the experience of child victims and witnesses before the courts and in assisting courts by making available the testimony of children. Together with legislative reforms that have created or redefined offences to better address the harms children face, these changes have also led to a significant increase in successful prosecutions.

Competency of Child Witnesses

However, a number of concerns remain. One is the continuing presumption that children under fourteen are not competent to testify. In each case, a *voir dire* (special hearing) must be held to determine whether the child is competent to testify – something that is done with adults only where there is reason to believe they are not competent.

In 1984 the Badgley Committee called for a fundamental change in the law to permit children to speak directly for themselves at legal proceedings arising from allegations of sexual abuse. The Committee members were convinced by their research that "the assumptions about the untrustworthiness of young children and their inability to recall events with respect to sexual offences are largely unfounded." They observed that there were significant variations in capacity among different children, just as there were with adults. In the Committee's view, making competency contingent on or influenced by age both failed to take into account the cognitive and developmental differences among children and was wrong in principle. The Committee concluded that there should be no special rules on the legal competency of children to give evidence in court, and that their evidence should be received and considered in a similar manner to that of adults. Their specific recommendation was that the *Canada Evidence Act,* the *Young Offenders Act* and provincial evidence acts should be changed to provide that:

1. Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility.

2. A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

3. The court shall instruct the trier of fact on the need for caution in any case in which it considers that an instruction is necessary.

This recommendation was one of many made by the Committee to improve the experience of, and minimize the trauma suffered by, children appearing before the criminal courts as either victims or witnesses. The thrust of the recommendations on competency was to do away with rules that reflected unjustified stereotypical assumptions about children, and to ensure their testimony was heard wherever possible by requiring only that they should be able to relate what happened and understand and answer simple questions. As with adult witnesses, there would normally be no need for preliminary tests of competency.

In 1988, Bill C-15 responded to the recommendations of the Badgley Committee by amending the *Canada Evidence Act.* A competency test was still required, but the

test itself was altered. The change appeared to reflect an easing of barriers to the reception of children's testimony by focusing on the ability of a proposed witness to "communicate the evidence," which the Badgley Committee had defined as the capacity to respond to simply framed questions. At the same time, the decision not to eliminate a competency test entirely, as the Badgley Committee had recommended, suggested that concerns about the reliability of children's evidence remained.

Under the *Canada Evidence Act*, then, a proposed witness under the age of fourteen may not testify until the court conducts an inquiry to determine whether he or she understands the nature of an oath or solemn affirmation and is able to communicate the evidence. Children who do not understand the nature of an oath or solemn affirmation, but are still able to communicate the evidence, may testify on promising to tell the truth. If they are unable to communicate the evidence, they are not to testify.

The courts have since added two further requirements – capacity to observe and capacity to recollect – to that of the capacity to communicate set out in section 16 of the *Canada Evidence Act*. Moreover, "capacity to communicate" has been interpreted to mean more than the ability to respond to simply framed questions. One court of appeal has said that it means that the witness has the capacity to relate the contentious parts of the evidence with some independence and not entirely in response to suggestive questions, and a willingness to relate the essence of what happened. Unresponsiveness, which would only affect the weight to be given to the evidence of an adult, renders a child incompetent to testify.

A further element was added when the same court said that the standards for the reception of evidence given under a promise to tell the truth under the new legislation are the same as those for the reception of unsworn evidence under the earlier legislation. The court held that, in order to allow a child to testify unsworn, the trial judge must find that the child understands the meaning of a promise and the importance of keeping it – in other words, that the child understands the meaning of the duty to speak the truth. In a recent decision, the Supreme Court of Canada appears to have adopted this view in emphasizing that children may have difficulty understanding the obligation imposed by a promise to tell the truth. This judicial interpretation would seem to return the law to its earlier state, so that the reform can be said to have had little or no effect. Any further attempt to legislate a standard for the reception of evidence given under a promise to tell the truth may be similarly unsuccessful.

Further Reform of Competency Requirements

Many arguments have been advanced in support of eliminating the current requirement that a competency hearing be held in all cases where a witness under the age of fourteen is called to testify in criminal proceedings. Without a statutory provision requiring an inquiry into the competency of every child witness, such factors as the

capacity to observe what was happening, to recollect what was observed, and to independently relate contentious parts of evidence would not be investigated as a matter of course before allowing the child witness to testify. These factors would, of course, continue to affect the weight to be given the testimony, just as for adult witnesses.

The competency test, and its interpretation by the courts, appears to add unnecessary complexity. The unintended effects of reform may have made the experience of child witnesses more rather than less traumatic and made it more difficult for their evidence to be heard. Preliminary proceedings for child witnesses are becoming more common and complex. A stigma continues to attach to evidence that is unsworn or given on a promise to tell the truth.

Other jurisdictions provide examples of new approaches that might be taken with respect to the competency of child witnesses. The United States *Federal Rules of Evidence* presume the competency of all witnesses, and the *U.S. Code* provides that a competency examination regarding a child may be conducted only if the court determines, on the record, that there are compelling reasons for it – the child's age alone is not considered a compelling reason. A competency examination of a child witness must be conducted out of the sight and hearing of a jury, and the questions asked must be appropriate to the age and developmental level of the child. As well, the questions must not relate to the issues at trial, and must focus on the child's ability to understand and answer simple questions.

England has also passed criminal justice legislation for the purpose of abolishing the competency requirements that had previously applied to children. Under the new law, a child witness is no longer required to undergo a competency hearing before being permitted to testify in criminal proceedings. Instead, the law provides that a child's evidence "shall be received unless it appears to the court that the child is incapable of giving intelligible testimony." There is no longer a requirement that the judge be satisfied that the child understands the duty to speak the truth, nor is there any requirement for the child to promise to tell the truth or for the judge to admonish the child to be truthful. Finally, the law provides that the evidence of witnesses under fourteen years of age shall be given unsworn.

Should child witnesses be placed on the same footing as adult witnesses by eliminating the requirement for a competency hearing?

Methods of Presenting Evidence of Child Witnesses

Testimony outside the courtroom or behind screens

Subsection 486(2.1) of the *Criminal Code* allows a complainant or any witness under eighteen to testify from outside the courtroom or from behind a screen or other device that prevents him or her from seeing the accused. The legislation is intended to relieve against situations where the child complainant or witness could reasonably be expected to be intimidated or otherwise adversely affected by the presence of the accused in the courtroom and may, for this reason, be inhibited in testifying. An application must be made to the judge for an order permitting testimony to be given in this manner.

An order will be made only if a number of conditions are met:

(1) the accused must stand charged with one of the specified assault or sexual offences, including sexual assault, sexual interference, invitation to sexual touching, sexual exploitation, indecent exposure, and assault causing bodily harm;

(2) the complainant or witness must be a child under the age of eighteen at the time of the trial or preliminary inquiry;

(3) the judge must form the opinion that the exclusion is necessary to obtain "a full and candid account of the acts complained of" from the complainant or witness; and

(4) in cases where the witness testifies outside the courtroom, the accused, judge and jury must be able to watch the testimony by means of closed-circuit television "or otherwise", and the accused must be permitted to communicate with counsel while watching the testimony.

The Supreme Court of Canada has upheld the constitutionality of subsection 486(2.1). The Court's major focus was the interest in receiving the most reliable evidence. The Court recognized that taking steps to minimize the child witness's trauma in order to allow the child to present testimony as effectively as possible could help a court's goal of seeking the truth. However, minimizing the witness's stress is not in itself an objective of the legislation. Even where testifying in front of the accused could be psychologically damaging, the witness is not entitled to testify behind a screen or by closed-circuit television if he or she is still capable of furnishing the court with a "full and candid" account of what occurred.

There are two different policy-based rationales for supporting the consistent use of screens and closed-circuit television for very young children and for adolescents.

The rationale for young children is that they need special consideration so that the court can receive as full an account of their stories as possible. The current understanding of the psychological and emotional development of older children and adolescents suggests that their trauma may focus not only on fear of the accused, but also on the shame and embarrassment involved in making the kinds of "public" disclosures sometimes required during courtroom proceedings. However, because some courts focus on fear of the accused and the interpretation of the term "necessary" in deciding whether to permit testimonial supports, this trauma suffered by adolescents may be seen by the courts as insufficient to meet the current test.

Changes to the wording of the test for permitting the use of these procedures might be considered. An amendment could clarify that these testimonial supports are available if either of two grounds is satisfied: that it would assist the child to give a full and candid account of the events in question or that it would be in the best interests of the child. Fear of the accused or trauma about testifying in open court would be two factors among others that might support an application on one or both of those grounds.

Another option would be to make the supports mandatory for child witnesses up to a specified age and available for young people above that age on either of the grounds mentioned above, perhaps subject to the discretion of the judge. The current provision applies only to child complainants and witnesses who testify in relation to specified sexual and some assault offences. Children who are complainants and witnesses in relation to any offence involving violence may suffer comparable trauma and be inhibited in testifying. These supports could perhaps be made more widely available in relation to other offences involving violence or other harm to children. Another possibility would be to make them available to all children under a certain age who testify, whatever the offence might be.

Should testimonial supports be made more widely available to children?

Are there any other ways in which testimonial support could be given to children in court?

The use of videotaped evidence

Section 715.1 of the *Criminal Code*, introduced in 1988 in the Bill C-15 reform and subsequently amended to extend its coverage, provides for the admissibility of videotaped statements made by child witnesses who were under the age of eighteen years at the time the offence was committed. The videotape must have been made within a reasonable time after the offence and the child witness must adopt the contents of the videotape at trial.

The Supreme Court of Canada has upheld the constitutionality of this provision. When the measure was introduced, it was argued that admitting an earlier statement would provide the court with a more accurate and complete account of what took place. The fact that it was taken in a more informal and less stressful setting at a time closer to the event would enhance its reliability. The witness might refer to the video even if he or she recalls the details of the event, and the video could replace the trial testimony if the witness is inarticulate or forgetful, whatever the cause. The requirement that the child must testify satisfies any concerns there may be about the lack of an opportunity to cross-examine the child when the statement is given.

Although children are still subject to cross-examination, the use of a videotape can save them from having to narrate the entire story in the courtroom. The videotape is played in court before the child is asked whether he or she remembers making it and adopts it.

Once the videotaped statement is ruled to have been adopted, it becomes evidence of the events described as if the child had made the statements in court. Any questions about the circumstances of the video, the truth of the statements, and their overall reliability are matters to be weighed by the court. If the witness makes statements during testimony contradicting the videotape, the videotaped statement may be given less weight but is not inadmissible.

Should the videotape procedure be made available to all child witnesses in criminal proceedings, regardless of the offence involved?

Should police and other professionals be encouraged to develop guidelines or standards on appropriate methods of conducting videotaped interviews of children to help ensure the interviews will be admitted in evidence?

Hearsay statements

The courts, to promote the "truth-seeking" goal of the criminal process, have focused at least in part on the protection of children as a reason for modifying the rule that prevented children's out-of-court statements to third parties from being admitted into evidence (the "hearsay" rule). Traditionally, courts did not admit such statements because they were considered not the best or most reliable evidence. Direct testimony from the victim under oath was preferred to testimony from a third party about what the victim said outside of court, mainly because the victim could be cross-examined.

However, in a 1990 case concerning a physician charged with sexually assaulting his three-year-old patient, the Supreme Court of Canada ruled that the hearsay rule should become more flexible in dealing with new situations and needs in the law: a child's out-of-court statement alleging crimes against the child could be admitted into evidence to establish the truth of the statement, provided the requirements of "necessity" and "reliability" were met.

In this case, the trial court's admission of the child's earlier statement to her mother describing what the physician had done was "reasonably necessary" because the trial judge had ruled that the child was incompetent to testify, and there was a need to get an "accurate and frank rendition" of the child's version of events before the court.

Subsequently a new trial was held, and the accused was convicted. At later disciplinary hearings, some four years after the event, the child was found to be competent to testify, but could no longer remember details or circumstances surrounding the assault. The earlier statement the child had made to her mother was again admitted into evidence. The necessity test was satisfied because the child's inability to recall the circumstances demonstrated that she could not give her own full and frank description of the relevant events.

The hearsay exception has been extended by the Supreme Court of Canada to cases where a witness does testify, but recants a previous out-of-court statement. The inability to obtain the evidence of a recanting witness is sufficient to establish the necessity of receiving the hearsay statement. Sufficient circumstantial guarantees of the statement's reliability are still required.

Without a videotape, the court must rely on another witness to recount the child's out-of-court statement and describe the child's demeanour. However, it is arguable that there is no reason in principle to distinguish an out-of-court record in writing or memory from one on videotape, if there are circumstantial guarantees of its reliability.

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 still be an additional requirement to show "necessity"?

Other Assistance for Child Witnesses

The *Criminal Code* directs the court to appoint counsel for an accused for the sole purpose of conducting the cross-examination of a witness who is under the age of

fourteen at the time of the proceedings. (Bill C-79 (1999), which deals with victims of crime, would raise the age of the witness to eighteen.) The Code also enables a judge, on application, to allow a "support person" chosen by the child witness to be close to the child while testifying, where the witness is under the age of fourteen at the time of the trial or preliminary hearing. However, it is not unusual for the witness to have reached the age of fourteen by the time of the trial or preliminary hearing, and so not to qualify for a support person.

These types of assistance are now available only in relation to trials of sexual offences and offences involving violence against the person.

It is also important to ensure that children are not asked questions in cross-examination that are inappropriate to their age and development. Inappropriate questions may confuse the child and mislead the court. One suggestion is that these concerns might be left to the courts to address directly on their own initiative, since the courts are in the best position to develop appropriate guidelines for questioning children, and to enforce them, with the co-operation of counsel.

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

Would it be preferable to make these types of assistance available to child victims and witnesses regardless of the offence, if it would help reduce their trauma and enable them to testify more fully and accurately?

Different Ages for Different Purposes: Age of Consent

The reason for having different ages for different types of assistance to child witnesses is to help overcome their difficulties in testifying and to assist the court by providing a full account of what happened. The question of age also arises in connection with *Criminal Code* offences involving child victims since the age of consent to sexual activity is part of the definition of crimes involving a child victim. The age of consent to most forms of sexual activity is fourteen, but in offences which target specific forms of child exploitation the age is eighteen – for example, section 153 of the *Criminal Code* prohibits sexual activity with a young person fourteen years of age or older but under eighteen, where the other person is in a position of trust or authority or where the young person is in a position of dependency.

The situations and purposes are different in the various cases. Part of the reason that the general minimum age of consent was set at fourteen was apparently to avoid criminalizing consensual sexual activity between young persons who are both this age or a little older. Since this conduct is generally not regarded as exploitative in nature, the minimum age of consent to most sexual activity is not relevant to the choice of age for offences which prohibit various forms of exploitation. On the other hand, the higher minimum ages in offences involving exploitation may be an influential argument for raising the general age of consent to provide necessary protection from exploitation by adults.

To avoid criminalizing conduct that Parliament thought should not be criminalized, there is also a "close-in-age" exception for young persons twelve or thirteen years of age who engage in consensual sexual activity with persons in their own age group (that is, less than two years older). The activity may be inappropriate and meet with social disapproval, but it may be better regulated through family guidance and values-oriented education.

However, there is concern that the present general age of consent, which has been in the *Criminal Code* for more than one hundred years, is too low to provide effective protection from sexual exploitation by adults. (At one time, there was a specific offence prohibiting sexual intercourse with a fourteen- or fifteen-year-old girl, which could be prosecuted only in certain limited circumstances that were difficult to prove.) Immature, inexperienced youngsters are unlikely to have adequate knowledge of the implications and consequences of sexual activity. The relatively low age may allow pimps, for instance, to seduce young girls without fear of prosecution, with the intention of luring them into prostitution.

Police forces have expressed concern that the current age of consent has attracted the attention of adults living in jurisdictions with a higher age of consent, who wish to lure young girls into sexual activity without fear of criminal consequences. For example in one recent case, a forty-three-year-old man living in the United States contacted a fourteen-year-old girl through the Internet and arranged to meet with her in an Ottawa hotel room. The girl's mother learned of the situation and contacted the police. The police found the man waiting in the room with sex toys and condoms, but he could not be charged because the girl was fourteen – the age of consent in Canada.

The age of consent in the United States and Australia is generally sixteen, which is also the age in England. In other European countries, the age varies depending on the country and conduct involved, ranging from twelve in the Netherlands to fifteen in France, sixteen in Belgium and Luxembourg and seventeen in Ireland. In Canada, there have been suggestions that the age should be raised to sixteen or even eighteen. Raising the age would provide children and young people 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 be more consistent with the treatment of children in other activities, such as leaving school, driving and even getting married.

Raising the age would recognize that young people older than fourteen are still vulnerable to exploitation by adults, which is the primary purpose of the higher minimum ages in the Code sections dealing with specific situations involving exploitation. However, if the general age of consent is set too high, it may fail to take into account that as adolescents mature into adulthood, young people are able to make progressively more responsible and informed autonomous choices to engage in sexual activity. It is generally accepted that the criminal law is not an effective means of controlling the sexual behaviour of older teenagers.

Should the general age of consent to sexual activity be changed? If so, what would be an appropriate age?

Invalid Consent: Its Effect on Sentencing

An important related issue is whether a child victim's consent to sexual activity should have any effect on sentencing where the child is below the age of consent and cannot legally give valid consent. Recently, an offender in his twenties, convicted of sexually assaulting a girl under fourteen years of age who had been babysitting his children, appealed his nine-month prison term. In a highly publicized decision, the appeal court substituted a conditional sentence allowing the offender to serve his sentence in the community and deleted a condition of the previous sentence prohibiting him from living in a home with a child under eighteen years of age.

The basis for the decision was the appeal 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 purposes in such cases has raised concerns because it seems to ignore the purpose of prohibiting sexual activity with a child under the age of consent.

Is there a need to amend the *Criminal Code* to clarify that no apparent consent or acquiescence can be considered a mitigating factor in sentencing where consent is specifically stated not to be a defence to a charge involving a child victim?

CONCLUSION: IMPROVING PROTECTION FOR CHILDREN

The victimization of children and young people has significant costs both for the victims and their families and for the future of our society as a whole. A continuing effort is required to improve detection and prevention of potential abuse, neglect and exploitation, and to ensure effective investigation, prosecution and punishment where crimes against children do occur.

The paper sets out a number of possible improvements that are being considered. The Department of Justice will be consulting with professionals and organizations working with child victims. However, the welfare of children is everyone's concern, and it is essential to hear and take into account the views of parents, other family members and all Canadians who care about our children. Written responses to the questions raised in the paper are invited from all concerned groups and individuals. All comments will be considered very carefully in determining what steps to take to improve criminal law protections for children and youths.

Please send your comments to:

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