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Child Victims



and the Criminal Justice System

Technical Background Paper

The Department of Justice Canada
Family, Children and Youth Section

November 1999

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INTRODUCTION

The last two decades have seen a virtual revolution in public recognition of the true scope and extent of child abuse, neglect and exploitation and the lasting harms they cause.¹ At the same time, the criminal law and the criminal process have come to recognize that special offences and other measures are necessary to protect children from extreme forms of harmful conduct, and that child victims and witnesses should be treated in a manner consistent with their age and development. Appropriate measures help ensure that children will have the opportunity to develop in safety and grow into adults capable of making a positive contribution to society. The *Criminal Code*, which is a responsibility of the Government of Canada, provides strong support for provincial and territorial initiatives to provide protection for children.

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.

The *parens patriae* power of the courts and the state in connection with children was originally the Crown's prerogative power to look after the property left to children whose parents had died. The state now has the ability to intervene to protect the developmental and physical needs of children. Decisions on whether to intervene involve balancing powers (derived from parental duties) with the interests of the child to be free from harm. In Canada, the superior courts currently exercise *parens patriae* as a general supervisory power in the interests of children. The criminal law is the means through which the state deters and punishes extreme forms of conduct that cause grievous harms and injuries to children.²

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. These include family members and guardians, and others who by virtue of their age or special positions of authority can exercise influence over them. Society has also come to recognize that some people seek out vulnerable children to satisfy their own dangerous impulses, frustrations or need to dominate. Such offenders may require structured supervision as well as access to treatment during and for some period of time after their incarceration to prevent them from re-offending against children and young people.

¹ For instance, victims of child abuse are at greater risk of becoming abusers, or victims of abuse, as adults. See *Brighter Futures: Canada's Action Plan for Children*, Health and Welfare Canada, 1992, p. 31; C.S. Widom, *The Cycle of Violence* (Washington, D.C.: National Institute of Justice, 1992); C.S. Widom and M.A. Ames, "Criminal Consequences of Child Sexual Victimization" (1994), 18 *Child Abuse and Neglect* 303.

² It has recently been recommended that the *parens patriae* jurisdiction of the provincial Crown be used to divert criminal charges that do not meet the criminal threshold for prosecution (where proof of guilt "beyond a reasonable doubt" is required in order to secure a conviction) to civil suits against perpetrators of domestic violence, where there is a lower standard of proof ("balance of probabilities"): W.A. McTavish, Q.C. (The Children's Lawyer for Ontario), and G. Nwabuogu, *Holistic Service Delivery for Domestic Violence in Ontario* (April, 1998), submitted to the Criminal Justice Review Committee, Ministry of the Attorney General of Ontario.

Developing and maintaining effective measures for the comprehensive protection of children from serious injury and death at the hands of adults requires the best efforts of the provinces and territories and the Government of Canada. Providing services to children in need of protection is the responsibility of the provinces and territories. Ensuring that appropriate offences and penalties are available to protect children against grievous harms and injuries is the responsibility of the Government of Canada. The need for both levels of government to do whatever is necessary to protect children was recognized by the federally appointed Committee On Sexual Offences Against Children and Youths (the Badgley Committee) in their 1984 report, which included an extensive examination of child protection services as well as of the application of the *Criminal Code* and the *Canada Evidence Act*. All provinces and territories co-operated with the Committee's National Child Protection Survey of Child Sexual Abuse, one of a number of surveys in the report. The continuing need for co-operation between both levels of government to protect children and youth was emphasized again as part of the National Strategy for Healthy Child Development.³

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. These special needs, substantial vulnerabilities and legal incapacities (all of which diminish gradually as the child grows into adolescence and young adulthood) have inevitable legal consequences. For children, they involve the absence of legal powers otherwise enjoyed by adults. For all members of society generally, they involve special duties and responsibilities toward children. Although the nature and extent of these duties toward children vary, depending on the relationship between the child and the other person, a child's legal status is in one sense absolute in that it affects all persons with whom the child has dealings. [emphasis added]⁴

The Committee also noted that the conferring of special status on children by the State:

. . . is intended to promote the welfare and protection of young persons in two complimentary 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 toward the child raise the social interests in the

³ *Building a National Strategy for Healthy Child Development: Report of the Federal-Provincial-Territorial Advisory Committee on Population Health, Working Group on the National Strategy on Healthy Child Development*, Health Canada, Ottawa, 1997, identifies as a specific goal the protection of children and youth from abuse, violence, inequity and discrimination.

⁴ Report of the Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (Ottawa: Minister of Supply and Services, Canada, 1984), Vol. 1, p. 291.

nurturance and protection of children to a legal plane and, it is hoped, thereby strengthen them.⁵

In 1988, the Government of Canada affirmed these duties toward children by introducing substantial new protections, including child-specific sexual offences, and provisions to help children testify in court against offenders. Research undertaken by the Department of Justice in 1993 on the implementation of these amendments to the *Criminal Code* and the *Canada Evidence Act* found they have been effective in improving protection for children, and there were additional amendments in the same year. Nevertheless, since that time, there have been a number of alarming incidents that have given rise to 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. Children have also been the victims of severe, long-lasting, and often permanent physical and emotional harms and injuries.

These events have given rise to suggestions and formal recommendations for changes to both the *Criminal Code* and provincial child welfare legislation to provide additional protection for children. 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. The issues and suggestions for reform come from a wide range of sources in response to reported cases of grievous injury and death of children. Those recommending greater protection for children include 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. Suggestions also include recommendations from judicial inquiries, coroner's inquest juries, child fatality review committees, and other review bodies.

To learn more about how these concerns might best be addressed, in 1997 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 (a responsibility of the Government of Canada) and the early warning, prevention and enforcement stages of child protection (a provincial-territorial responsibility). A co-operative effort by a federal-provincial-territorial project team to improve the exchange of information among government agencies on risks to children is currently under way, and other similar projects are contemplated.

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 death to children. The issue for the Department of Justice is whether there is a need

⁵ *Ibid.*, Vol. 1, p. 292.

for new criminal law protections for children against serious harm by adults, and whether improvements can be made in protection against all types of offences.

This paper examines suggested possible changes to the *Criminal Code* and the *Canada Evidence Act* to help 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 against them; and
- facilitating children's testimony and providing for assistance for child witnesses, as well as issues relating to age, including age of consent.

What this paper does not include

Child pornography and child prostitution are criminal activities through which adults deliberately exploit and seriously harm children. However, these activities also raise complex social and legal issues which are outside the scope of this paper. The child pornography provisions of the *Criminal Code* are currently before the courts in criminal prosecutions. Child prostitution is comprehensively examined by the Federal-Provincial-Territorial Working Group on Prostitution in their recent *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (December 1998). As a result, these two issues – child pornography and child prostitution – are not the subject of this consultation.

The *Criminal Code* provides a defence to a teacher, parent or person standing in the place of a parent who uses reasonable force by way of correction toward a pupil or child. This defence is currently the subject of constitutional challenge in the courts, and is also outside the scope of this paper. This paper focuses on extreme forms of conduct and injury that can never be justified or defended. It therefore does not examine this or other defences. Rather, its object is to help ensure that there are child-specific criminal offences available which accurately reflect the horrendous types of conduct involved and make successful prosecutions possible.

THE EVOLUTION OF CRIMINAL LAW PROVISIONS TO PROTECT CHILDREN

Prior to the Badgley Committee Report

General criminal law reforms relating to sexual offences, enacted in 1968⁶ and 1983,⁷ did not specifically address sexual offences against children or the treatment of child victims and witnesses in the criminal process. The early 1980s saw a rise in public awareness of the prevalence of sexual offences against children and of shortcomings in the approach of the law

⁶ *Criminal Law Amendment Act*, 1968-69, c. 38, s. 7.

⁷ Bill C-127 (1983) *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125, s. 19; *Criminal Code*, R.S.C. 1985, c. 46, ss. 151, 153, 156.

toward the protection of children and treatment of child victims. Among those identified at the time were the following: (i) the law did not protect children from some types of conduct that might be child sexual abuse; (ii) there were complicated variations in the minimum age of consent to sexual acts; (iii) a number of rules of evidence often led the courts to treat the testimony of children with suspicion, ultimately making the conviction of some offenders less likely; (iv) child witnesses, classified as children “of tender years,” were presumed incompetent to testify and were required to undergo a special inquiry to determine whether they understood “the nature of an oath”; (v) unsworn testimony given by a child required corroboration, but corroboration was rarely available because child sexual abuse was ordinarily committed in private, where the child involved was the only witness, and often resulted in psychological trauma rather than physical injury; (vi) the law did little to recognize or accommodate the problems, vulnerabilities and developmental stages of young victims and witnesses required to testify in criminal proceedings (e.g. the trauma of visual confrontation or questioning by the accused).⁸

The Badgley Committee Report

Concerns over an increase in the reported incidence of child sexual abuse and over the adequacy of the existing *Criminal Code* offences in protecting children against such abuse led to the establishment of the Badgley Committee in 1981. The Committee was asked to ascertain the incidence and prevalence of sexual abuse against children and youths, to determine the adequacy of the laws in protecting them against sexual offences, and to make recommendations for improving protection. In 1984, the Committee issued a report⁹ that made 52 recommendations directed at all levels of government and the private sector, including recommendations suggesting improvements in the criminal law to protect children. The findings and recommendations of the Committee became the source and provided many of the rationales for the law reforms that followed.

The Committee concluded that previous reforms of the law relating to sexual offences had failed to respond adequately to the peculiar vulnerabilities of children and the realities of child sexual abuse, and failed to afford sufficient protection for young victims of such abuse. In its view, these deficiencies derived from an “age-old practice” of using a legal framework designed for adult victims to deal with child victims.¹⁰ The Committee stated that the essential goals of legal reform and the justification for legal intervention should be:

- the protection of children against abusive or exploitative interference with their bodily integrity and security;

⁸ See, generally, J.P. Hornick and F. Bolitho, *A Review of the Implementation of the Child Sexual Abuse Legislation in Selected Sites* (Ottawa: Department of Justice, Canada, 1992), at pp. 4-7.

⁹ Report of the Committee on Sexual Offences Against Children and Youths, *op. cit.* footnote 4.

¹⁰ *Ibid.*, Vol. 1, p. 336.

- the deterrence of others from violating the trust implicit in all adult-child relationships by exploiting a child's emotional and sexual vulnerability, or by involving developmentally immature persons in sexual acts having implications which they do not fully understand; and
- the deterrence of others from involving young persons in sexual acts that may be physically and emotionally harmful to the young person.¹¹

The Committee observed that child sexual abuse was a complex phenomenon involving many different forms of unacceptable sexual behaviour, and that such unacceptable behaviour should be clearly delineated.¹² The Committee also concluded that sentencing policy applicable to offences committed against young people was inadequate and that, for many offences, there was only a "partial congruence" between the nature of the sexual acts involved, the charges laid and the sentences imposed.¹³ Considering the frequency of sexual misconduct toward children by persons prominent in the child's life, the Committee emphasized that the role of the criminal law in punishing and deterring violations of familial and trust relationships should be explicit, and that violations of such trust relationships should be specified as aggravating factors in sentencing.¹⁴

With respect to the evidence of children and the treatment of child witnesses, the Committee concluded that assumptions about the untrustworthiness of young children and their inability to recall events surrounding sexual offences were "largely unfounded"; that a "fundamental change" in the law was needed to overcome previously held suspicions and to permit children to speak directly for themselves at legal proceedings; and that a child's testimony should be received and considered in the same light as that of an adult, its cogency being a matter of weight given to the testimony, and not a matter of admissibility.¹⁵

Response of the government to the Badgley Committee Report

The response of the Government of Canada to the Badgley Committee Report included legislative reform (Bill C-15), educational projects and the commissioning of further research to identify the social dimensions of the issues and emphasize the need for a multifaceted approach in addressing them.¹⁶ Later, the Government of Canada funded a sizeable body of legal studies focusing on the operation of the new legislation. These activities led to additional legislation in 1993. In November 1994, the Solicitor General of Canada announced a national information

¹¹ *Ibid.*, Vol. 1, p. 292.

¹² *Ibid.*, Vol. 1, pp. 29-30.

¹³ *Ibid.*, Vol. 1, pp. 31-32.

¹⁴ *Ibid.*, Vol. 1, pp. 57-58.

¹⁵ *Ibid.*, Vol. 1, pp. 32 and 373.

¹⁶ Examples of educational projects included the development of a wide range of information materials on the new law for distribution across the country. The materials included a storybook for children (*The Secret of the Silver Horse*), a pamphlet for teenagers and adults (*What to do if a child tells you of sexual abuse. . . Understanding the Law*) and a guide to the law for social workers and others (*Canada's Law on Child Sexual Abuse: A Handbook*). More than four million copies of these materials were distributed.

system on child sex offenders based on modifications to the Canadian Police Information Centre (CPIC) to make information available to organizations to help them screen out child sexual abusers applying for paid or volunteer positions with children.¹⁷ Further improvements have since been introduced to the information system.

Bill C-15 (1988)

Bill C-15, a package of reforms to the criminal law and rules of evidence that was proclaimed in force January 1, 1988, represented the initial legislative response of the government to the Badgley Committee report. The goals of the new legislation were set out in Parliamentary debates and official government policy statements as including: better protection of child victims and witnesses; enhancement of the ability to successfully prosecute child sexual abuse cases; improvement in the experience of child victims and witnesses; and better correlation between sentencing and the severity of the offence.¹⁸

Although it did not implement the Badgley recommendations for change to the *Criminal Code* and the *Canada Evidence Act* in every detail, Bill C-15 did create new offences specifically addressing the conduct involved in child sexual abuse (sexual interference; invitation to sexual touching; sexual exploitation of a young person aged fourteen or more but under age eighteen by persons in a position of trust or authority toward the young person; and exposure of genitals for a sexual purpose to a person under fourteen¹⁹). Changes were made to certain offences which involve a minimum age of consent to sexual activity and to the provisions dealing with the competence of child witnesses to testify.²⁰ Measures were enacted to improve the treatment and experience of child complainants under eighteen who are required to testify, by allowing them to testify outside of court or behind screens,²¹ and allowing the use of their videotaped testimony in certain circumstances.²² A statutory requirement that the unsworn testimony of young children had to be corroborated was removed.

Bill C-126 (1993)

Bill C-126, *An Act to amend the Criminal Code and the Young Offenders Act*, proclaimed in force August 1, 1993, introduced several reforms designed to protect children

¹⁷ CPIC was adjusted to contain more information, including data on convicted sex offenders; information on prohibition orders and peace bonds relating to sex offenders; data on the age and sex of child victims of sexual abuse; and fingerprint information on those convicted of hybrid child sexual offences.

¹⁸ J.P. Hornick and F. Bolitho, *supra*, footnote 8, p. 8.

¹⁹ *Criminal Code*, sections 151, 152, 153 and subsection 173(2) respectively.

²⁰ Enacted, respectively, as section 150.1 of the *Criminal Code* and section 16 of the *Canada Evidence Act*.

²¹ *Criminal Code*, subsection 486 (2.1).

²² *Criminal Code*, section 715.1.

from risks posed by sex offenders, as well as other changes to further improve the way children who appear as victims and witnesses before the courts are treated.

Measures to better protect children from the risks posed by sex offenders allowed courts to prohibit convicted offenders from engaging in activity involving contact with children or from attending at certain locations where children might be present.²³ The prohibition may be for life or for some shorter period. Another protective provision allowed a person having reasonable grounds to fear that an enumerated sexual offence would be committed against a child or young person under fourteen to apply to a court to have the potential offender post a "peace bond" lasting up to twelve months.²⁴

Measures with respect to child witnesses included the abrogation of what had been known as the *Kendall* rule, established in the case law, requiring judges, in every case where a child testified (even if under oath), to warn of the danger of accepting the child's uncorroborated testimony.²⁵ The purpose of the earlier reform permitting a child victim to testify from behind a screen or by closed-circuit television was so that the child would not have to experience the anxiety of seeing the accused in the courtroom.²⁶ However, an accused representing himself or herself could not be prevented from questioning or cross-examining the child. Bill C-126 directed the court to appoint counsel for the accused for the sole purpose of conducting the cross-examination of a child victim who is under the age of fourteen at the time of the proceedings.²⁷ The Bill also enabled a judge, on application, to allow a "support person" of the child victim or witness's choice to be close to the child while testifying, thus recognizing the importance of giving the child reassurance and support while testifying; helping minimize any discomfort that might be involved; and facilitating clear testimony.²⁸

²³ *Criminal Code*, section 161. Before section 161 was enacted, there was a similar provision in the vagrancy provision of the *Criminal Code*. However, that provision was eventually held to be unconstitutional by the Supreme Court of Canada in *R. v. Heywood*, [1994] 3 S.C.R. 761, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133.

²⁴ *Criminal Code*, section 810.1. The bond may include conditions prohibiting the potential offender from engaging in any activity involving contact with children under fourteen or from attending places where children under fourteen are usually present, such as public parks, swimming areas and school grounds.

²⁵ *R. v. Kendall* (1962), 132 C.C.C. 216 (S.C.C.). Courts had persisted in giving this warning even after Bill C-15 removed the statutory requirement in relation to unsworn testimony.

²⁶ *Criminal Code*, subsection 486(2.1).

²⁷ *Criminal Code*, subsection 486(2.3). Bill C-79 (1999), *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*, would raise the age where cross-examination of a child witness by the accused personally is prohibited from fourteen to eighteen.

²⁸ *Criminal Code*, subsection 486(1.2). The subsection provides that the witness must be under the age of fourteen years *at the time of the trial or preliminary hearing*. Bill C-79 (1999), which deals with victims of crime, would leave the age at fourteen, but support persons would also be available to witnesses of any age who have a mental or physical disability. It is not unusual for the child 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. Some have suggested that it might be more appropriate to provide that the witness must be under the age of, for example, sixteen at the time of the trial or preliminary hearing, to ensure that any delay would not deprive the witness of

Bill C-41 (1996)

Bill C-41, proclaimed in force September 3, 1996, enacted major reforms to the sentencing scheme set out in Part XXIII of the *Criminal Code*. The amendments set out for the first time directly in the *Criminal Code* a statement of the purpose and principles of sentencing and provided that, in certain circumstances, the fact that the victim is a child is an aggravating factor to be taken into account by the sentencing court. Other measures were later enacted for the sentencing of offenders. (The specifics of the various sentencing and corrections reforms are considered in more detail later in this paper.)

Bill C-27 (1997)

The provisions of Bill C-27 came into force in May 1997. As well as introducing specific measures dealing with child prostitution, the Bill included a provision requiring a court sentencing an offender for criminal harassment to consider, as an aggravating factor, the breach of a prohibition order under section 161 of the *Criminal Code* or a peace bond under section 810, or 810.1 (to prohibit contact with children). In addition, the sections of the *Criminal Code* allowing testimony of child complainants under eighteen to be given outside the courtroom or behind a screen and providing for the admissibility of their videotaped evidence were extended to child witnesses under eighteen.

Trends in the Courts

Beginning in 1990, various court decisions have described the nature of child sexual abuse and reexamined traditional rules applicable to the evidence of young children.²⁹ For example, the courts have said that:

- they recognize the goal of tailoring and interpreting rules of evidence to accommodate the developmental stages and needs of young victims and witnesses;
- the credibility of the evidence given by young children should not be judged by the same standards and criteria used to judge the credibility of adult witnesses. The credibility of all witnesses is to be assessed by criteria appropriate to their mental state, understanding and ability to communicate;

needed support.

²⁹ See e.g., *R. v. B.(G.)*, [1990] 2 S.C.R. 30; 56 C.C.C. (3d) 200; 77 C.R. (3d) 347; *R. v. Khan*, [1990] 2 S.C.R. 531; 59 C.C.C. (3d) 92; 79 C.R. (3d) 1; *R. v. W.(R.)*, [1992] 2 S.C.R. 122; 74 C.C.C. (3d) 134; 13 C.R. (4th) 257; *R. v. Levogiannis* (1993), 25 C.R. (4th) 325; 85 C.C.C. (3d) 327 (S.C.C.); *R. v. L.(D.O.)*, (1993), 25 C.R. (4th) 285 at 318 (S.C.C.), per L'Heureux-Dubé J. See also *Re Khan and College of Physicians and Surgeons of Ontario* (1992), 76 C.C.C. (3d) 10 (O.C.A.).

- the need of the courts to seek the truth about allegations of child abuse is a primary goal, and to that end, accounts that children and young people are able to give of the details of abusive events and conduct should be received;
- it is an error for a court to automatically discount a child's evidence based on stereotyped views of the characteristics of children or young people or of the quality of testimony they give;
- the courts' truth-seeking function may be impaired if rules of evidence and procedure inflict or permit the further infliction of trauma on children and young people which, in turn, impairs their ability to provide a full account to the courts;
- they approve, both in principle and constitutionally, the creation of mechanisms to make participation in the process less stressful and traumatic for child and adolescent complainants and recognize that such supports assist the courts in the presentation of evidence and the discovery of the truth; and
- the essential issue compounding the seriousness of current offences criminalizing sexual abuse involving children is the abuse of relationships in which one party is able to manipulate a power imbalance against a weaker and more vulnerable party.

AREAS FOR CONSIDERATION

I. DEFINING FURTHER CHILD-SPECIFIC CRIMINAL OFFENCES

There are several ways in which the law can address the goals of protecting children from exploitation by adults and improving their safety. The first line of protection remains provincial child protection laws. However, in the case of extreme forms of conduct which cause serious harms and even death to a child, the criminal law must play a role in supporting and complementing the provincial child protection laws by targeting and deterring the types of conduct and harm that pose the greatest risk to children. In 1988, in response to the recommendations of the Badgley Committee,³⁰ new offences were created to specifically address sexual abuse of children. This part of the paper collects concerns and suggestions about whether there are other extreme types of conduct or harm to which children are particularly vulnerable that are not adequately covered by the present criminal law. If so, consideration could be given to creating new offences or re-defining the elements of existing offences to enhance the protection of children.

A. Background

Possible extreme types of conduct or harm to which children are particularly vulnerable, and from which the present criminal law may not provide adequate protection, include severe emotional and psychological harm, “non-violent” neglect, and “unintentional” homicide. There is also a question as to whether creating a new crime of failure to report suspected crimes involving children would serve to increase their safety.

Historically, the criminal law has been concerned with extreme behaviours resulting in physical harm. This is in part because physical harm is more easily proved and in part because the impacts of emotional and psychological harm are not well understood. There is a growing awareness and concern about the lasting impact of severe emotional and psychological harm suffered by children. A National Population Survey, considering the experience of 7,000 sexually assaulted children and young people, disclosed that a larger proportion suffered emotional harms than physical injury.³¹ Governments at all levels and courts are increasingly recognizing the prevalence of severe emotional and psychological harms caused to children by all forms of abuse, and are seeking ways to protect children from such harm.³² In 1995, Ontario put into force a Victim’s Bill of Rights that, for purposes of a victim seeking compensation from an offender, recognizes that victims of domestic and sexual assaults are presumed to have suffered emotional distress.³³ Almost all provincial child protection legislation now recognizes

³⁰ Report of the Committee on Sexual Offences Against Children and Youths, *op. cit.*, footnote 4.

³¹ *Ibid.*, Vol. 1, p. 213.

³² *R. v. Berard*, (1994) CCL 11034 (Alta. C.A.); *R. v. B.(A.)* (1997), 33 O.R. (3d) 321 (C.A.); *R. v. N.(W.L.)* (1993), 21 W.C.B. (2d) 22 (Alta. C.A.). See also *R. v. Ireland and R. v. Burstow*, [1998] A.C. 147 (H.L.), holding that bodily harm includes the infliction of psychiatric injury.

³³ J. Rusk, “New set of rights for victims introduced,” *Toronto Globe and Mail*, November 24, 1995, p. A6A.

emotional harm caused by abuse as a basis for intervention.³⁴ A recent legislative review commissioned by the Province of Ontario recommended that the test for emotional harm should focus on the behaviour of the caregiver, and that emotional harm could be demonstrated where a parent shows a pattern of rejecting, humiliating, threatening or making accusations against a child.³⁵

The same review panel concluded that neglect and risk of neglect should be explicitly included in Ontario's *Child and Family Services Act* as grounds for declaring a child in need of protection, and that neglect should be defined as failure to provide such necessities as an adequate home, nutrition, education, medical care, supervision, affection and emotional support and stimulation.³⁶ This recommendation reflects the growing recognition that children may suffer severe harm not only from violent physical abuse, but also from "non-violent" neglect. Concerns have been expressed that the criminal law is not adequately supporting provincial initiatives in this area.

Among the most tragic cases to come before the justice system are those where a child has been killed. Statistics Canada has reported that between 1974 and 1996, there were, on average, 87 victims of homicide under the age of eighteen each year, for a total of 1,994 during the period. Fifty-eight percent of these homicides were committed by family members -- seventy-eight percent of these by a parent.³⁷ There were 1,164 homicides involving children under twelve. A previous history of violence involving the victim and the accused was a factor in one-quarter of the family-related child homicides from 1991 to 1996. Homicides involving victims under two years of age were most likely to have been preceded by this type of abuse.

These statistics point to the importance of timely reporting of child abuse or the risk of abuse, and also of effective intervention. Research suggests that much child abuse is never reported to the proper authorities, or that information that is reported is not always shared among investigative agencies in a timely or useful manner. Some lack of reporting may be due to fear of or coercion by offenders or to shame, which can inhibit reporting by family members aware of the abuse.³⁸ But some concerns have been raised that other lack of reporting may occur because no effective sanction for failure to do so exists or is applied. In some cases, information known by various professionals concerning possible danger to a child in the home might not be revealed because of confusion over confidentiality requirements.

The issue of reporting within the context of child protection legislation was addressed in the recent Ontario legislative review. The review panel recommended that all citizens, not only

³⁴ Canadian Centre for Justice Statistics: Juristat: *Assaults Against Children and Youth in the Family, 1996*. Statistics Canada Cat. No. 85-002 XPE Vol. 17, p. 3.

³⁵ Report of the Panel of Experts on Child Protection (March 1998), *Protecting Vulnerable Children* (Ontario, Ministry of Community and Social Services).

³⁶ *Ibid*, p. 19.

³⁷ Juristat, *Assaults Against Children and Youth in the Family*, *supra*, footnote 34, p. 9.

³⁸ The Badgley Committee reported that about one-half of mothers who knew of abuse occurring did not report it to anyone: *op. cit.* footnote 4.

professionals, should be obliged to report even suspicions of child abuse and neglect to a Children's Aid Society and face penalties for not doing so.³⁹

B. Possible Reforms to Address Risks and Define Offences

One suggested option for better protecting children is to use the criminal law to more clearly support provincial initiatives in this area by defining new offences or improving the coverage of current offences so as to address more directly and clearly the specific conduct and dangers our experience tells us children face, much as was done in the Bill C-15 reforms dealing with sexually abusive conduct. Any extreme forms of conduct, harms or abuses endangering children that should be addressed by the criminal law but that the present criminal law does not adequately address should be identified. Once these are identified, a determination would have to be made as to whether children could be better protected by creating new offences to specifically target the conduct of concern, by redefining or finding a better way to apply existing offences, or by altering rules of evidence to facilitate proof of elements of offences.

One example of the kind of behaviour special offences could address comes out of recent research observing the disparity in conduct between offenders coming to the attention of and prosecuted by the criminal justice system and those that may actually pose the greatest danger to children. One study observed that the records of a sexual assault service disclosed that seventy-seven percent of the cases of sexual abuse against children involved abuse by family members in the home, generally not characterized by physical violence. However, the cases prosecuted disproportionately involved abuse by strangers and acquaintances, such as family friends and caretakers, that occurred outside the home, and focused on the issues of physical violence and resistance offered by the child. The researchers concluded that current legal doctrines operate to excuse and minimize conduct and risks children face by inappropriately focusing on physical harm, danger and blame.⁴⁰ There was also a concern that lesser penalties tend to be imposed where the relationship between the offender and the child is a close one, when the most serious abuses may occur at the hands of close family members. It has also been pointed out that because an offence against the child in the home may involve a serious breach of trust in addition to the offence itself, it can have additional serious effects on the child.

1. Criminal Physical Abuse of a Child

One approach might be to create a specific offence targeting the severe physical abuse of a child, for example, conduct which results in physical disabilities that could be permanent. At first glance, creating such an offence might seem unnecessary in light of the other offences, such as assault, already found in the *Criminal Code*. However, enacting such a provision would enable the criminal law to more specifically address and define extremes of behaviour and harms, and to develop appropriately serious penalties which would help protect children against

³⁹ *Op. cit.*, footnote 35.

⁴⁰ K.E. Renner, C. Alksnis, L. Park, "The Standard of Social Justice as a Research Process" (1997), 38 *Canadian Psychology* (No.2) (at pp. 7-8 of pre-publication copy of article).

those who might re-offend. Many states in the United States have adopted this approach with respect to the severe physical abuse of a child, even though they have laws of general application prohibiting some or all of the conduct involved.

The various United States statutes dealing with physical abuse of children disclose 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. For example, in North Carolina, such offences directed at persons thirteen, fourteen or fifteen years of age are treated most seriously if the offender is more than six years older than the child.

Some statutes specifically address the failure of a parent or caretaker to protect a child from physical abuse inflicted by another. In the state of Utah, it is an offence for a parent to knowingly permit another person to inflict injury on a child. Presumably, the parent could discharge his or her responsibilities in the matter by reporting to the proper authorities in a timely way.

2. Criminal Neglect of a Child

Every year in Canada, there are numerous highly publicized cases of familial or caretaker neglect causing serious harm to, or resulting in the death of, a child. Concerns have been raised that some courts are less likely to treat cases of extreme neglect as seriously as cases where physical violence has been directed toward the child.⁴¹ Such cases raise the issue of whether there is need to reassess the adequacy of the criminal law in dealing with neglect that seriously harms children -- or puts them at risk of serious harm.

Most forms of neglect will continue to be 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 would send a clear message that "non-violent" neglect may, in appropriate circumstances, be treated as seriously as the direct infliction of physical violence. Such an offence could also supplement provincial child welfare initiatives (such as those previously discussed in relation to Ontario) 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*, which does not specifically target neglect, is a possible charge in these cases. The 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 sixteen, 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 -- two years imprisonment, even in cases where the child suffers serious harm -- has been criticized as inadequate. A new, specific child neglect offence could have a higher maximum penalty.

⁴¹ "Crowd enraged by sentence in N.B. child's death", *Toronto Globe and Mail*, December 18, 1997, p. A6.

Many states in the United States have created criminal child neglect offences, often termed “endangering the welfare of a minor”. The statutes often deal with issues similar to those found in section 215 of Canada’s *Criminal Code*. Some expand on the prohibited conduct covered. For example, in Arkansas, part of the relevant section addresses the “reckless failure” of a parent, guardian or person legally charged with the care or custody of a child, to take action to prevent the abuse of a child who is less than eleven years old.⁴² Other statutes address the situation of a caretaker who places a child in a position where the person or health of the child is endangered.⁴³

3. 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.⁴⁴ Inquest juries and inquiry reports have suggested that the focus of the current criminal law on physical harm is insufficient and that there should be more effective recognition of emotional harm or severe psychological harm by the criminal law. Consideration might be given to defining a separate offence in the *Criminal Code* prohibiting severe emotional abuse or the causing of severe emotional or psychological harm to a child. Additionally, consideration might be given to including the causing of severe emotional or psychological harm to a child within the definition of current offences or any newly created offences that deal with criminal physical abuse or criminal neglect.

Many criminal statutes in the United States specifically address the infliction of emotional harm by defining abuse as 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.⁴⁵ 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, evidentiary difficulties would likely remain. In most cases, courts require specific evidence that the victim suffered the harm that is alleged. Emotional harm is often difficult to prove, since its full effects may not become apparent until long after the

⁴² Ark. Code Ann. #5-27-221 (Michie 1993).

⁴³ For example, in the state of Wisconsin, a person responsible for a child’s welfare is guilty of a felony (a more serious offence) if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child; is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated; fails to take the necessary action; and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child caused by the other person: Wis. Stat. Ann #948.03 (West 1996).

⁴⁴ See K.E. Renner, C. Alksnis, L. Park, *supra*, footnote 40, pp. 7, 10.

⁴⁵ For example, in Arizona, abuse is defined to mean inflicting, allowing, or allowing another person to cause “serious emotional damage, as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behaviour and which emotional damage is diagnosed by a medical doctor or psychologist and which is caused by the acts or omissions of an individual having care, custody or control of a child”: Ariz. Rev. Stat. Ann # 8-0546(A) (West Supp. 1996).

conduct that caused it occurred. As well, it is often difficult for a child to articulate such harm. Proof that emotional harm is caused by a specific act may also be a complicated matter requiring the testimony of psychologists or psychiatrists. On the other hand, there might be circumstances in which emotional harm and its cause would be virtually self-evident. Some courts in Canada have suggested that they are prepared to assume that emotional harm is 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.⁴⁶ 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.⁴⁷

In light of the difficulties in proving emotional or psychological harm caused to young victims of abuse, another approach might be to make it easier to prove such harm by setting out the type of evidence that is indicative of emotional harm; employing definitions that focus on the conduct of the abuser;⁴⁸ or, in addition to any evidence of actual harm that could be introduced, establishing statutory presumptions that certain types of conduct result in emotional harm. There are models that might be informative. For example, in Nevada, mental injury is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of his ability to function within his normal range of performance or behaviour.”⁴⁹ In Florida, child abuse is defined to mean: “(a) intentional infliction of physical or mental injury upon a child; (b) *an intentional act that could reasonably be expected to result in physical or mental injury to a child*; or (c) active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child”[emphasis added]; and the statute specifies that it is an offence to knowingly or wilfully abuse a child even without causing great bodily harm, permanent disability or permanent disfigurement.⁵⁰

4. Child Homicide

Murder and manslaughter are two forms of homicide. (Another is infanticide, which is discussed below.) 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.⁵¹

⁴⁶ See cases cited above, footnote 32.

⁴⁷ *R. v. McDonnell*, [1997] 1 S.C.R. 948.

⁴⁸ For an example in a non-criminal law context, see Report of the Panel of Experts on Child Protection, *op. cit.*, footnote 35, p. 20.

⁴⁹ Nev. Rev. Stat. # 432B.070 (1995).

⁵⁰ Fla. Stat. Ann. # 827.03 (West Supp, 1997).

⁵¹ These do not require foreseeability of death: *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.), at pp. 371-372, per McLachlin J., for the majority of the Court. Nor would a special child homicide offence.

Special child homicide statutes in the United States clarify that when a child's death results from abuse, prosecutors must only show that the offender physically abused the child and that the abuse caused the child's death.⁵² Other state statutes dealing with child homicide 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 have already been discussed. Should either of these result in death, a child homicide offence could be charged. Whether or not a new child-specific homicide offence results 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.

The coroner's inquest jury that recommended the creation of a child homicide offence went further and also suggested that the offence of infanticide be eliminated. The development of this offence in England, and its consequent enactment in Canada, Australia and other Commonwealth countries (it is not available in the United States) was the result of a prolonged effort by judges and law reformers who were concerned that a woman who killed her newborn child (less than a year old), while her judgement was disturbed as a consequence of birth, should not be charged with murder. The offence (and the lesser maximum penalty of five years imprisonment) is intended to take into account the consequences of physiological changes resulting from the birth process and to stress the need for continuing treatment for the few women who meet the special conditions necessary to charge this offence instead of murder. Section 672.11 of the *Criminal Code* provides for assessment of the woman's mental condition, and those who do not meet the special conditions of the offence may be charged with murder.

Infanticide is a child-specific homicide offence that also takes into consideration the unique physiological and mental condition of the mother. For this reason, even if a more general child homicide offence were created, it might still be necessary to recognize the special circumstances of infanticide in a separate offence. At the same time, it is important that in each particular case a careful investigation should determine whether the appropriate charge is infanticide.⁵³ These investigations could be assisted by a co-operative study of actual cases conducted by those responsible for investigating and reviewing child deaths.

5. Failing to Report Crimes Involving Child Abuse or Neglect

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. In some, there is no penalty for persons who are not professionals.

However, at present there is no federal *Criminal Code* requirement to report cases of suspected criminal offences involving child victims, for example the suspicious death of a child.

⁵² National Center for Prosecution of Child Abuse, "Legislation Regarding Child Homicide" (December 31, 1996).

⁵³ The better charging practice is discussed in E.A. Tollefson, Q.C. and B. Starkman, *Mental Disorder in Criminal Proceedings* (Toronto), Carswell (1993), at p. 45.

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.⁵⁴

Most provinces have protocols requiring child protection authorities to inform police if they receive reports of possible crimes. However, there is concern that in some situations criminal offences may not be reported to police -- for example, where the offender has left the home or where the parents have agreed to co-operate in therapy.⁵⁵ 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 delineating responsibilities and reinforcing protocols for co-operation between the child protection and criminal justice systems has been emphasized by all levels of government.

It has been suggested that children could be better protected by making it a criminal offence to fail to report these offences to the police. Such reports could be required in addition to current 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. It might also better enable the criminal process to address and investigate the real risks children face, and might bring to light cases that would otherwise be concealed or ignored. A duty to report could play an important role in crime prevention; assist in the early identification, investigation and successful prosecution of crimes involving child abuse and neglect; and lead to the establishment of a more comprehensive system of record keeping in relation to such crimes.

To encourage reporting, immunity from both criminal prosecutions and civil actions could be provided to persons who report these suspected crimes, provided the reports are not made maliciously or without reasonable cause. Reported suspicions and allegations would be subject to investigation before action could be taken.

II. SENTENCING TO PROTECT CHILDREN

Creating new offences is one of the methods by which the criminal justice system can support and reinforce attempts by provincial law to improve the protection of 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, through co-operation between jurisdictions, all available means are used to prevent them from re-offending, either against the

⁵⁴ Report of the Committee on Sexual Offences Against Children and Youths, *op. cit.*, footnote 4, Vol. 1, p. 195; *The Legal Response to the Sexual Abuse of Children*, a background paper prepared for the Metropolitan [Toronto] Chairman's Special Committee on Child Abuse, Toronto: October, 1982, p. 23.

⁵⁵ Metropolitan [Toronto] Chairman's Special Committee on Child Abuse, *ibid.*

specific child they have already harmed or against other children to whom they may pose a risk of future harm. Sentences appropriate to the crimes and conduct of offenders can also send powerful messages of denunciation and hopefully deter others.

In recent years, sentencing laws have been reformed to include a clear statement of the purpose and principles of sentencing. As well, courts have been equipped with a greater range of sentencing options in order to deal more appropriately with the range of situations before them, from violent, dangerous offenders, to offenders who pose little or no future threat.

A. Background

1. Sentencing Purpose and Principles

As a result of a major and comprehensive reform of sentencing law in 1996,⁵⁶ the purpose and principles of sentencing in Canada are now set out in Part XXIII of the *Criminal Code*. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- to denounce unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or the community; and
- to promote a sense of responsibility in offenders and acknowledgement of harm done to victims and the community.⁵⁷

The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁵⁸ Other principles emphasize restraint in the use of incarceration: an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances,⁵⁹ and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.⁶⁰

Another principle that a court must consider in imposing a sentence is that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.⁶¹ While not specifying circumstances that should invariably be seen to be mitigating, the legislation does direct a sentencing court to consider certain circumstances to be aggravating, including evidence that the offence has been

⁵⁶ Bill C-41, proclaimed in force September 3, 1996.

⁵⁷ *Criminal Code*, section 718.

⁵⁸ *Criminal Code*, section 718.1.

⁵⁹ *Criminal Code*, paragraph 718.2 (d).

⁶⁰ *Criminal Code*, paragraph 718.2 (e).

⁶¹ *Criminal Code*, paragraph 718.2 (a).

motivated by bias, prejudice or hate based on age, among other grounds;⁶² evidence that the offender, in committing the offence, abused the offender's spouse or child;⁶³ and evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.⁶⁴

2. The Conditional Sentence

A conditional sentence is a type of sentence that allows offenders in certain circumstances to serve their sentences in the community. The basis for imposing a conditional sentence is set out in section 742.1 of the *Criminal Code*:

- conviction of an offence not punishable by a minimum term of imprisonment;
- imposition of a sentence of imprisonment of less than two years; and
- satisfaction of the sentencing court that serving the sentence in the community will not endanger the safety of the community.

Section 742.3 of the *Criminal Code* specifies compulsory and optional conditions that relate to the imposition of a conditional sentence. The compulsory conditions involve requirements to report to supervisors and give notice of location and movement. The optional conditions involve such matters as prohibiting the consumption of alcohol or drugs or the possession of weapons; requirements to support and care for dependants, perform community service, or agree to attend provincially approved treatment programs; or other conditions, determined in the court's discretion, "for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences."

Conditions imposed by the sentencing court under section 742.3 expire when the conditional sentence expires; that is, they may under no circumstances continue in force for longer than two years less a day. However, when a court imposes a conditional sentence, it has the power to order the offender to comply with conditions prescribed in a probation order when the conditional sentence expires.⁶⁵ A probation order may continue in force for a period of up to three years.⁶⁶ A probation order may also contain conditions, the purpose of which is stated to be "for protecting society and for facilitating the offender's successful reintegration into the community."⁶⁷ One condition of a probation order may be a requirement to participate actively in a treatment program approved by the province, but because experience has shown that treatment of any kind is usually only effective where an individual wants to change, the condition may be imposed only if the offender agrees and the program's director accepts the offender. Thus, a court imposing a conditional sentence on an offender who is allowed to serve

⁶² *Criminal Code*, subparagraph 718.2 (a)(i).

⁶³ *Criminal Code*, subparagraph 718.2 (a)(ii).

⁶⁴ *Criminal Code*, subparagraph 718.2 (a)(iii).

⁶⁵ *Criminal Code*, paragraphs 731(1)(b); 732.2 (1)(c).

⁶⁶ *Criminal Code*, paragraph 732.2(2)(b).

⁶⁷ *Criminal Code*, paragraph 732.1(3)(h).

his or her sentence in the community may require some form of supervision and treatment of the offender lasting up to five years from the date the sentence is imposed.

Due to varying judicial interpretations of certain aspects of the new sentencing law, an amendment which came into force on May 2, 1997, directed that a decision to impose a conditional sentence should be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.⁶⁸

3. Prohibition Orders

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 engaging in employment that might put the offender into a position of trust or authority in relation to children. The prohibition order may last for life.

4. Power of Sentencing Courts to Order a Delay of Parole

The 1996 sentencing reforms contained in Bill C-41, although comprehensive, were carried out in the context of earlier reforms affecting the treatment of offenders after conviction for certain offences prosecuted by indictment. Section 120 of the *Corrections and Conditional Release Act* sets out the normal periods of parole eligibility, which, in most circumstances, will be one-third of the sentence or seven years, whichever is less. The earlier reforms, enacting what was then section 741.2 of the *Criminal Code*, allowed a court sentencing an offender to a term of imprisonment of two years or more for specifically listed offences (including the sexual assault and child sexual abuse offences) prosecuted by indictment, to order that the time served in prison before the offender can be released on parole should be one half of the sentence imposed or ten years, whichever is less. An order to delay parole may be made if the court is satisfied it is necessary to reflect society's denunciation of the offence or the objective of general or specific deterrence. Bill C-41 added, for greater certainty, that "the paramount principles that are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles."⁶⁹

5. Power of Correctional Authorities to Delay Release

Concurrently with the changes allowing courts to delay parole, the *Corrections and Conditional Release Act* was also extensively amended.⁷⁰ One new provision made it easier to

⁶⁸ Bill C-95; S.C. 1997, c. 18, section 107:1. The Supreme Court of Canada has since granted leave to appeal in six cases which raise issues of the proper interpretation of the conditional sentencing provisions.

⁶⁹ Now found in section 743.6 of the *Criminal Code*.

⁷⁰ Bill C-45, *An Act Respecting Corrections and the Conditional Release and Detention of*

delay parole and detain, until the end of his or her sentence, an offender sentenced to a term of two years or more in relation to certain listed offences, including the child sexual abuse offences. This could be done if the offender was sentenced for an offence which caused the death of or “serious harm” to another person and there were reasonable grounds to believe the offender was likely to commit a similar offence before the expiry of the sentence.⁷¹ “Serious harm” was defined to mean “severe personal injury or severe psychological damage.”⁷²

In 1995, further amendments were enacted responding to concerns about the difficulty in applying the definition of “serious harm” in cases involving children.⁷³ A press release issued by the Department of the Solicitor General at the time of the proclamation of this amendment stated that, while the government recognized that “all sexual offences are serious”:

Experience has shown that, unlike cases involving adult victims, it has often been difficult to establish serious harm where the child victim had to provide the evidence, because the child could not articulate the personal impact of the experience. Further, research has shown that the impact of such a crime on a child may not become evident until many years later. This amendment ... is in keeping with the government’s desire to improve the protection of children and responds to the Parliamentary Standing Committee on Justice and Solicitor General’s report on serious harm released in February 1993. ...

... Under the new scheme, it only has to be established that such an offence [by a sex offender who victimizes a child] was committed and that a further sexual offence against a child is likely to be committed after release.

The effect of this amendment is that it is no longer necessary to establish “serious harm” in relation to both the offence committed and the offence that might be committed in future on release. Continued detention may be ordered simply if the National Parole Board is satisfied that an offender is likely to commit a sexual offence specified in the Act⁷⁴ against a child, if released before the expiry of the sentence.

6. Long-Term Offenders

In September 17, 1996, the government also introduced new initiatives to strengthen the sentencing and correctional schemes in dealing with those individuals presenting a high risk of violent re-offending. These measures were proclaimed in force in July and August 1997.⁷⁵ Research had shown that over ninety percent of successful Dangerous Offender applications involved sex offenders, but this procedure was an exceptional one, used in relatively few cases. There was a need for a sentencing option that would allow intensive supervision of sex offenders

Offenders and to Establish the Office of Correctional Investigator, proclaimed in force December 1, 1992 (CCRA).

⁷¹ CCRA, subsection 129(1).

⁷² CCRA, section 99.

⁷³ Bill C-45, proclaimed in force December 15, 1995.

⁷⁴ CCRA, section 129.

⁷⁵ Bill C-55; S.C., 1997, c.17; *Criminal Code*, sections 753.1 - 753.3.

after they completed their term of imprisonment. The new Long-Term Offender procedure targeted sex offenders generally and sex offenders against children specifically, adding, for a person found to be a Long-Term Offender, a period of supervision up to ten years after release from prison and completion of any period of parole.

The court must be satisfied that it would be appropriate to impose a prison sentence of two years or more; that there is a substantial risk that the offender will re-offend; and that there is a reasonable possibility of eventual control of the risk in the community. The court may conclude that there is a substantial risk of re-offending if the offender is convicted of sexual interference, invitation to sexual touching, sexual exploitation or exposure in relation to a child under fourteen, or other specified sexual crimes, and has shown a pattern of repetitive behaviour making it likely he or she will cause death or injury to, or inflict severe psychological damage on, other persons; or that his or her conduct in any sexual matter has shown a likelihood of causing injury, pain or other evil to other persons in the future. Breach of an order of long-term supervision is an indictable offence punishable by up to ten years imprisonment.

This procedure complemented the already existing Dangerous Offender procedure, in which an offender meeting criteria specified in the *Criminal Code* is jailed indefinitely. A Dangerous Offender application can be converted to a Long-Term Offender application if the court does not find the offender to be a Dangerous Offender, provided the Long-Term Offender criteria are met.

The Long-Term Offender designation, by imposing an additional period of supervision in the community after the end of a sentence, attempts to give the offender a structured opportunity to reintegrate into the community. Public safety is improved because the National Parole Board, working with the Correctional Service of Canada, can set stringent conditions on the behaviour of the offender.⁷⁶

7. Peace Bonds

Strictly speaking, a peace bond is not a type of sentence because it is granted by the court without having to charge or convict the person against whom it is made. However, reforms have recognized that the goals of deterrence and protection may be advanced by making provision for applications to the court in the absence of charges or convictions. In appropriate circumstances, where there is 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.⁷⁷

⁷⁶ "Protecting Canadians and their Families: Measures to Deal with High-risk Violent Offenders", Departments of Justice and Solicitor General, Canada, Autumn 1996.

⁷⁷ *Criminal Code*, subsection 810(1), sections 810.1 and 810.2.

B. Possible Reforms of Sentencing Policies and Sentencing Options

1. Addressing the Needs and Interests of Children in Sentencing Policy

The Badgley Committee found that, at the time, sentencing policy applicable to offences against children was inadequate because there was only a partial congruence between the nature of the acts involved, the charges laid and the sentences imposed.⁷⁸ There was a failure to identify and respond to the real nature of the offences committed against children, the characteristics of the offenders posing the greatest danger to them, and the harms caused. The *Criminal Code* now establishes, as a fundamental principle of sentencing, the general need to ensure that sentences are proportionate to the gravity of the offence and the degree of responsibility of the offender. As indicated, recent reforms addressing the most dangerous offenders have focused on the commission of offences against children and repetitive patterns of abusive behaviour toward them. The conditional sentence also allows for relatively long-term supervision and treatment of offenders not considered dangerous enough to warrant their removal or separation from the community. These measures demonstrate ways in which the sentencing and corrections policies of the criminal justice system can recognize, take into account and respond to children's needs for protection. Could other changes be made to provide improved protection? A number of factors might be considered.

First, the fundamental principle of sentencing, set out in section 718.1 of the *Criminal Code*, states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Most people expect the courts to view sexual offences against children as particularly reprehensible acts because they violate the fundamental obligation of society to protect those who cannot protect themselves. However, research shows that sentences for offenders who commit offences against children do not always reflect these views. In 1984, the Badgley Report identified a trend toward more lenient sentences for convicted sex offenders.⁷⁹ While many of the above measures were adopted with the aim of reversing that trend, more recent research based on current *Criminal Code* sexual offences demonstrates that sexual assaults against children are still generally punished less severely than sexual assaults against adults.⁸⁰

⁷⁸ Report of the Committee on Sexual Offences Against Children and Youths, *op. cit.*, footnote 4, Vol. 1, pp. 31-32.

⁷⁹ *Ibid.*, Vol. 1, p. 364.

⁸⁰ K.E. Renner, C. Alksnis, L. Park, *supra*, footnote 40. Comparison between sentences imposed in cases of sexual abuse against children and sexual assaults against adults showed significant differences in sentencing outcomes between the two groups. Men convicted of sexual abuse against children received lighter sentences than men convicted of sexual assault against adult women. Court records examined revealed that only thirteen percent of offenders who commit offences against children received a sentence of two years or more in contrast to thirty percent of offenders convicted of sexual assault against adult women. At the other end of the scale, sixty-one percent of those convicted of child sexual abuse received less than one year in jail compared with forty-four percent of those convicted for adult sexual assault, while an equal proportion of perpetrators in adult and child cases (twenty-six percent) received a sentence from one to two years.

A number of reasons were suggested by the researchers to account for these discrepancies. These include such factors as:

- the circumstances of the case -- when the victim is a child, there is far less “violence”; less frequent use of a weapon; seldom any physical injury; less physically intrusive sexual contact; and less resistance by the victim;
- procedural matters -- accused persons in cases involving children plead guilty more often; there is less medical evidence, fewer Crown witnesses, fewer court exhibits, more confusion of children testifying due to cross-examination, and there is less likely to be supporting police testimony at the trial; and
- characteristics of the offender -- in contrast to the accused in most sexual offences against adult women, the accused in cases involving child victims, is usually older, less likely to have a criminal record, more likely to be married, less likely to have a history of substance abuse, and more likely to be a family member or person well-known to the family.⁸¹

The conclusions reached in this study suggest that these factors influence the way courts punish offenders in cases of sexual abuse against women and children. Offenders who do not have a previous record appear to be treated less harshly by the courts. The long-term, often “invisible” emotional and psychological harm that usually results when children are victims is considered to be less serious than more obvious physical harm.⁸²

Children are particularly vulnerable to persons who may seek to re-offend against them or to harm other children. They may be at particular risk of further harm where the offender is a family member who returns to the family home after serving a sentence. As indicated, there is concern, specifically with regard to offences against children, that the previous good character or lack of a criminal record of offenders and other factors indicated may result in a tendency for the courts to underestimate the risk to children and impose more lenient sentences.

However, there have been several recent positive developments. First, some courts have handed down harsher sentences in cases involving the sexual abuse of children. For example, the Ontario Court of Appeal recently increased the sentence of a man convicted of a series of indecent assaults on children. Although no physical force was used and no physical injury was inflicted, the Court recognized the profound psychological harm that can result from sexual abuse and expressed the need for a denunciatory sentence.⁸³

Second, professionals have been progressively improving their abilities to identify offenders and offence characteristics posing the greatest risks and dangers to children. Studies have identified classes of offenders who prey on children and who are at greater risk of re-offending. The Long-Term Offender designation is itself premised on the ability of professionals to identify offenders and the likelihood that they will re-offend, based on their past conduct or on

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *R. v. Stuckless* (1998), 127 C.C.C (3d) 225, 39 W.C.B. (2d) 309 (Ont. C.A.).

patterns of repetitive abusive behaviour. Many believe that there may be no choice but to remove such offenders from society and to monitor, control, offer treatment to and supervise them for long periods both while incarcerated and after they are released. The importance and benefits of long-term supervision and treatment of some offenders in preventing their further re-offending is also becoming better recognized, as is the fact that incarceration alone, even for long periods, may not protect children as effectively as a program offering treatment and providing for control and supervision of the offender both during and for some period after incarceration. The Correctional Service of Canada devotes substantial resources to sex offender treatment. A number of sentencing options, including the conditional sentence, probation, and the Long-Term Offender procedure, contain provisions making treatment available and providing for longer-term supervision.

Third, there is increasing recognition, through research and experience, of the true nature and scope of the harms caused to children when they are abused, including the emotional injury that may be left even where no physical injury is visible.

In light of these factors and concerns, questions have arisen as to whether current sentencing policy adequately addresses the needs and interests of children. Suggestions have been made that 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.

2. 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. For example, the stated fundamental goal of sentencing -- the maintenance of a just, peaceful and safe society -- necessarily includes the maintenance of a just, peaceful and safe environment for children, who are part of that society. Similarly, the goals of deterrence and denunciation of unlawful conduct include denunciation and deterrence of unlawful conduct directed toward children. However,

these general statements do not draw attention to child protection and safety as fundamental goals and objectives. The inclusion of more direct references might assist the courts, in appropriate cases, to focus directly on the needs of child victims when crafting their sentences.

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.⁸⁴ The recent amendment to paragraph 742.1(b) of the *Criminal Code*, requiring sentencing courts to consider the fundamental purpose and principles of sentencing in determining whether to impose a conditional sentence, would thus more clearly also require the courts to consider the safety of the child victim in assessing whether an offender should receive a conditional sentence.

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.

3. 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. Subparagraphs 718.2(a)(ii) and (iii) deem the following to be 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.⁸⁵ Some are suggested below.

In recognition of the responsibility that all adults in our society have toward children, it might also be possible to amend section 718.2 to provide that the fact that the victim of a crime committed by an adult is a child is itself an aggravating factor for sentencing purposes. However, in light of the recent case of *R. v. McDonnell*,⁸⁶ it might be necessary to limit the

⁸⁴ Similarly, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, subsection 10(1), contains its own statement of the fundamental purposes of sentencing in relation to offences committed under that Act. It essentially repeats the statement of fundamental purpose found in section 718 of the *Criminal Code*, but specifically adds the goals of encouraging rehabilitation and treatment of offenders in appropriate circumstances.

⁸⁵ See C.-A. Bauman, "The Sentencing of Sexual Offences against Children", (1998), 17 C.R. (5th) 352.

⁸⁶ *Supra*, footnote 47.

application of such a provision to cases where the existence of a child victim is not itself an element of the offence.

In *R. v. McDonnell*, the Supreme Court of Canada held that there is no legal basis for the judicial creation of a subcategory of offence within a statutory offence for the purpose of imposing harsher sentences for conduct or harms. In this case, emotional harm, caused by a sexual assault charged under section 271 of the *Criminal Code* and carrying a maximum penalty of ten years imprisonment, could not justify a higher starting point for the sentence imposed because that harm could have formed the basis of a charge of sexual assault causing bodily harm under section 272, for which the maximum penalty was fourteen years imprisonment. This may mean, for example, that if an offender is convicted of sexual exploitation, the fact that the offender abuses a position of trust in committing the offence cannot be an aggravating factor in sentencing for that offence because an abuse of the position of trust is the essence of the offence itself. Allowing it to be an aggravating factor on conviction would, in effect, create a new minimum floor for sentencing for that offence not justified by the current wording of section 153 of the *Criminal Code*.

Making the fact that the victim is a child an aggravating factor in sentencing for any offence could arguably also conflict with the spirit of the *McDonnell* case in those offences that are already “child-specific,” such as sexual interference, invitation to sexual touching and sexual exploitation. However, it might be possible to designate the fact that a victim is a child as an aggravating factor for other offences, such as sexual assault. Further, the *McDonnell* case was concerned only with the *judicial* creation of a subcategory of a statutory offence for sentencing purposes. A new subcategory could still be created through legislation.

If the *McDonnell* case applies where offences are already child-specific, there are other possible ways of emphasizing aggravating factors which might not conflict with the spirit of the ruling. For example, the *Controlled Drugs and Substances Act* provides that, on conviction for certain offences under the Act, the court must consider as aggravating factors the fact that the offender committed certain offences under the Act in or near a school or any other public place frequented by persons under eighteen; trafficked in prohibited substances to a person under eighteen; or used or involved a person under eighteen in the commission of certain offences under the Act.⁸⁷ If the court is satisfied of the existence of an aggravating factor but chooses not to impose a sentence of imprisonment, subsection 10(3) of the Act requires the sentencing judge to give reasons for this decision. This might provide a precedent for similar statements in the *Criminal Code*. Suggestions for further aggravating factors 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;⁸⁸

⁸⁷ *Supra*, footnote 83, subsection 10(2).

⁸⁸ The Report of the Panel of Experts on Child Protection, recommending that exposure to family violence be included as a ground for protection under Ontario’s child protection legislation, noted that “[e]ducators, health professionals and agencies, as well as a review of literature, indicate that children exposed to violence are at an increased risk of abuse and long-

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

4. Expanding the Courts' Powers to Structure Conditions in Sentencing

Options included in this paper for possible changes to the current sentencing scheme should not be taken as advocating that the solution to the problems identified is simply to sentence more harshly or imprison offenders more readily. The deterrence of offences against children will require a range of responses far more complex than simply incarcerating offenders. Recent reforms have recognized, and experience has demonstrated, that deterrence and protection may be better advanced in some cases by controlling, supervising and making treatment available during incarceration, as well as in the community when they are given a conditional sentence, and for long periods after release. As previously discussed, the courts' powers of control and supervision at present include:

- imposing prison sentences (reformatory if sentenced to less than two years and penitentiary if sentenced to two years or more). The Correctional Service of Canada makes specific sex offender treatment available to those who are sentenced to penitentiary terms. It is not clear that specialized sex offender treatment programs are consistently available for offenders sentenced to terms of imprisonment in a reformatory;
- imposing conditional sentences (prison sentences served in the community);
- requiring an offender sentenced to less than two years imprisonment to comply with the conditions in a probation order for up to three years after the prison sentence or conditional sentence expires;
- making orders to delay the granting of parole to offenders who commit crimes against children. Correctional authorities may also delay the release from prison of certain offenders who commit crimes against children if there is reason to believe that they will commit further, similar crimes;
- making a finding that an offender is a Long-Term Offender, and ordering a period of specialized supervision for a period up to ten years after the prison sentence ends;
- making a prohibition order under section 161 of the *Criminal Code*;
- requiring a person who poses a danger to children to enter into a peace bond.

Together, these provide a wide range of options for the supervision and treatment of those who threaten the safety of children. However, the current scheme does not address all of the possibilities suggested.

When a conditional sentence is imposed, the court is able to impose terms to control, supervise and make treatment available for the period of the conditional sentence and for a further three years by way of a probation order when the conditional sentence expires. A probation order is also available following a sentence of less than two years imprisonment. If the offender poses a danger to the community and meets the criteria for being designated a Long-Term Offender, the court may sentence the offender to imprisonment for more than two years

term emotional harm”: *op. cit.*, footnote 35, p. 20.

and also structure up to ten years of additional supervision to commence when the offender is released.

However, a court confronted with an offence involving a child victim may view the seriousness of the offence and the need to protect the child to be such that a conditional sentence is not appropriate and that a sentence greater than two years should be imposed. If an offender is not a candidate for Long-Term Offender status, but the court wishes to ensure their continuing supervision and the availability of treatment upon release from prison in the interest of protecting the child or other children, 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.

Such an amendment would enable the courts, in the interests of protecting the child victim and other potential child victims, to provide for longer-term supervision and availability of treatment both in prison and after release. After treatment in prison, the parole board could decide to release the offender, who would be subject to the provisions of the court's order after the period of detention and any period of parole expire. It could be provided that the handling of a breach of the court's order could remain with the Correctional Service.

The option of longer probation could have significant cost implications as additional expense would be required to supervise and have treatment available for some offenders for longer periods during and after release from imprisonment. However, the potential additional expense would be somewhat balanced by cost savings where supervision and treatment succeed in preventing some offenders from committing further offences.

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. Reasons would have to be given if the judge's order is not followed, or the matter could be brought back before the judge if there is a change of circumstances. This process would assist the parole board by clarifying the need to focus on continuing protection for the child when making decisions to allow parole and in imposing conditions to apply on the offender's release on parole.

With respect to *Criminal Code* provisions allowing justices and courts to impose controls and conditions on potential offenders who have not been charged or convicted (the peace bond provisions), it would be helpful to determine to what extent these provisions are being used to provide effective protection for children, or what, if anything, could be done to improve their use.

5. Conditional Sentences Only in Exceptional Circumstances

In order to impose a conditional sentence, the court must be satisfied that allowing an offender to serve a sentence of less than two years imprisonment in the community will not endanger the community, which by implication includes its children. Parliament intended that the conditional sentence be imposed primarily for non-violent offenders. Although concerns were expressed initially that some courts imposed conditional sentences in inappropriate circumstances, it appears that, on the whole, appellate courts have begun to develop principles to guide judges in their decision-making process. As indicated above, the Supreme Court of Canada has agreed to hear six appeals of conditional sentences, and is expected to provide guidance on the proper interpretation of the conditional sentencing provisions.⁸⁹ In cases involving sexual offences, drug offences and offences involving breach of trust or abuse of a spouse or child, courts have fairly consistently stated that sentencing principles such as denunciation or deterrence make the granting of conditional sentences inappropriate⁹⁰ unless the circumstances of the offender or the offence are exceptional. Exceptional circumstances might arise where the offender is in very ill health, very advanced in age or suffering from mental health problems, and concerns about possible danger to the community can be met by imposing appropriate conditions.⁹¹ However, community concerns have arisen concerning specific applications even in these limited circumstances.

Consideration might be given to altering the criteria for imposing a conditional sentence to assist the sentencing court to focus on the need for the protection of child victims. This might be done, for example, by requiring the court to be satisfied that allowing the offender to serve the sentence in the community would not endanger the safety of any child, or by requiring the court to give special consideration to the continuing need to protect any child victim involved or any other child who could be at risk.

6. Better Recognition of Emotional and Psychological Harm Caused to Children

The harm caused by any form of child abuse is often detrimental to the child's future psychological and emotional development. But experience has demonstrated that such harm is often difficult to prove in relation to the originating offence, as was noted in the 1995 reform of

⁸⁹ *Supra*, footnote 67. S. Bindman, "House arrest rules coming," *Ottawa Citizen*, June 6, 1998, p. A3.

⁹⁰ See *R. v. Biancofiore* (1998), 35 O.R. (3d) 782 (C.A.).

⁹¹ See, for example, *R. v. Waldner* (1998), 209 A.R. 297 (Alta. C.A.).

the *Corrections and Conditional Release Act*. Emotional and psychological harm is often not readily apparent until the child is older, and may not appear until long after the causal event. Even as adults, it is often difficult to be open about the long-term damage.

Reports of inquest juries have recommended that emotional and psychological harms should be better recognized in the law. Research studies indicate that the psychological and emotional harms caused by an offence against a child may be equally, if not more, serious than the physical harm, and thus possibly should require lengthier sentences and/or some form of continuing protection for the victim. Some courts have recognized the emotional harm that results from sexual assault even in the absence of physical injury.⁹² Reference has earlier been made to the Ontario Victim's Bill of Rights, which states that an offender is liable for emotional distress and bodily harm resulting from an assault and presumes that victims of domestic or sexual assault have suffered emotional distress. Psychological harm is also recognized in the criteria for Dangerous and Long-Term Offender findings.

One option for better recognizing the emotional harm caused to children would be to provide that, in sentencing an offender for a "serious personal injury offence" against a child (as defined in Part XXIV of the *Criminal Code*), emotional harm may be assumed even in the absence of physical injury.

7. Sexual Exploitation: Section 153 of the *Criminal Code*

The offence of sexual exploitation prohibits certain sexual conduct in relation to a complainant who is fourteen years of age or more but under eighteen where the accused is in a position of trust or authority in relation to the complainant or where the accused is a person with whom the complainant is in a relationship of dependency. This offence is punishable by no more than five years on indictment, or six months on summary conviction. There have been suggestions that the maximum penalty should be raised to ten years on indictment as is the case with sections 151 and 152, so that the higher maximum sentence would be available for the most serious cases.⁹³ With the current maximum, there may be an implication that the worst cases involving complainants aged fourteen to seventeen could not be as serious as those involving complainants under fourteen years of age. The courts have stated that the conduct involved in committing this offence is serious and deserving of condemnation.

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 -- improving the experience of child victims and witnesses before the criminal courts and the reception of their

⁹² See, for example, *R. v. Nicholson*, [1993] A.J. No. 712 (Alta. C.A.).

⁹³ The Federal-Provincial-Territorial Working Group on Prostitution found merit in this argument in its *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (December 1998), p. 24.

testimony by the courts -- has been a major focus of legislative reform and judicial innovation over the past decade. This area includes the issue of competency of child witnesses to testify, testimony outside the courtroom or behind screens, the use of videotaped evidence, hearsay statements, and other assistance for child witnesses.

Legislation has also addressed research identifying the special needs and vulnerabilities of children and the nature, extent and effects of the trauma they may suffer as a result of their involvement in the adversarial atmosphere of the courtroom. In particular, legislative initiatives have responded to growing recognition of the possible adverse effect of that trauma on the memory of children, their ability to clearly articulate their recollections of events, and the accuracy and completeness of their testimony in court. The serious impact of trauma could also impair the ability of the courts to discover the truth, and may lead to greater difficulty in convicting an offender.

Legislation that recognizes the seriousness of this issue has been enacted to allow children to testify with support persons present; to prohibit their personal cross-examination 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 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.⁹⁴

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. As well, the successive appearances and questioning of the child in proceedings other than the trial itself may have the effect of increasing the child's trauma, thus defeating the purpose of the reforms. Despite the clear benefits these reforms have had, further reforms and improvements may be desirable.

⁹⁴ See generally, V. Schmolka, *Is Bill C-15 Working?* (Ottawa: Minister of Supply and Services, Canada, 1992); J.P. Hornick and F. Bolitho, *supra*, footnote 8, p. 117.

A. Competency of Child Witnesses⁹⁵

1. Background

Historically, the law and courts in Canada have generally tended to view the testimony of children as unreliable and to be approached with caution. Before a child could testify, section 16 of the *Canada Evidence Act* required the judge to conduct a special inquiry in order to determine whether the child understood the “nature of an oath.” If the judge found that the child did understand the nature of an oath, the child would be sworn; but if the judge formed the opinion that the child did not understand the nature of an oath, the child could be allowed to testify unsworn, if the judge formed the opinion that the child was “possessed of sufficient intelligence to justify the reception of the evidence” and understood the duty to speak the truth. If a child were allowed to testify unsworn, the Act still declared that corroboration by some other material evidence was required, and that without such evidence, no case could be decided only on the child’s unsworn evidence. This rule relating to the child’s unsworn evidence was reinforced by another rule set out by the Supreme Court of Canada in 1962, in the case of *R. v. Kendall*⁹⁶ -- in every case in which a child testified, the judge was required to warn of the danger of accepting the child’s uncorroborated evidence, even if the child was sworn. The Supreme Court stated that the justification for this requirement was the “mental immaturity” of children due to the underdevelopment of their capacity to observe and recollect events, as well as to understand questions and frame answers.

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.”⁹⁷ They observed that there were significant variations in capacity among different children, just as there were with adults.⁹⁸ 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

⁹⁵ It should be noted that the issue considered here is the need for a competency requirement specially directed at child witnesses. The issues of whether a religious oath requirement should be retained and whether witnesses should be required to swear an oath before testifying have been considered by the Federal-Provincial-Territorial Working Group on Diversity, Equality and Justice, and have been the subject of their reports.

⁹⁶ *Supra*, footnote 25.

⁹⁷ *Op. cit.*, footnote 4, Vol. 1, p. 32.

⁹⁸ *Ibid.*, p. 68.

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.⁹⁹

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 evidence 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 section 16 of the *Canada Evidence Act*. A competency test was still required, but the test itself was altered. In addition, the previous corroboration requirement applying to the unsworn testimony of children was deleted. The deletion of the corroboration requirement appeared to reflect an acceptance of the proposition that children were not inherently less truthful or reliable than adults and that the evidence of children should be approached on an individual basis. However, the common law corroboration warning requirement set out in the *Kendall* case continued to apply until 1993, when it was abrogated by an amendment to section 659 of the *Criminal Code*. Similarly, the change to the competency test set out in the *Canada Evidence Act* 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. If the judge determines that these two conditions are met, the child witness must testify under oath or solemn affirmation. 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.

In the case of *R. v. Marquard*,¹⁰⁰ the Supreme Court of Canada considered whether a trial judge had properly applied the competency test in relation to the proposed testimony of a young child who was three-and-a-half years old when her grandmother allegedly abused her. The trial judge had allowed the child to testify on a promise to tell the truth (in other words, unsworn),

⁹⁹ *Ibid.*, pp. 373-374.

¹⁰⁰ (1993), 25 C.R. (4th) 1; 85 C.C.C. (3d) 193 (S.C.C.).

after finding that she was not capable of understanding the significance of an oath. The Supreme Court allowed an appeal against the conviction and ordered a new trial.

Madame Justice McLachlin, writing a majority judgment, applied the same test of testimonial competency to child witnesses that has been traditionally applied to adult witnesses whose competency is questioned. She held that, in such cases, the inquiry is not limited to the witness's capacity to communicate at the time of trial but requires inquiry into whether the witness had the capacity to observe what was happening; the capacity to recollect what was observed; and the capacity to communicate what he or she remembers.¹⁰¹ The majority also approved the trial judge's repeated warnings to the jury that the child's evidence should be treated with caution because the child had not been sworn but was testifying on a promise to tell the truth.¹⁰²

Thus, the Court 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*. This result is interesting for two reasons. First, the requirement of a capacity to communicate had been added in response to the Badgley Committee's recommendation that a child should be permitted to testify if able to respond to simply framed questions - an intention that seems to have been frustrated rather than furthered by this decision. Second, the Court although having acknowledged earlier in *R. v. W.(R.)*,¹⁰³ the removal of the notion that the evidence of children was inherently unreliable or less reliable than that of adults and was therefore to be treated with special caution, now appeared to approve of the trial judge's words of caution based on the fact that the child had not been sworn. Madame Justice L'Heureux-Dubé, dissenting, expressed the view that the majority judgment ran counter to both the purpose of the legislative reform and the clear wording of section 16, as well as the trend to do away with the presumption of unreliability that had applied to children's evidence. With respect to the majority's comments of approval in relation to the trial judge's cautionary statements about the evidence, one commentator observed:

There is no corroboration requirement any more but evidently, according to the court, unsworn evidence, given on a promise, is not as valuable as sworn, and the trial judge is required to so charge the jury.¹⁰⁴

Other court decisions have also struggled with an interpretation of the competency test. The Ontario Court of Appeal, in the case of *R. v. Caron*,¹⁰⁵ stated that "capacity to communicate" means more than simply the ability to speak. 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,¹⁰⁶ and a willingness to relate the essence of what happened.¹⁰⁷ According to

¹⁰¹ *Ibid.*, p. 10 (C.R.). Previously, as pointed out by Madame Justice L'Heureux-Dubé in a dissenting opinion, a child's testimonial capacity could be established by demonstrating that the child possessed "sufficient intelligence" and understood the duty to speak the truth.

¹⁰² *Ibid.*, pp. 13-14 (C.R.).

¹⁰³ *Supra*, footnote 29.

¹⁰⁴ R.J. Delisle, "Children as Witnesses: The Problems Persist" (1993), 25 C.R. (4th) at 41.

¹⁰⁵ (1994), 94 C.C.C.(3d) 466; 19 O.R.(3d) 323 (O.C.A.).

¹⁰⁶ *Ibid.*, p. 326 (O.R.).

Caron, unresponsiveness -- a matter 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 by the Ontario Court of Appeal in the case of *R. v. Farley*.¹⁰⁸ Prior to the 1988 reforms, a child could testify unsworn if the judge determined that the child understood the duty to speak the truth and was possessed of sufficient intelligence to justify the reception of the evidence. The competency test introduced in 1988 provided that a child witness could testify unsworn, upon promising to tell the truth, if "able to communicate the evidence." The Court in *Farley* stated 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. It 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. 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.¹⁰⁹

The *Farley* 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. The distinction between sworn and unsworn evidence remains. In fact, the requirements for allowing unsworn evidence under the new legislation may be more difficult for a child witness to meet and require a more sophisticated level of understanding on the part of the child than had been the case before the reform. Any further attempt to legislate a standard for the reception of evidence given under a promise to tell the truth may be similarly unsuccessful.

2. 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.

A competency requirement which encompasses only child witnesses appears to be based on an assumption that the evidence of children is inherently less reliable than that of adults and must be viewed with suspicion -- in other words, a form of reverse onus: children are presumed not to be competent, and must prove that they are. Yet this assumption is not supported by research in this area, and has earlier been rejected by the courts. Empirical studies of children in

¹⁰⁷ *Ibid.*, p. 327 (O.R.).

¹⁰⁸ (1995), 23 O.R. (3d) 445 (C.A.).

¹⁰⁹ In the recent case of *R. v. F.(W.J.)*, judgment rendered October 15, 1999, per McLachlin, J. for the majority of the court.

courtroom settings suggest that, on the whole, they make competent witnesses. These studies include at least one which has indicated that court observers from all sides have noted the ability of children to testify in court under very difficult circumstances.¹¹⁰

In addition to the Badgley Committee recommendations favouring the removal of competency hearings for young children, the Ontario Law Reform Commission, in its 1991 *Report on Child Witnesses*, recommended the abolition of competency tests for child witnesses in civil proceedings. It also recommended that any presumption as to the incompetence of child witnesses should be abolished. It referred to similar actions that had been taken in Australia and at the federal and state levels in the United States, and to the absence of any special competency requirements for children in many countries of continental Europe, including France, West Germany and the Scandinavian countries. It referred to numerous studies that had established that children are as capable as adults of furnishing accurate accounts of events, and noted that the evidence of adults can also be subject to many of the frailties thought to characterize children's evidence.

The Commission also criticized the Bill C-15 reforms, asserting that the introduction of the promise to tell the truth failed to resolve the uncertainty, in the former section 16 of the *Canada Evidence Act*, concerning the distinction between sworn and unsworn evidence. They reasoned that the abolition of corroboration requirements for unsworn evidence left little reason for the maintenance of a competency inquiry, as no meaningful distinction remained between the tests for receiving sworn as opposed to unsworn evidence. They also noted that the test was too complex, in essence adding a third category to the two that had previously existed.

The Commission concluded that all witnesses should be allowed to testify on promising to tell the truth. Factors that might previously have been relevant to the question of competency, such as deficiencies in memory or narration, should affect the weight to be given to the evidence by the trier of fact. The presumption of incompetency should be replaced by a rebuttable presumption of competency, reflecting the view in the scientific literature that children are as reliable as adults. The presumption could be rebutted if the witness is incoherent, unable to communicate or of unsound mind. The Commission concluded that the distinction between sworn and unsworn evidence should also be abolished, as the abolition of corroboration requirements necessitates that both kinds of evidence be given the same weight. Abolishing the distinction would also serve to eliminate the possibility that the trier of fact would draw adverse inferences about the value of evidence depending on whether it was sworn or unsworn. As a result, in 1995, Ontario changed its *Evidence Act* to provide that a "person of any age is presumed to be competent."¹¹¹

Provision for the introduction into evidence of prior videotaped statements by child witnesses, discussed in detail below, lends further support to the argument in favour of a presumption of competency for child witnesses in Canada. Provided certain conditions are met, a prior videotaped statement is admissible in court without any requirement to establish that the witness was competent at the time the videotape was made. The circumstances surrounding the taking of the videotape, the statement itself, and the manner in which it is given are considered

¹¹⁰ See J.P. Hornick and F. Bolitho, *supra*, footnote 8, p. 47.

¹¹¹ *Ontario Evidence Act*, subsection 18(1).

sufficient to enable the court to assess its reliability and weight. In fact, not only is there no competency *voir dire* where a videotaped account has been given (so there is no need to establish a capacity to perceive and recollect, and so on), but in adopting the videotape, it need not be shown that the child perceived or recalled what he or she has said. Questions about the overall reliability of the statements are matters of weight for the trier of fact.¹¹²

The competency test and its interpretation by the courts appear 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.¹¹³

Some states of the United States, in addition to abolishing presumptions of incompetency generally by statute, have adopted specific provisions that address children who are victims of abuse. For example, the state of Connecticut provides:

No witness shall be automatically adjudged incompetent to testify because of age. Any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact.¹¹⁴

England has also passed criminal justice legislation for the purpose of abolishing the competency requirements that had previously applied to children.¹¹⁵ 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

¹¹² *R. v. F.(C.C.)* (1997), 120 C.C.C. (3d) 225; 154 D.L.R. (4th) 13 (S.C.C.).

¹¹³ *Federal Rules of Evidence*, rule 601; USCA # 3509(c) (Supp. West: 1997).

¹¹⁴ Conn. Gen. Stat. Ann. s. 54-86h (West 1994).

¹¹⁵ *Criminal Justice Act 1991*, subsections 52(1) and (2), amending the *Criminal Justice Act 1988* (by inserting section 33A) and the *Children and Young Persons Act 1933*, subsection 38(1). For a discussion of the changes introduced to the competency law by the 1991 amendments, see J.R. Spencer and R.H. Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed.) (Glasgow: Blackstone Press Ltd., 1993), pp. 62-65. The law was further amended in 1995 by section 168 and Sched. 9, para. 33 of the *Criminal Justice and Public Order Act 1994*, amending the *Criminal Justice Act 1988* (by inserting subsection 33A(2A)).

unless it appears to the court that the child is incapable of giving intelligible testimony.”¹¹⁶ There is no longer a requirement that the judge be satisfied that the child understands the duty to speak the truth,¹¹⁷ 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.

Eliminating the requirement for a competency hearing would place child witnesses on the same footing as adult witnesses. The court would hear their testimony, and then decide how reliable or believable it was. A commentator observed that:

If a child is too immature to understand the difference between truth and falsehood, or to explain it, common sense suggests that we should be cautious in believing anything that child tells us. But it does not suggest that we should simply refuse to listen altogether, particularly if the child appears to be the victim of a criminal offence and is the only witness except for the offender. Yet that is exactly the effect of the competency requirement....

...[H]owever gloomy a view we take of the evidence of children, surely the evidence of even the youngest child has some element of value and, as such is worth putting before the court....¹¹⁸

Subsection 16(5) of the *Canada Evidence Act* sets out the procedure that applies when the mental capacity of a proposed witness fourteen years of age or older is challenged. The party making the challenge has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under oath or solemn affirmation. If the presumption of incapacity applicable to children under fourteen were to be abolished, this section could be used to regulate a challenge to the competency of all witnesses. Appropriate grounds for a challenge could include those mentioned in the report of the Ontario Law Reform Commission, such as incoherence and an inability to communicate.

The *Ontario Evidence Act* still retains the oath and the promise to tell the truth. However, if a proposed witness under fourteen understands neither the nature of an oath nor what it means to tell the truth, the court is given a discretion to admit the evidence if they are satisfied that it is sufficiently reliable and the child is able to communicate the evidence.

Section 714.5 of the *Criminal Code* now allows the reception in Canada of the evidence of a witness given outside Canada if given either under oath or affirmation or “in any other manner that demonstrates that the witness understands that they must tell the truth.”¹¹⁹

¹¹⁶ In *D.P.P. v. M.*, [1997] 2 Cr. App. R. 70 (Q.B. Div. Ct.), it was held that a child is capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible (at p. 75).

¹¹⁷ See *G. v. D.P.P.*, [1997] 2 Cr. App. R. 78 (Q.B. Div. Ct.). The case also held that “intelligible testimony” is simply evidence that is capable of being understood, and that the question of whether a child is capable of giving intelligible testimony does not require input from an expert.

¹¹⁸ J.R. Spencer and R.H. Flin, *supra*, footnote 123, pp. 54, 56.

¹¹⁹ S.C. 1999, c. 18, s. 95, entered into force on June 17, 1999.

If the option of testifying on oath or solemn affirmation is not preserved or, if preserved, a particular child witness is unable to understand the nature of an oath or affirmation, the question remains whether it should be necessary for the child witness to indicate in some way that he or she understands the importance of giving a full and accurate account of what happened. In England, there is no such requirement, and the same position could be adopted in relation to criminal proceedings in Canada. Another option would be to allow young witnesses to testify upon being admonished by the judge to give a full and truthful account of what happened.¹²⁰

Finally, a word about corroboration. As discussed previously, a number of courts have continued to warn of the dangers of convicting on the uncorroborated unsworn evidence of a child, despite the repeal of all formal requirements for such warnings. Yet the burden of proof on the prosecution in cases involving child victims is the same as in other criminal cases: proof of guilt beyond a reasonable doubt. This is an exacting standard, and one that can be difficult to meet in any case that relies upon the evidence of a single witness.¹²¹ Even without special corroboration requirements or warnings, judges and juries are unlikely to convict an accused on the basis of the uncorroborated testimony of a child unless that testimony is cogent, credible and convincing. Arguably then, the burden of proof provides the accused with any necessary protection in cases where the child's unsworn testimony constitutes the only evidence of the crime.

B. Methods of Presenting Evidence of Child Witnesses

1. Testimony Outside the Courtroom or Behind Screens

Background

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 help in situations

¹²⁰ While recommending that the competency requirement for child witnesses should be dispensed with and that all child witnesses should testify unsworn, the Advisory Group on Video Evidence in England went on to say, “[a]lthough we do not believe that there should be a formal requirement in this respect, we think that judges may find it helpful to admonish child witnesses to give a full and truthful account of what occurred in terms suitable to their age and understanding. This could be to the effect of ‘Tell us all you can remember of what happened. Don’t make anything up or leave anything out. This is very important.’”: *Report of the Advisory Group on Video Evidence* (Home Office, London, December 1989; His Honour Judge Thomas Pigot, Q.C., Chairman), pp. 50-51.

¹²¹ See, for example, comments by the court on the unlikelihood of securing convictions based on a child's uncorroborated testimony -- even though believed -- because such evidence often fails to meet the burden of proof: K. Makin, “Some sex-assault trials abuse children again: judge,” *Toronto Globe and Mail*, May 18, 1998, pp. A1, A23.

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 might, 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.

In *R. v. Levogiannis*,¹²² the Supreme Court of Canada upheld the constitutionality of subsection 486(2.1). A unanimous Court stated that the goal of the criminal process is truth-seeking, and the evidence of all involved in the process must be given in a way most favourable to eliciting the truth. The Court recognized that the court process was in many instances failing children, particularly victims of abuse, who are subjected to further trauma as participants in the process. It further recognized that young complainants often suffer tremendous stress when required to testify in front of those they accuse. The purpose of subsection 486(2.1) was to get at the truth, and this goal would be enhanced if young victims could focus their attention on giving evidence rather than on the difficulties they were experiencing in facing the accused.¹²³

The Supreme Court also addressed the concern that the section could interfere with the right of an accused to confront his or her accuser. It noted that in the United States, where a right to confrontation is specifically protected in the Constitution, the Supreme Court of the United States ruled that the right of confrontation may give way to the State's interest in the physical and psychological well-being of child abuse victims.¹²⁴ The Supreme Court of Canada stated that the trial judge has substantial latitude in deciding whether to permit the procedure, and that the evidence presented on the issue of whether out-of-court testimony should be allowed "need not take any particular form." The trial judge is not required to find that the child will suffer "exceptional and inordinate stress."¹²⁵

¹²² *Supra*, footnote 29.

¹²³ *Ibid.*, pp. 331, 333 (C.R.).

¹²⁴ *Maryland v. Craig*, 110 S.Ct. 3157, p. 3167 (1990).

¹²⁵ *Supra*, footnote 29, p. 338 (C.R.).

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 serve to advance a court's goal of truth-seeking. However, as the Ontario Law Reform Commission pointed out in its *Report on Child Witnesses*, 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.¹²⁶

Some courts have interpreted the test for allowing use of screens restrictively. For example, in one case, the Ontario Court of Appeal held that a trial judge erred in allowing a twelve-year-old complainant to testify from behind a screen because the complainant was only found, on a *voir dire*, to be reluctant to testify in front of a lot of people and the accused, rather than reluctant to give a full and candid account in front of the accused. Thus, the screen was not "necessary" in order for the child to give a full and candid account.¹²⁷

Concerns have been raised that the *voir dire* that is currently required can become complicated, possibly requiring parents, friends, social workers and psychologists to testify and be cross-examined about the nature, extent and significance of the fear and trauma the child is suffering.¹²⁸ The child may be required to articulate the nature of his or her fears, a process that may, in itself, add to the child's trauma.

Another area of concern is the impact of using screens in a particular case. Some prosecutors believe children find screens distracting, or that they are unwieldy, and choose not to use them. Some view the test set out in the subsection as a major obstacle to the use of these aids, and prefer to avoid undertaking the process. Some prefer not to use the devices because of an impression that the testimony of a child facing the accused or seen by the jury in person has more impact; and some fear that the trier of fact may draw an adverse inference against a child who appears afraid to face the court or the accused. Some defence counsel, however, suggest that the use of a screen can be prejudicial to the accused, as it may leave the impression that the child has reason to fear the accused.

Studies have indicated that the practical application of this provision varies considerably across the country.¹²⁹ In most locations, it is necessary to arrange for the space and equipment on a case-by-case basis, a logistical aspect of trial preparation that is both time-consuming and expensive. Even in locations where closed-circuit television is available, the facilities might not be used in cases involving child witnesses.

¹²⁶ Ontario Law Reform Commission, *Report on Child Witnesses* (Toronto: Ontario Law Reform Commission, 1991), p. 74.

¹²⁷ *R. v. M.(P.)* (1990), 42 O.A.C. 153, 1 O.R. (3d) 341 (C.A.).

¹²⁸ See J. Castel, "The Use of Screens and Closed Circuit Television in the Prosecution of Child Sexual Abuse Cases" (1992), 10 Can. J. Fam.L. 283, p. 288.

¹²⁹ V. Schmolka, *supra*, footnote 93, pp. 63-64.

On the other hand, a study of the effects of the 1988 reforms conducted by the London Child Witness Project, published in 1993,¹³⁰ while agreeing that these aids were used infrequently, pointed out that the children who did testify behind a screen “were happy to have been permitted that concession.”¹³¹ Of the 144 children in the survey, two-thirds indicated that not seeing the defendant would have made the experience easier for them.¹³²

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 rationale for older children or adolescents may be different. 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.

Options for change

Several options for reforming the law in relation to the use of screens and out-of-court testimony for child witnesses might be considered in order to improve the experience of child witnesses and facilitate the reception of their testimony.

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.

There are several models for such a two-pronged approach. The *Ontario Evidence Act* test requires only that the court should be of the opinion that the support “is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness.”¹³³ In its *Report on Child Witnesses*, the Ontario Law Reform Commission referred to legislation in the Australian Capital Territory which provides that the court may order that a child give evidence by closed-circuit television if “it is likely that the facts would be better ascertained by the use of such a device” or “it is satisfied that the child will suffer mental or emotional harm if required to give evidence in the courtroom.”¹³⁴

¹³⁰ Child Witness Project, *Three Years After the Verdict* (London, Ontario: London Family Court Clinic Inc., 1993).

¹³¹ *Ibid.*, p. 119.

¹³² *Ibid.*

¹³³ *Ontario Evidence Act*, section 18.4.

¹³⁴ *Supra*, footnote 124, p. 81, referring to the *Evidence (Closed Circuit Television) Ordinance*

In light of concerns about the complexity of evidence that must be produced to support an application to use the procedures, and the fact that the need to resort to a *voir dire* may inhibit use of the procedures, consideration might be given to eliminating the current application requirements and replacing them by a more automatic entitlement. Children could be entitled to testify via closed-circuit television or from behind a screen upon request, subject to the trial judge's discretion to order otherwise. This latter qualification would appear to be necessary if there is to be any change to the process, as it was a key factor focused upon by the Supreme Court in the *Levogiannis* case approving the current procedure.

The "full story" justification for these testimonial supports, as well as the goal of minimizing trauma, could support their presumptive availability. However, if these supports were to be made more automatically available, the question arises as to whether the upper age limit should be lowered from eighteen. It has been suggested that there is little justification for expecting that most persons aged sixteen or seventeen, for example, would be traumatized by appearing in court to the point that the coherence of their testimony would be adversely affected. For older children, screens or closed-circuit television could be made available, on application, if the judge is satisfied that it would be more likely to result in full disclosure or would be in the best interests of the witness.

Some jurisdictions have gone further and made the use of supports like screens and closed-circuit television mandatory for certain child witnesses. New South Wales -- where specially-equipped closed-circuit "video link" rooms have been set up so that child witnesses, when testifying, can see only the person who is speaking to them at any given time -- provides a model for such an option. The law in New South Wales states that in any criminal proceeding in which it is alleged that the accused has committed a "personal assault offence" on a child under the age of ten, the child *shall* give evidence by means of closed-circuit television.¹³⁵

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, regardless of the offence.

Another measure that might be taken to achieve a more frequent and consistent use of these procedures would be to provide dedicated facilities for use specifically in cases involving child witnesses or complainants.

1989 (A.C.T.).

¹³⁵ *Crimes Act 1900* (N.S.W.), s. 405D.

Where a screen or closed-circuit television is used, it might be useful for the judge to explain to the jury that the law provides for the use of these supports in the case of child witnesses. This might alleviate possible concerns on the part of the jury that there is “something strange” about the proceedings.

2. The Use of Videotaped Evidence

a. Videotaped statements and interviews

Background

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. The section now reads:

715.1 In any proceeding relating to an offence under section 151, 152, 153, 155, or 159, subsection 160(2) or (3), or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272, or 273, in which the complainant or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

In the case of *R. v. L.(D.O.)*,¹³⁶ the Supreme Court of Canada upheld the constitutionality of this provision. The Court characterized the provision as a response to the dominance and power that adults have over children, by virtue of their age, which is designed to accommodate the needs and safeguard the interests of young victims of various forms of sexual abuse, irrespective of their sex; make their participation in the process less stressful and traumatic; and aid in the preservation of evidence and the discovery of the truth.¹³⁷ The Court also stated that admission of a videotaped statement does not offend against rules of evidence prohibiting the admission of hearsay evidence and previous consistent statements. The Court viewed the provision as being consistent with the principles of fundamental justice because the judge retains a discretion to edit or refuse to admit a videotaped statement if its prejudicial effect outweighs its probative value. It also concluded that the choice of eighteen as the upper age of availability of the procedure was not arbitrary, but was consistent with laws defining the age of majority as eighteen and the special vulnerability of young victims.¹³⁸

Madame Justice L’Heureux-Dubé, in a concurring judgment, elaborated on a number of issues raised by this legislative innovation. In her view, child victims continued to face barriers in seeking justice through the court system. The unique circumstances of children, involving a power imbalance between the victim and the perpetrator, combined with the fact that there are

¹³⁶ *Supra*, footnote 29.

¹³⁷ *Ibid.*, p. 291 (C.R.).

¹³⁸ *Ibid.*

likely no witnesses to the crime other than the assailant and the young victim, make it difficult to attain truth in the court process. The purpose of the provision was to assist in discovering the truth by allowing the child's story to be told to the court; by focusing on the child's special needs and the protections necessary for the child to expose the truth; and by decreasing the stress caused to the child by being required to repeat the details of the incidents in successive interviews and testimony.

When the measure was introduced, testimony before a parliamentary committee suggested that admitting an earlier statement would provide a 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 ability to cross-examine the child when the statement is given. Once the witness adopts the statement, it becomes part of the witness's testimony as if it were given in open court.¹³⁹

The *L.(D.O.)* ruling also has potential value for accused persons. It established that an accused has the right to pre-trial access to any videotape of an interview with a child that is in the possession of the police. Also, the accused may introduce a videotaped interview with the child into evidence to show an inconsistency between the statements on the tape and the child's testimony in the courtroom, even if the Crown declines to seek its admission into evidence under section 715.1.¹⁴⁰

Thus, among the advantages of using videotaped statements include: (i) evidence can be "crystallized" at a point in time much closer to the incident in question, and therefore is likely to provide a fuller and fresher account; and (ii) 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.¹⁴¹

The considerable degree of acceptance and frequent use of videotaped statements (unlike the provision permitting use of screens and closed-circuit television) appear to be based on practical considerations. The viewing of the videotape does not involve a great deal of change for the judge and lawyers to accommodate. Unlike the use of closed-circuit television, it does not involve much physical rearrangement, or require court personnel to be educated in the uses of technology. Further, the use of videotaped evidence (such as videotaped confessions) has become more common in criminal cases, so the idea of receiving evidence in this way is not novel and not limited to children's evidence.

¹³⁹ *Ibid.*, pp. 301-318 (C.R.).

¹⁴⁰ N. Bala and H. McCormack, "Accommodating the Criminal Process to Child Witnesses," 25 C.R. (4th) 341, at p. 346.

¹⁴¹ Experience suggests that, in some cases, the playing of the videotape in court may bolster the child's confidence. Anecdotal accounts indicate that videotaped evidence reduces the amount of time children spend on the witness stand, and that defence lawyers generally take less time cross-examining when section 715.1 is invoked.

Issues raised in the case law regarding this section revolve around questions as to what constitutes “adoption” of the videotape, or what constitutes a “reasonable” period of time after the alleged offence within which the videotape must be made. There are also practical concerns, such as badly conducted interviews or inconsistent protocols used to produce the videotaped statements.

The Supreme Court of Canada in its recent judgment in *R. v. F.(C.C.)*¹⁴² considered the adoption requirement in section 715.1 and the effect on the admissibility of the videotaped statement if the child gives evidence at trial contradicting what he or she said in the videotape. The Ontario Court of Appeal had held that a contradiction would amount to a failure to adopt the part of the statement contradicted; therefore, the portion of the videotape containing the contradiction could not be used to establish the truth of that part of the statement. However, the Supreme Court of Canada disagreed.

Referring to its own previous conclusion as to the purpose of the provision in the case of *R. v. L.(D.O.)*, the Court concluded that a videotape is ordinarily more accurate than testimony at trial and enhances the court’s ability to find truth. The Court reiterated the benefits, for the goals of truth-seeking and minimizing a child’s trauma, of admitting the videotaped statement. With respect to an assault on a child three or four years of age, the Court emphasized that a video record may be the only way to present the child’s evidence, since the child may have little memory of the event or circumstances two years later. The Court also referred to a statement in Parliament during the second reading of Bill C-15 to the effect that the purpose of introducing the measure was to capture the child’s story when it is fresh in the child’s mind.

With respect to the adoption test itself, the Court stated that the test is satisfied if the child simply recalls giving the videotaped statement and asserts that he or she was trying to be truthful when the statement was made. The child does not have to verify the accuracy and content of the earlier statement. In light of the aim and purpose of section 715.1, any lack of recollection the child may have when testifying due to trauma and emotion increases the need for the videotaped evidence. It noted that children are prone to forget details as time passes, particularly at certain stages of ordinary child development, and that the videotaped statement made closer to the event is likely to be more accurate. The Court did not accept the argument that the videotape could not be used if the witness had an independent memory of the events, asserting that the combination of the prior videotape and the in-court testimony may result in a more complete version. The important issue is the reliability of the videotaped statement, and the section itself contains built-in guarantees of reliability. The videotape shows the witness’s demeanour at the time and therefore may substitute for the absence of an opportunity to cross-examine the child about events he or she has forgotten. If the child has no independent recollection, the trier of fact can be cautioned as to the dangers of convicting on the videotaped evidence alone.

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. Thus, the adopted statement and the evidence given in court become the testimony-in-chief. Any questions about the circumstances of the video, the truth of the statements, and their overall reliability are matters of

¹⁴² *Supra*, footnote 112.

weight for the trier of fact. If the witness makes statements during testimony contradicting the videotape, the videotaped statement may be given less weight but is not inadmissible. On the other hand, the trier of fact may find that the videotaped statement is more reliable than the testimony and prefer it. Finally, the trial judge has a discretion to exclude the videotaped evidence if it is felt that its prejudicial effect will outweigh its probative value.

Options for change

Several issues arise in light of the court judgments respecting the purpose and application of section 715.1.

In light of the position taken by the Supreme Court, particularly in emphasizing the guarantees of reliability inherent in a videotaped statement taken under the conditions specified in section 715.1, the question arises as to whether it should still be necessary for the child to formally adopt the statement. In *R. v. F. (W.J.)*, the child witness was emotionally traumatized to the point of being unable to testify and adopt the videotape.¹⁴³ The *Ontario Evidence Act* provides that a videotape may be admitted if the court is of the opinion that “this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness if the videotape is admitted.”¹⁴⁴

On the other hand, it may be argued that, where the child witness is able to testify, the adoption requirement is not unduly onerous, as the child need only recall giving the statement and does not have to verify its content and accuracy. In fact, the child’s adoption of the statement in open court may actually serve to enhance his or her credibility.

Another question is whether the videotape procedure should be made available to all child witnesses in criminal matters, regardless of the offence involved. The Ontario Law Reform Commission in its *Report on Child Witnesses* argued in favour of broadening the admissibility of videotaped interviews of child witnesses, subject to the judge’s discretion.¹⁴⁵ The Commission’s rationale for making the procedure more widely available was that it produces reliable evidence, reduces rehearsals of the evidence and coaching of the child, alleviates concerns about the child’s potential memory loss, and encourages guilty pleas.

Changes might also be considered in relation to the age requirements. Section 715.1 currently requires that the child must have been under eighteen when the offence is alleged to have been committed in order for the videotape to be admitted into evidence. Although the Supreme Court has ruled that the age of eighteen is an acceptable upper limit for the provision, the procedure may be considered by some to be inappropriate for children who were sixteen or seventeen at the time of the alleged offence, because they may be seen as more capable of recollecting and articulating details of past events, and coping with the trauma of testifying, than are younger children.

¹⁴³ *Supra*, footnote 109.

¹⁴⁴ *Ontario Evidence Act*, subsection 18.3(1).

¹⁴⁵ *Supra*, footnote 124, pp. 83-90.

Consideration could also be given to the development of guidelines or standards to be used by police and other professionals as to the appropriate methods of conducting the videotaped interviews in order to better guarantee that they will be admitted into evidence and provide the court with useful evidence. Examples of matters that could be addressed in guidelines or standards include: the timing of the interview (i.e. early in the investigation or after several other interviews have already been conducted); the style of questioning used (e.g. avoidance of leading questions); the order in which different professionals should interview children; the number of interviews that should be included on the videotape; and the suggested weight to be given to different interviews and/or to different types of questions. Better efforts might also be made to ensure that potential interviewers (e.g., police, child care workers) receive specialized training in how to conduct videotaped interviews with child witnesses.

b. Video depositions

Another option would be to expand the law to allow children to make video depositions to be used instead of their having to testify at trial. A number of jurisdictions, including Ontario and several of the American states, have taken the step of allowing a videotape of a child's testimony to become the child's evidence-in-chief. This could help to relieve child witnesses of the need to make multiple appearances and undergo repeated questioning in different proceedings. It would also assist in obtaining an account from the child closer in time to the alleged event.

In the United States, where the procedure is used in criminal proceedings in several states, the constitutional confrontation clause requires the presence of the accused during the taping, but the child at that time may testify through closed-circuit television to avoid face-to-face contact with the accused. In Ontario the procedure applies in civil proceedings. It involves the taking of testimony in an informal setting, and requires the trial judge and representatives of the parties to be present (but apparently not the parties themselves). An opportunity to cross-examine the child is provided.

Some jurisdictions, such as Scotland, go even further, allowing a videotaped deposition by the child with cross-examination conducted later by an independent commissioner appointed by the court.¹⁴⁶ The parties submit questions to be asked to the Commissioner. This procedure was recommended by the Royal College of Psychiatrists in England.¹⁴⁷ A somewhat similar procedure is also used in Israel.

If video depositions were adapted to criminal matters in Canada, the presence of the accused might be required. In this event, subsection 486(2.1) (which allows for the child to testify behind a screen or by closed-circuit television) could be made applicable to those proceedings. The witness would be available for cross-examination by the accused's counsel.

¹⁴⁶ *Prisoners and Proceedings (Scotland) Act*, 1993.

¹⁴⁷ Royal College of Psychiatrists: *The Evidence of Children*, Report CR44, January 1996.

3. Hearsay Statements

Background

The courts, in furtherance of 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 describing abuse they have suffered from being admitted into evidence for the purpose of establishing the truth of those statements. Traditionally, the courts did not admit such statements because it was thought that, being hearsay, they were not the best or most reliable evidence. Direct testimony from the victim under oath about the event was preferred to testimony from a third party about what the victim said outside of court, mainly because the victim could be cross-examined if he or she gave direct testimony.

However, in *R. v. Khan*,¹⁴⁸ 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, 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 surrounding the alleged assault before the court. The Supreme Court held further that the necessity requirement may be satisfied even if the child is able to testify, if expert evidence establishes that testifying in court will be too traumatic for the child. However, the Court suggested that the necessity requirement might not be satisfied if the child, in a new trial, was ruled competent to testify.

With respect to the issue of “reliability”, the Court stated that the issue should be determined by the trial judge taking into account all of the circumstances. Relevant considerations would include the timing of the statement, the demeanour, personality, intelligence and understanding of the child, and the absence of any reason to expect that the statement might be fabricated. In the Court’s view, the reliability test was satisfied in this case because the child had no motive to fabricate and was probably too young to have independent knowledge of the events she described; her story had emerged spontaneously; and there had been no suggestion of coaching or leading questions by her mother.

¹⁴⁸ *Supra*, footnote 29 (S.C.C.). In *R. v. Smith*, [1992] 2 S.C.R. 915, the Supreme Court clarified that the hearsay exception first articulated in *Khan* is not limited to statements of children in sexual assault cases. In this case, the Court admitted certain phone calls made by an adult deceased to her mother. The Court adopted the same test of reliability and necessity and pointed out that the statements were necessary because the maker of the statements was dead.

Subsequently a new trial was held, and the accused was convicted. At later disciplinary hearings before the Ontario College of Physicians and Surgeons, some four years after the alleged 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. At issue on a subsequent appeal was whether the necessity criterion was satisfied in light of the fact that the child had testified. The Ontario Court of Appeal ruled that the statement was properly admitted. Despite the earlier suggestion by the Supreme Court that a ruling allowing the child to testify might result in the necessity test not being satisfied, the Ontario court ruled that the fact that the child testified was relevant, but not decisive of the issue. Reasonable necessity does not mean unavailability. In the case of an alleged sexual assault on a child, necessity means the need to have the child's version of events before the tribunal that must decide whether the offence occurred and the need to obtain an accurate and frank rendition of the child's version of the relevant events. In this case, the child's inability to recall the circumstances demonstrated that she could not give her own full and frank description of the relevant events, thus establishing the necessity of admitting her out-of-court statement to her mother.¹⁴⁹

In *R. v. Rockett*,¹⁵⁰ the Ontario Court of Appeal summarized the circumstances under which necessity may be established: (i) the child is physically unavailable to testify; or (ii) the child is not competent to testify under section 16 of the *Canada Evidence Act*; or (iii) the experience of testifying will be unduly traumatic for the child; or (iv) it is unlikely that the child can give a coherent and comprehensive account of the events in court. However, necessity is not established solely on evidence that the Crown has decided not to call the child to testify.

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. In *R. v. B.(K.G.)*,¹⁵¹ a majority of the Supreme Court changed another long-standing but related hearsay rule prohibiting the admission, to establish its truth, of a prior inconsistent statement of a witness made out-of-court and not adopted by the witness in court. The majority held that even if not adopted, a prior inconsistent statement may be admitted to prove the truth of its contents if certain conditions are met. In essence, the new rule states that the necessity criterion outlined in the *Khan* case is met by the fact that a witness has recanted his or her prior statement. The inability to obtain the evidence of a recanting witness was held to be sufficient to establish the necessity of receiving the hearsay statement. Sufficient circumstantial guarantees of the statement's reliability were still required. In the *B.(K.G.)* case, the statement was recorded on videotape which had sufficient inherent circumstantial guarantees of reliability, and the witness could be cross-examined at trial.¹⁵²

In *R. v. B.(D.C.)*,¹⁵³ the Manitoba Court of Appeal took a further step, holding admissible a ten-year-old child victim's previous *consistent* statement to a school counsellor about the abuse she had suffered. The three judges each issued separate decisions. One was

¹⁴⁹ *Re Khan and College of Physicians and Surgeons of Ontario*, *supra*, footnote 29 (O.C.A.).

¹⁵⁰ (1995), 99 C.C.C.(3d) 31 (O.C.A.); *aff'd* [1996] 3 S.C.R. 829, 110 C.C.C. (3d) 481.

¹⁵¹ [1993] 1 S.C.R. 740, 19 C.R. (4th) 1; 79 CCC (3d) 257.

¹⁵² See also *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764; 42 C.R. (4th) 133.

¹⁵³ (1994), 91 C.C.C. (3d) 357 (Man. C.A.).

prepared to rule that the child's previous consistent statement to the counsellor was admissible for the purpose of enhancing the child's credibility (but not for its truth) if it amounted to a child's previous complaint of sexual abuse. The rationale for this approach was, essentially, that the change would be consistent with evolving views about children's evidence expressed by the courts, particularly the Supreme Court of Canada, recognizing that standards applied to assessing the credibility of adults should not necessarily apply when assessing the credibility of children; that the evidence of children is not inherently unreliable or to be approached with special caution; that such evidence should not automatically be discounted; and that the evidence of all witnesses should be assessed by reference to criteria appropriate to their mental development, understanding and ability to communicate.

Another judge in the *B.(D.C.)* case went even further, concluding that, provided the child who made the earlier complaint and the recipient of the complaint both testify and can be cross-examined, evidence of the earlier complaint would be admissible for all purposes, including the truth of its contents.¹⁵⁴ In this judge's view, whether videotaped or not, if the previous statement adds something to the evidence the child gives in the courtroom (for example, where the child cannot recall the full story), it is not redundant and, like a videotape made admissible by statute, a non-videotaped statement of a similar nature should also be admissible in principle if its contents can reliably be proved. The judge did not appear to require satisfaction of a "necessity" test in addition to "reliability" as a required element of admissibility. The third judge expressed the opinion that the statement was properly admitted but was not prepared to agree with one or other of the views of the other judges as to the use that might be made of the statement. He did, however, conclude that it was time for the courts to recognize that evidence of a child's spontaneous account of sexual abuse might be relevant to the issue of the child's credibility and should be admitted.

Although perhaps difficult to apply to other cases because of the differing judgments and the fact that their decisions related to an issue that was not directly raised as a ground of appeal, the case is another example of the courts' evolving attitudes toward accommodating formerly inflexible rules of evidence to the developmental needs and characteristics of children. The trend toward recognizing the difficulties children face in providing courtroom testimony and the need for flexibility in rules of evidence to enable them to give a full account of the events, in the interest of protecting children and seeking the truth, amounts to the incremental evolution of the law toward the position advocated by the Badgley Committee. Well before the courts began the movement to reform the hearsay rules, the Committee had recommended that the following rule be adopted:

1. A previous statement made by a child when under the age of fourteen which describes or refers to any sexual act performed with, on or in the presence of the child by another person.
2. Is admissible to prove the truth of the matters asserted in the statement.
3. Whether or not the child testifies at the proceedings.

¹⁵⁴ See D. Deutscher, "*R. v. B.(D.C.): A Pigeonhole Without a Principle*," *Manitoba L. J.*, Vol. 24, No. 2, pp. 477-478.

4. Provided that the court considers, after a hearing conducted in the absence of the jury, that the time, content and circumstances of the statement afford sufficient indicia of reliability....¹⁵⁵

The result of these cases and the recent *F. (C.C.)* and *F. (W.J.)* decisions is that the content of a child's disclosure to another person alleging crimes against the child is admissible at trial to prove the truth of the disclosure if the child is physically unavailable; if the child is ruled not competent to testify; if the experience of testifying will be too traumatic for the child; if the child is traumatized to the point of being unable to testify;¹⁵⁶ or if the child does testify but it is unlikely the court will receive the whole story (which would, presumably, include the situation found in the case of *B. (K.G.)* where the witness recants a previous complaint). It is unclear whether the statement may be admitted if the child is ruled competent to testify and can testify reasonably coherently about the events, but the trend of authority is to admit the statements, either as a previous consistent statement in accordance with the case of *B. (D.C.)* or in accordance with the decision of the Ontario Court of Appeal in *Re Khan and College of Physicians and Surgeons of Ontario*, if the trial judge believes for any reason, such as the child's forgetfulness, that the child's in-court testimony will not provide the whole or best story available.

The rationale in the recent *F. (C.C.)* decision, although dealing with the admissibility of a prior videotaped statement under section 715.1 of the *Criminal Code*, calls into question the one qualification under the head of necessity that, according to the Supreme Court in the *Khan* case, could justify a refusal to admit an out-of-court statement: the situation where the child is ruled competent to testify and does so. The *F. (C.C.)* decision emphasized that, if the prior statement is found to be reliable in all of the circumstances, it should be admitted so the trier of fact can have the most complete account possible in furtherance of its truth-seeking role. The prior statement is to be considered part of the child's testimony, and it is for the trier of fact to weigh the testimony and decide what parts of it to accept or reject.

Options for change

Underlying the recent cases on the admissibility of child victims' out-of-court statements appear to be the goals of making participation in criminal proceedings less traumatic for child witnesses and assisting courts in exercising their truth-seeking function. The cases recognize that a statement made close in time to the alleged offence may provide the most accurate and complete account of the events. Taken together with section 715.1 of the *Criminal Code* (which allows for the admission of a child witness's prior videotaped statements in certain cases), out-of-court statements made to third parties by children alleging crimes committed against them could arguably be admitted into evidence to prove the truth of the statements, provided the statements were made in circumstances supporting a conclusion that they are reliable. The additional "necessity" criterion, articulated in some of the cases, could be removed.

¹⁵⁵ *Op. cit.*, footnote 4, Vol. 1, p. 71, rec. 21.

¹⁵⁶ *R. v. F. (W.J.)*, *supra*, footnote 109. Where it is self-evident that the child is unable to testify, special evidence of necessity is not essential.

Some trial decisions indicate that Crown counsel have understood the rule in *Khan* to mean that out-of-court hearsay statements are not admissible when the child testifies because the necessity test is not met. On the other hand, one judge in *R. v. B. (D.C.)* held that a previous consistent statement of a child, amounting to a complaint of a crime committed against him or her, should be admissible to prove the truth of the previous statement, in order to ensure the courts are provided with the most complete account available.

This is essentially the effect of the current section 715.1 of the *Criminal Code* in relation to videotaped records of what the child said. Of course, in the case of prior videotaped statements, the court is provided with a verbatim record of what the child said and an opportunity to assess the child's demeanour at the time the statement was made. 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.

If the goal of admissibility is the pursuit of truth, it may be that a child's out-of-court statements should be admitted and their weight determined by the trier of fact, whether or not the witness testifies or can remember the events or offer a coherent and comprehensive account of what happened. If the witness is ruled incompetent or is otherwise unavailable, the statement would be admissible (if it meets the reliability test), because it is the only available account of the child's version of events and its circumstantial reliability compensates for the absence of an ability to cross-examine. If the witness is testifying, he or she can be cross-examined, providing an even stronger justification for admitting the statement. Provided the trial judge retains a residual discretion to refuse admission of the statement if the judge believes that its prejudicial effect outweighs its probative value, eliminating the necessity test would not conflict with the principles of fundamental justice. Admitting such statements would recognize that the ability of children to retain details in memory is more susceptible to deterioration over time, and would be consistent with a rationale underlying the courts' approval of the legislation admitting videotapes -- the desire to preserve evidence when it is fresh and contribute to the discovery of truth. It would also recognize the other rationale underlying recent judicial reform of the law, that children must be protected in the court process to be able to effectively tell their stories.

The Ontario Law Reform Commission, in its *Report on Child Witnesses*, recommended that, provided the presiding judge is satisfied a hearsay statement of a child is sufficiently reliable, it should be admitted into evidence.¹⁵⁷

Thirty-three states in the United States have enacted special child hearsay exceptions. Most specify as a condition only that the judge should find that the time, content and circumstances provide sufficient indicia of reliability. Most are specifically stated to apply both when the child does and does not testify. Various age limits of the children at the time of trial are specified for the statements to be admissible. Many of the statutes require notice to the accused if it is intended that the statement will be used and the child will not be testifying. Many require corroboration of the statement if it is admitted when the child does not testify, no doubt addressing the accused's constitutional right of confrontation and the inability of the accused to

¹⁵⁷ *Op. cit.*, footnote 124, p. 68.

cross-examine either when the statement is made or at trial, or possibly reflecting a concern about the appearance of justice if an accused were to be found guilty purely on the basis of hearsay testimony about a child's complaint.¹⁵⁸ However, the latter possibility did not appear to trouble the Supreme Court of Canada in similar circumstances in the *Khan* and *B.(K.G.)* cases.

One option would be to legislate that, whether or not the child testifies, the child's out-of-court statement should be admitted simply if the trial judge determines that the time, content and circumstances of the making of the statement are sufficient indicia of its reliability. Another option would be to leave the courts to continue developing the law based on the principles they have accepted and articulated in the series of cases discussed above.

4. Other Assistance for Child Witnesses

As indicated above under "Response of the government to the Badgley Committee Report," 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. The Code also enables a judge, on application, to allow a "support person" of the child witness's choice 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.

These types of assistance are now available only in relation to trials of sexual offences and offences involving violence against the person. It might be preferable to make them available to child victims and witnesses regardless of the offence being tried, if this would help reduce their trauma and enable them to testify more fully and accurately.

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.¹⁵⁹ One suggestion is that these concerns might be left to the courts to address directly on their own initiative, with the co-operation of counsel, since the courts are in the best position to develop appropriate guidelines for questioning children and to enforce them.

5. 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,

¹⁵⁸ NCCAN Clearinghouse, Child Abuse and Neglect State Statute Series, *Child Hearsay Exceptions*, Vol. IV, No. 22 (1996).

¹⁵⁹ See "Children as Witnesses." Child Abuse Prevention & Counselling Society of Greater Victoria (February 23, 1999).

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 more but under the age of 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.¹⁶⁰ 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 girl fourteen years of age or more and under sixteen, 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.¹⁶¹

The age of consent in the United States and Australia is generally sixteen,¹⁶² which is also the age in England.¹⁶³ In other European countries, the age varies depending on the country and

¹⁶⁰ Per McEachern C.J.B.C., dissenting in the result, in *R. v. Sharpe*, [1999] B.C.J. No. 1555 (B.C.C.A.). Vancouver Registry No. CA025488.

¹⁶¹ L. Futerman, “Ministers to tackle question of proper age for sex,” *Ottawa Citizen*, December 5, 1997, p. 1.

¹⁶² In the United States, the age of consent for crimes involving sexual penetration of a child by an adult is sixteen or over in all but two states (it is fourteen in only one state, fifteen in another).

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 (in the absence of a relationship of trust, authority or dependency, or other specific exploitative situation), it may fail to take into account the fact 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.

6. 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."¹⁶⁴ 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. The *Criminal Code* might be amended to

The age is seventeen in six states and eighteen in twelve states.

¹⁶³ *Sexual Offences Act*, 1956, s. 6(1).

¹⁶⁴ *R. v. Bauder*, (1997), 126 Man. R. (2d) 32; leave to appeal to Supreme Court of Canada refused: [1997] 3 S.C.R. xiii.

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.

This paper is intended to provide technical background information on issues concerning child victims. Readers are reminded that written responses to the questions raised in the shorter consultation 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.