

# MISSING WOMEN COMMISSION OF INQUIRY

## POLICIES AND PRACTICES IN THE TREATMENT OF VULNERABLE AND INTIMIDATED WITNESSES

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A POLICY DISCUSSION REPORT PREPARED FOR THE  
MISSING WOMEN COMMISSION OF INQUIRY  
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### **Statement of Purpose**

*This paper is a research report prepared by the Missing Women Commission of Inquiry to provide background information and to assist in deliberations on potential recommendations for change.*

*The content of the report does not necessarily reflect the views of the Commissioner and Commission staff and, in particular, no conclusions have been reached on the issues raised in this report.*

*The Commission invites public input on the issues, policy options and questions raised in this report and other issues within its terms of reference by May 31, 2012.*

## INTRODUCTION

The missing and murdered women from the Downtown Eastside who are the subject of the Missing Women Commission of Inquiry shared a number of characteristics that made them particularly vulnerable to violence or subject to intimidation. Many were engaged in the survival sex trade and addicted to drugs and/or alcohol. Most lived in insecure circumstances because of poverty and drug use, where they were very dependent on their customers and their drug dealers. A high percentage of these women relative to the general population were Aboriginal or racialized. These intersecting factors translated to social inequalities that placed these women at high risk of violence. In other research papers prepared for the Inquiry, we have referred these factors as creating a “cycle of distress.”<sup>1</sup>

It has been well documented that women in the Downtown Eastside are likely to experience repeated assaults, sometimes by the same perpetrator, and that they are vulnerable to serial predation. And of course, the missing and murdered women who are at the heart of the Commission suffered violence in their disappearances, which in some cases included sexual violence.

These women were also likely to have been involved with the criminal justice system. However, the same factors contributing to women’s marginalization may deter their participation in the criminal justice system when they themselves are victims. Those who are intoxicated or in withdrawal at the time of an assault may be unable to provide a consistent narrative of what happened, a situation magnified if a woman also has mental health issues. They may also be seen as inherently unreliable because of their engagement in illegal activities. Women who are difficult to maintain contact with are also difficult to protect.

In legal parlance, these factors together may serve to make a potential witness in criminal justice processes particularly vulnerable or intimidated. Vulnerable witnesses are those who, because of their personal characteristics, may have difficulty testifying in a regular adversarial trial process. Intimidated witnesses are those who are unwilling to participate because they fear retaliation for their role in identifying or testifying against offenders. These factors may also affect a witness’s or victim’s perceived credibility.

Whether a vulnerable or intimidated witness participates in the criminal justice system may significantly influence whether the accused is brought to justice. For example, Appendix A of an internal review by the Vancouver Police Department (VPD), a compendium of reported cases of violence against sex workers in the Lower Mainland not attributed to Robert Pickton, shows a number of documented instances in which women in the Downtown Eastside chose not to report an assault

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<sup>1</sup> Missing Women Commission of Inquiry, *Police Protection of Vulnerable and Marginalized Women*, February 2012, <http://www.missingwomeninquiry.ca/reports-and-publications/>.

because they were either vulnerable and/or intimidated, or because they were not believed to be credible witnesses.<sup>2</sup>

Increasing the willingness and ability of vulnerable and intimidated witnesses to participate in police investigations and to testify at trials could greatly facilitate more frequent and earlier convictions of repeat criminal offenders. Vulnerable and intimidated witnesses may require additional supports during initial investigative procedures. Intimidated witnesses may also require supports during the trial process: the trial process and measures designed to enhance the rights of the accused and prevent wrongful convictions may serve to re-traumatize or exclude vulnerable and intimidated witnesses. If the best evidence in criminal prosecutions is to be brought forward, the law of evidence may have to adapt to facilitate participation by vulnerable and intimidated witnesses.

In Canada, a number of special measures have been put in place to make it easier for children, disabled adults, and victims of certain types of crimes, such as crimes of sexual and domestic violence, to testify. However, such measures are not regularly available to witnesses with drug and alcohol addictions or to those engaged in survival sex work.

Limited protections such as publication bans and peace bonds exist under the Canadian common law system to protect the identities and the safety of those involved in criminal trials. These may not be sufficient to convince witnesses who are street-engaged that they are safe testifying at criminal trials.

This paper attempts to assess how factors contributing to witnesses' marginalization are currently dealt with in the criminal justice system. Intimidation is often discussed along with vulnerability and receives less attention in legal literature; therefore, it is dealt with in this paper primarily in conjunction with vulnerability.

The paper is divided into three sections. The first section outlines some of the basic victims' rights that have been formulated in international instruments. The second section discusses issues that may arise for witnesses in the process of taking a report from the victim of an assault, from first contact with police to trial, with some comparison of BC practices to those in other jurisdictions. It also outlines the special measures in Canadian legislation that are available generally to vulnerable and intimidated witnesses. In the final section, a list of recommendations gleaned from discussions of best practices is included.

This paper reviews current law, policies and practices based on sources available at the time of writing. There are significant gaps. For example, while Aboriginal women are known to face high levels of violence, because of lack of data about

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<sup>2</sup> Doug Leopard, *Missing Women Investigation Review*, Vancouver Police Department, 2010, p. 366 – 371.

programs for Aboriginal or racialized women as witnesses, this paper does not specifically address this issue. Much of the literature on adults as vulnerable and intimidated witnesses concerns sexual assault, a focus reflected here, in part because there is very little information about how addiction and social marginalization have been accommodated as vulnerabilities. In suggesting changes that could be made to facilitate greater participation of vulnerable and intimidated witness at criminal trials, reference has been made where possible to practices in other jurisdictions. The Missing Women Commission of Inquiry welcomes additional information that would help to make this view more complete.

## 1. RECOGNITION OF WITNESS RIGHTS

In international and Canadian law, the rights of the accused to a fair trial are protected by a number of measures, including the presumptions that the accused has the rights to face his or her accuser in an open court before the public and media; to directly hear the allegations brought, usually through witness testimony in the case of criminal complaints; and to respond to complaints with evidence suggesting an alternate version of events. These protections exist to ensure that every accused enjoys the right to be treated as innocent until proven guilty under due process of the law. It is not the intent of this paper to review the large body of jurisprudence and commentary on the importance of protecting against wrongful convictions, or to discount its importance.

At the same time, there has been growing recognition that the rights of victims and witnesses are equally deserving of protection, and that they should not be sacrificed to the adversarial court process. While many of the statements made at the international level concern victims of and witnesses to gross violations of human rights, they apply equally in the context of other serious crimes.<sup>3</sup> The following are just some of the protections of witnesses' rights that have been codified in international instruments. All of them stress the importance of addressing not only the well-being but also the privacy of complainants.

Article 6 of the Declaration on the Basic Principles for Victims of Crime<sup>4</sup> states:

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where

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<sup>3</sup> UN General Assembly, Report of the United Nations High Commissioner for Human Rights on the Right to the truth, A.HRC.15.33, 28 July 2010.

<sup>4</sup> UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.

serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

The Declaration also provides:

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above [race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.]

Article 68 of the International Criminal Court Statute also requires that appropriate measures be taken to protect the safety, dignity and privacy, and physical and psychological well-being of victims and witnesses. It recognizes that victims of sexual violence must be considered vulnerable and in need of special attention in the application of protection measures available through the Rules of Court to facilitate their voluntary participation.

In 1996, the European Court of Human Rights extended its interpretation of Article 6 of the European Convention on Human Rights, which is primarily concerned with the rights of defendants in criminal proceedings, to include the rights of vulnerable witnesses:

*It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [right to a private life].*

*Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.<sup>5</sup>*

The Court has also stated that, "In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life."<sup>6</sup>

Various international courts have shown a willingness to amend traditional procedures such as *viva voce* testimony and cross examination when necessary to protect victims, and to put other, supplementary procedures in place. The former European Commission on Human Rights has found that it is not necessarily unfair to prevent the accused from cross examining vulnerable witnesses (including the complainant), provided there are other safeguards in place such as corroborating evidence or appropriate directions from the judge.<sup>7</sup> The European Court of Human Rights approved the use of anonymous testimony in one case involving the former Yugoslavia, although that decision has not been subsequently followed.<sup>8</sup>

Reviews have been conducted to assess the treatment of women who have been raped or experienced other forms of sexual and gender-based violence in the International Tribunals on Rwanda and Yugoslavia. Among the best practices proposed is the need to take steps to protect victims and witnesses from retribution not only before and during trials, but from the time that the complainant comes forward.<sup>9</sup> These reviews also suggest a wide range of sensitivity training for all

<sup>5</sup> *Doorson v Netherlands* [1996] 22 EHRR 330, at para 70.

<sup>6</sup> *Baegen v Netherlands* [1995] A/327-B, at para 77.

<sup>7</sup> *HM Advocate v Nulty* [17 February 2000] 2003 SCCR 378.

<sup>8</sup> *Prosecutor v. Duso Tadic*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Case No. IT-94-1-T, 7 May 1997.

<sup>9</sup> Eva Gazurek and Anne Saris, *The Protection of Women as Witnesses in the ICTR*, Coalition on Women's Human Rights in Conflict Situations, 2002.

persons responsible for dealing with victims of sexual violence to prevent additional trauma to victims.

The UN Handbook on Justice for Victims was written with the aim of lessening the negative impact of law enforcement and judicial processes on victims. It notes that secondary victimization is a concern in a wide variety of contexts:

*The effects of victimization strike particularly hard at the poor, the powerless, the disabled and the socially isolated. Research shows that those already affected by prior victimization are particularly susceptible to subsequent victimization by the same or other forms of crime. These repeat victims are often found in many countries to reside in communities with high crime levels ....*

*Secondary victimization refers to the victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.*

*Institutionalized secondary victimization is most apparent within the criminal justice system. At times it may amount to a complete denial of human rights to victims from particular cultural groups, classes or a particular gender, through a refusal to recognize their experience as criminal victimization. It may result from intrusive or inappropriate conduct by police or other criminal justice personnel. More subtly, the whole process of criminal investigation and trial may cause secondary victimization, from investigation, through decisions on whether or not to prosecute, the trial itself and the sentencing of the offender, to his or her eventual release. Secondary victimization through the process of criminal justice may occur because of difficulties in balancing the rights of the victim against the rights of the accused or the offender. More normally, however, it occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim.<sup>10</sup>*

## Vulnerability of victims of sexual assault

Victims of crime are inherently vulnerable. Victims of crime may be rendered more vulnerable because of personal characteristics, circumstances in which the crime occurred, or the nature of the crime itself. This paper focuses on rape and other forms of sexual assault because of the prevalence with which women in the Downtown Eastside experience sexual violence. It has been internationally recognized that the nature of sexual assault renders victims particularly vulnerable.

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<sup>10</sup> *UN Handbook on Justice for Victims* (New York: United Nations Office for Drug Control and Crime Prevention, 1999), p. 5.

In Canada, most adult witnesses who are identified as vulnerable are those who have experienced sexual assault.

There are two aspects to the need for protection of sexual assault victims:

- physical integrity – because of the nature of the crime and the potential for retribution and stigmatization to discourage reporting, protection of the victim’s identity is important; and
- mental and emotional integrity – because of the trauma and loss of power and control experienced by sexual assault victims, fair treatment, respect, and avoiding re-traumatization or secondary victimization is critical.

Much as has been written on the secondary victimization of those who experience sexual assault.

*The experiences of secondary victimisation and, by extension, the measures required to prevent or minimise them, involve a wide range of actors including judges, prosecutors, lawyers and police personnel, medical professionals and providers of victim support services such as counselling. Secondary victimisation may and does occur at any stage of a victim’s involvement with the criminal justice system, from the reporting of a sexual assault to the medical examination and police interviews, to the prosecution and trial. Such diverse contexts have important implications for understanding the negative effects that secondary victimisation may have on a victim’s willingness to pursue her complaint and, therefore, for the chances for a successful prosecution. It also influences the types and range of responses needed.<sup>11</sup>*

## Reporting and prosecution of sexual assault

The effects of stereotyping and fear of secondary victimization should not be underestimated. Internationally, victims of rape and other sexual and gender-based violence are unwilling to bring complaints because of pervasive fears of negative experiences with justice systems.<sup>12</sup> In Canada, according to Statistics Canada, the rate of sexual offences reported to the police declined by 36% between 1993 and 2002; during this period it was also found that, compared to other crimes, fewer sexual offences proceed to charges and that adult sexual offenders were less likely than other violent offenders to be found guilty.<sup>13</sup>

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<sup>11</sup> *Jurcevic v. Croatia*, European Court of Human Rights, Application no. 42418/10, Amicus Brief submitted by Interights, p. 2-3.

<sup>12</sup> United Nations General Assembly, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk: Indicators on violence against women and State response, A/HRC/7/6, 29 January 2008.

<sup>13</sup> Rebecca Kong, Holly Johnson, Sara Beattie and Andrea Cardillo, *Sexual Offences in Canada, Statistics Canada*, Catalogue no. 85-002-XIE, Vol. 23, no. 6, July 2003.



Women are wary to report sexual assaults for a wide number of reasons, including:

- Fear of or threats by the offender;
- Social stigma of being a sexual assault victim [which is heightened if the victim is also a sex worker and reporting will result in public revelation of that];
- Fear of being disbelieved, especially if the abuser is in a perceived position of power or esteem in the community;
- Fear of being questioned about how they resisted the assault;
- Embarrassment, shame or blame for being sexually assaulted;
- History of negative experiences or mistrust of police or other authorities
- Concern about negative reactions, criticism, shame or judgment of family, friends, or community;
- Fear that their sexual and mental health history and other private aspects of their lives will be made public and become the focus of the investigation; and
- The feeling that the assault was not serious enough to merit reporting, a situation that may arise among those who have been repeatedly abused or exposed to frequent incidents of violence.<sup>14</sup>

Fear of reporting may be felt even more profoundly by sex workers or drug users, who may risk arrest themselves for engaging in illegal activities if they report a sexual assault. This leads to a culture of impunity for perpetrators and ensures that those already vulnerable will become more vulnerable, undermining the deterrent effect of criminal law and sentencing.

In addition to high rates of non-reporting on sexual violence, there are high attrition rates when cases are reported: many sexual assault complaints never make it to trial.<sup>15</sup> In Canada, over half of all *reported* sexual assault complaints in Canada drop out of the system during the criminal justice process. Only 42% of sexual assault complaints to police that are recorded as crimes result in charges, indicating that more than one out of two complainants is either not believed by police or unwilling to proceed with charges; of the cases that are prosecuted, convictions have occurred at a rate of 11% or less since 1994.<sup>16</sup>

Numerous international instruments confirm that states have an obligation to provide access to justice for victims of sexual violence and protection through all

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<sup>14</sup> Judith Daylen, Wendy Van Torgeren Harvey, and Dennis O'Toole, *Trauma, Trials and Transformation: Guiding Sexual Assault Victims through the Legal System and Beyond* (Toronto: Irwin Law, 2006), p. 183.

<sup>15</sup> Jo Lovett and Liz Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (London: Child and Women Abuse Studies Unit, London Metropolitan University, 2009); and Holly Johnson, *Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault* in Elizabeth Sheehy, ed., *Sexual Assault Law, Practice and Activism in a post-Jane Doe Era* (Ottawa: University of Ottawa, 2009).

<sup>16</sup> *Sexual Offences in Canada*, supra, p. 14.

stages of the criminal process.<sup>17</sup> The measures put forward internationally in the best practices reports and at various tribunals cited above are remarkably similar, and repeat a number of basic elements with regard to fair treatment, respect and protection of victims, including ensuring that relevant personnel undergo sensitivity training, keeping victims informed of all aspects of proceedings, providing victims a voice in proceedings, and allowing for compensation and restitution in domestic measures.

## Intimidation

Witnesses who are vulnerable may also be intimidated, but intimidation can involve a separate set of circumstances. Intimidation occurs when witnesses are threatened with retribution for reporting a crime. Most studies of intimidated witnesses have occurred in the context of international organized crime and mass human rights violations, but intimidation is also prevalent in intimate relationship violence. Most famously, witness intimidation has been the subject of movies and television shows involving witness protection programs. The witness protection practices such as identity changes and relocation are believed to be relatively rare in Canada, although little public information is available about them.

Some of the international recommendations for explicitly addressing intimidation include:

- Ensuring that witnesses and victims who are intimidated have a safety plan in place for emergency situations;
- For law enforcement agencies, engaging in relationship-building with communities where intimidation is common, so that contact between community members and police is not considered unusual or suspicious;
- Banning disclosure of a witness's identity during any proceedings in the criminal justice system, including through the use of publication bans and redaction of court and other materials;
- In extreme cases, allowing anonymous testimony, by affidavit or in court, or using pseudonyms;
- Using closed session testimony, or testimony via video link;
- When *viva voce* testimony is used in court, using face and voice distortion technology; and
- Relocating witnesses when necessary and possible.<sup>18</sup>

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<sup>17</sup> For example the United Nations Declaration on Violence Against Women; the European Community Convention on Violence Against Women; CEDAW General Recommendation No. 19: Violence Against Women (11<sup>th</sup> Session, 1992).

<sup>18</sup> United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime (New York, United Nations, 2008).

## 2. JUSTICE SYSTEM PROCEDURES

This section follows the sequence of contacts of the victim with the criminal justice system, from first reporting of an assault to the police, through charging, preparation for trial and trial. It attempts to assess whether there is special recognition of vulnerable and intimidated witnesses in practices, policies, and laws, and where particular steps could be taken. Under each topic there is discussion of existing policy as it compares with that of other jurisdictions. Where appropriate, best practices are highlighted.

Definitions of vulnerable and intimidated witnesses vary by jurisdiction. In this section, we will use the term “vulnerable victim/witness” to describe anyone who might have difficulty providing evidence by conventional means because of a difficulty communicating, and “intimidated witness” to describe anyone who is reluctant to testify for fear of reprisals.

### FIRST CONTACT WITH POLICE

The first frontline responders to many complaints of sexual violence are not police; they are rape crisis centres, shelters, community organizations and other groups that serve marginalized populations, hospitals or clinics. In some cases, personnel from these organizations can accompany complainants and support them while they make a report to police. Fear or mistrust of police may prevent victims from reporting crimes, sometimes for significant periods of time, resulting in delays that can affect the collection of evidence. However, there are also situations in which the victim of an assault will call for emergency assistance or present at a police station unaccompanied shortly after an assault has occurred, sometimes injured or in extreme distress. In these situations, police are generally responsible for taking a statement, conducting an investigation aimed at collecting evidence, and if appropriate, forwarding the charge to prosecution services for evaluation and possible approval.

Victims of sexual assault may decide to have forensic evidence collected (what is colloquially known as “getting a rape kit done”). Consent to medical procedures including collection of forensic evidence may be an issue if the victim of an assault is intoxicated and needs to be treated with appropriate sensitivity and victim care.<sup>19</sup>

The UN Special Rapporteur on Violence Against Women has found that the prevailing atmosphere at the police station when a woman reports a crime greatly

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<sup>19</sup> Sexual Assault Service, BC Women’s Hospital & Health Centre and Women Against Violence Against Women, *Have you been sexually assaulted? Information for Survivors of Sexual Assault*, Sixth Ed., April 2011; Baroness Vivian Stern, *The Stern Review* (London: Home Office, 2010).

influences whether the victim will pursue her complaint.<sup>20</sup> Not surprisingly, if a woman is treated with respect and sensitivity, the likelihood of her following through to give a statement and willingly participating in the investigation process is greatly increased.

A guidebook produced by the Commonwealth Secretariat for police training on violence against women and child abuse contains very thorough training plans for a victim-centred approach that bears in mind the victim's mental and physical needs. Among its recommendations are that responding officers should:

- keep preliminary interviews short,
- follow with a lengthier complaint interview, to be conducted by a woman (if the victim desires), and
- conduct any physical examinations away from police stations.

This guidance is echoed by a police service guide to vulnerable and intimidated victims for the United Kingdom, which requires police to provide victims of sexual violence with enhanced service.<sup>21</sup> In addition to using a functional definition of vulnerability that recognizes vulnerability may arise from specific crime situations, the guide lists specific “prompts” that would indicate a witness is more likely to be vulnerable because of individual characteristics or intimidation. For vulnerable witnesses, these include apparent difficulty communicating and understanding questions, as well as information that would indicate the victim is receiving social assistance benefits, is in an assisted living situation, or has a social worker. Prompts indicating that the witness may be intimidated include refusal to talk to police or reluctance to give a statement, that the person is a victim of sexual assault or that the incident is only one in a series of incidents. This is not to say that the identification system is always effective when dealing with people who are socially marginalized, as opposed to disabled. For example, it has been found that in cases of “stranger” rape, where witnesses would normally be automatically identified as vulnerable for experiencing sexual violence, police have in some cases failed to identify those in the sex trade as vulnerable.<sup>22</sup>

During the Bernardo Investigation into the rapes and murders of women in Ontario by Paul Bernardo, women who had been raped were interviewed about their experiences in dealing with police. The Bernardo Investigation Review found that the relentless demands of the investigation, the prosecution, the defence, and the adversarial court process were not inherently victim-friendly, concluding: “Without

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<sup>20</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, 12 February 1997, E/CN.4/1997/47, para. 22.

<sup>21</sup> Ministry of Justice (United Kingdom), *Vulnerable and Intimidated Witnesses: A Police Service Guide*, March 2011, p. 9 – 13.

<sup>22</sup> See Mandy Burton, Roger Evans and Andrew Saunders, *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies*, Home Office Online Report 01/06, p. 35.

respect, sensitivity, and support for the victim these forces can overwhelm and re-victimize the original target of the assault.” The Review went on:

*Many of the themes were common: the need for sensitivity on the part of the initial response officers and throughout the investigation; the tremendous difference that police sensitivity and training can make for the victim; the positive response to effective victim support services; the need to be informed regularly of the progress of the investigation and to learn of major events before hearing about them from the media; the importance of continuity of investigators; the importance of training and interview techniques to ensure initial full disclosure of the details of the attacks; concerns about the media, and frustrations with the court process.*

*The most important conclusion from all of this is the importance of training for all officers involved in the response to and investigation of sexual assaults, and the tremendous advantage for the victim of a consistent system of support, continuity, and information about the progress of the investigation and the prosecution.<sup>23</sup>*

The Bernardo Investigation Review made the following recommendations, based directly on the victims’ comments and observations:

- Training should be provided so officers will not be awkward with sexual assault victims;
- Training should be provided so officers will reassure sexual assault victims;
- The same officer should be responsible for follow-up and contact all the way through, so that there is continuity for the victim;
- Police forces should make sure that officers and other personnel are not pulled away at critical moments by other assignments or because they are prohibited from doing overtime;
- Police forces should make sure the victim has a point person; this increases the likelihood of the victim developing rapport with officers;
- Police should conduct interviews privately or with neutral support persons (not family or friends);
- It is important to make sure the environment for interviews is comfortable;
- It is important to make sure that there is someone available to the victim who can answer questions about process;
- Victim services should provide a single point of contact;
- Victim services may sometimes be in conflict because they are also there to support the adversarial process; in this case, referral to services that are outside the police force and dedicated only to victims’ needs is appropriate;
- In cases that span different geographic areas, victims should be put in touch with victim services in their neighbourhoods;

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<sup>23</sup> *Bernardo Investigation Review, Report of Mr. Justice Archie Campbell, June 1996, p. 235.*

- Victims would find it easier if there were greater continuity of Crown prosecutors throughout the trial process;
- Being informed, including being informed of issues before the police tell the media, is critical; and
- Media should be sensitive to the desires of victims not to be identified.<sup>24</sup>

The Commonwealth Secretariat guidelines for police also direct:

*After the report of sexual or physical assault, it is vital that the victim continues to be treated with respect as the investigation proceeds, even if sufficient evidence cannot be produced to enable a case to go to court. Although the primary objective of the police officer is to obtain information and samples for evidence, the victim has other immediate needs, including psychological support, physical treatment, and accommodation. Officers need to know how to deal with these or make referrals. The experience of police officers confirms that support of the complainant initially and during the investigation is key to continuing cooperation.<sup>25</sup>*

In the International Criminal Tribunal for Rwanda, one important issue was that witnesses usually received identity and other protection only once the authorities had assessed the value of their testimony. Protection granted only after disclosure often comes too late to guarantee the protection of the witness's identity. Instead, witnesses who are identified as intimidated or particularly vulnerable to retaliation should have their identities protected as soon as a potential witness comes forward or has been identified.<sup>26</sup> This may be a concern in a relatively small and close-knit community like the Downtown Eastside.

New Zealand Police have implemented a cognitive interview training program with a program of accreditation and workplace evaluation. These techniques stress asking open-ended questions during investigative interviews, allowing for a detailed response that is not influenced by the questioner and thus more accurate and less subject to "contamination"<sup>27</sup> through suggestion.

In the United Kingdom, considerable use has been made of videotaped statements taken early in the investigative process as evidence in chief for victims and witnesses requiring special measures, to obviate or lessen the need for testimony at trial.

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<sup>24</sup> *Ibid.*

<sup>25</sup> Commonwealth Secretariat, *Guidelines for Police Training on Violence Against Women and Child Abuse*, 1999.

<sup>26</sup> *The Protection of Women as Witnesses in the ICTR*, supra, p. 1.

<sup>27</sup> Yvette Tinsley and Elisabeth McDonald, *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges* (2011) 42 VUWLR at 726-727.

In both the United Kingdom<sup>28</sup> and Holland,<sup>29</sup> police performance is measured in terms of victim satisfaction: exit interviews or surveys are used to evaluate police performance. A system of performance evaluation administered by a neutral party external to law enforcement services can be an extremely valuable tool in assessing why victims are not reporting to police and what could be done to change this.

### **BC Law Enforcement Procedures in Responding to Victims of Crime**

Both Vancouver Police Department and Royal Canadian Mounted Police (RCMP) policies have some codified procedures for responding to victims of crime and identifying particular vulnerabilities associated with the individual characteristics of the victim or the circumstances of the crime. In particular, sexual violence and intimate relationship violence are highlighted as requiring particular sensitivity. For several years the Attorney General has had a mandatory enforcement policy on domestic violence or “K” files.

It is not known how much lifestyle considerations may factor into identification of victims and assessment of their needs or credibility in BC. Law enforcement policies in BC include general principles regarding treatment of witnesses but little in the way of detailed or step-by-step guidance, though these may be issues dealt with in police training.

### **Ministry of the Attorney General Policies for All Criminal Justice System Personnel**

General VPD policies (discussed below) are supplemented by the Criminal Justice System Response to Violence against Women and Children, and the Violence against Women in Relationships Policy (updated 2010). These two policies relate specifically to domestic or intimate relationship violence and stress that police should identify particular vulnerabilities and show sensitivity in responding to victims with special needs (understood in this context to relate to disability):

*The police may be the only chance for effective intervention in cases when the couple is elderly and abuse has been long term, or when cultural, religious, community or family values, sexual orientation or disability (physical or mental), make it difficult or impossible to seek assistance to stop the violence. In such situations, respectful and dignified treatment of the victims and an understanding of the dynamics of domestic violence are critical. Police must be sensitive and accommodating when dealing with victims/witnesses who have special needs due to isolation, mobility restrictions, and language or*

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<sup>28</sup> Stern Review.

<sup>29</sup> UN Handbook on Justice for Victims, supra, p. 58.

*communication abilities. It might be necessary to alter investigative procedures for victims with special needs.*<sup>30</sup>

The protocol for high risk offenders also recognizes potential victim vulnerability and intimidation by requiring that criminal justice system person develop a safety plan for victims.

Corrections personnel are also directed to be sensitive to the diverse needs of victims, including “aboriginal victims, visible minority victims, immigrant and refugee victims, lesbian/gay/bisexual/trans-gendered victims, victims with disabilities, elderly victims and victims who are isolated or in rural areas.”<sup>31</sup> Officers and Crown Counsel must also ensure that victim contact does not jeopardize the victim’s safety and may be made through an identified third party.

While neither those involved in sex work nor those with addictions are specifically mentioned in these policies, the recognition of diverse needs of specific groups indicates there could be room for consideration of their particular needs. The policy for those identified as having special needs specifies allowing support persons for victims and witnesses during interviews; assessing the risks to the victim, in concert with personnel of other relevant agencies such as welfare workers and corrections staff, including the possibility that new and unforeseen circumstances may develop; making referrals to victim services supports; and supporting detention and no contact orders for the accused. All of these considerations may be appropriate in cases where victims are psychologically distanced from the justice system or experiencing the effects of addiction.

### **Vancouver Police Department**

The Vancouver Police Department’s Regulations and Procedures Manual<sup>32</sup> contains general guidance on responding to crimes and taking evidence from victims and witnesses. As of March 2012, the Vancouver Police Department was actively engaged in approving a set of protocols ensuring that sex workers be treated with dignity and respect, which is discussed below.

Under the headings Incident Investigations<sup>33</sup> and Completion of Investigations<sup>34</sup> in the Manual, officers conducting the primary investigation are directed to inform the complainant or victim as to whether charges or further investigation will be requested. They are also to ensure that victims are advised of services available to

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<sup>30</sup> Ministry of the Attorney General BC, *Violence Against Women In Relationships Policy*, 2010, PSSG10-30, p. 18.

<sup>31</sup> *Ibid.* p. 30.

<sup>32</sup> *Vancouver Police Department, Regulations and Procedures Manual* (2009), online: <http://vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>, accessed March 23, 2012. References that follow are to paragraph numbers.

<sup>33</sup> *Ibid.*, 1.6.

<sup>34</sup> *Ibid.*, 1.6.8.



them. If secondary investigation is undertaken, the complainant is to be notified as to whether or not charges have been laid and approved by Crown Counsel.

The procedure under for domestic violence<sup>35</sup> notes:

*10. Where there is evidence indicating an offence took place, members shall submit a GO report to Crown Counsel recommending a charge even if no injury occurred and regardless of the desires of the victim or their apparent willingness to testify in a criminal prosecution. Victims shall not be asked if they want charges to be laid. **The consumption of alcohol or drugs by the victim or the suspect or the lack of independent corroborating evidence shall not in itself form the basis for exercising discretion not to recommend charges where reasonable and probable grounds exist.** Members shall indicate on the witness sheet of the GO report to Crown Counsel whether the victim will be a reluctant or hostile witness.*

*11. Members are cautioned that they have very narrow discretion for not recommending charges where reasonable and probable grounds do exist.*

(emphasis added)

Where information is received that as a result of an investigation the safety of a victim or witness is in real danger, members shall consider applying for protection under the Witness Protection Policy. This policy is administered by the Provincial Government and may be accessed through the Vice-Drugs Section. Members seeking protection for a victim or witness shall submit a report to the Deputy Chief Constable Commanding Investigation Division outlining all circumstances of the threat.<sup>36</sup>

Specific procedures are in place to allow Vancouver Police Department members to take “KGB” (sworn videotaped) statements from witnesses in the case of domestic violence; however, these may only be used in the event that a witness is later not available at trial.

There are also specific policies addressing hate crimes. Hate crimes are identified as such when perpetrators use spoken language or graffiti indicating the violent acts are motivated by racial, sexual or other prejudice. These policies may or may not be helpful in dealing with crimes against women who are vulnerable because they are involved in the sex trade, since perpetrators may not overtly express why the victims were chosen.

There is a provision for ride-alongs by community members for cooperative policing and educational purposes, which, while not directly applicable in identifying and

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<sup>35</sup> Ibid, 1.6(10).

<sup>36</sup> Ibid, 1.6.37(vi).

aiding vulnerable witnesses and victims, could be used to build community relations in order to enhance reporting of crimes.

The Diversity & Aboriginal Policing Section (DAPS) of the Vancouver Police Department responds to safety issues of specific and marginalized populations, including those engaged in the sex trade. A Diversity Advisory Committee whose members are drawn from community organizations provides consultative advice to this section. Aboriginal populations may be psychologically distanced from law enforcement not only because of historical racism, but also because of the role that the RCMP and other policing forces played in removals of children to residential schools and to Ministry care.

The DAPS' goals are to improve the following measurable policing and public safety outcomes for the populations it serves:

- over-representation in illegal behaviours
- over-victimization
- under-reporting of crimes
- participation in investigations and in court as victims/witnesses
- involvement in crime prevention activities
- provision of information/intelligence on criminals, crime groups and crimes
- perceptions of safety/fear
- confidence in the police.

The DAPS focuses on increased recruitment of police officers from the populations it serves, specialized training for officers, including co-training with populations (for example, Aboriginal community members), and relationship-building to achieve its goals. The DAPS participates in the Sex Industry Workers Safety Action Group (SIWSAG), which specifically aims to create informed strategies to improve the safety of those in the sex industry.

In March 2012, after consultation with WISH, PIVOT, Susan Davis, PEERS and PACE, the VPD released a draft of its Sex Work Enforcement Guidelines. These guidelines focus on balancing the needs of the community and the safety of sex workers. They recognize that by building positive relationships of mutual trust, sex workers will be more likely to report crimes, leading to increased safety and more willingness to share information about such serious crimes as human trafficking and gang violence.<sup>37</sup> While the guidelines do not specifically talk about witness vulnerability and practices to mitigate it, they do recognize that violent crimes against sex workers are common,<sup>38</sup> and that situations involving violence, exploitation,

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<sup>37</sup> Vancouver Police Department, *Sex Work Enforcement Guidelines*, prepared by Kristie McCann, Sergeant Richard Akin and Inspector Cita Airth, with the assistance of WISH, PIVOT, Susan Davis, PEERS and PACE, p. 3.

<sup>38</sup> *Ibid*, p. 4.

organized crime and human trafficking are high risk, requiring priority intervention. They direct that in any case where a sex worker speaks to a VPD officer or attends a police station alleging violence, an officer should be assigned to investigate. They also direct that officers escalate responses in higher risk situations and where previous attempts with less intrusive tactics have failed.

These guidelines are welcome as a codification of the recognition of sex worker vulnerability to violence, particularly in the face of discriminatory and stigmatizing social beliefs.

### Royal Canadian Mounted Police

The RCMP Operational Manuals also provides guidance for officers on sexual assault and puts in place specific provisions that recognize the need for sensitivity in dealing with sexual assault victims.

The federal manual<sup>39</sup> directs that divisions must receive adequate training in sexual assault investigations and have continual access to appropriate resource and training materials.<sup>40</sup> Only those with adequate training should investigate sexual assault complaints.<sup>41</sup> Complaints are to be investigated promptly, thoroughly and with sensitivity. Priority is to be given to the needs of victims in all cases, and medical and psychological services should be offered, as should victim services, where available. A sexual assault evidence kit used by the RCMP in such circumstances may be completed. Responding officers should use appropriate interview techniques and follow established procedures for video and audio taping statements. In particular, officers are advised to use their own judgment when formulating questions to solicit information that do not imply judgment of the victim. Standard criteria may be adapted to the situation and comprehension of the victim. The policy suggests walking the victim through the attacks in the initial report and asking for specifics regarding the behaviour, acts and repetition of acts by the accused.

The RCMP provincial “E” Division Operational Manual<sup>42</sup> provides further information about responses to sexual assault in BC. The Pacific Region Training Centre offers a 10-day course for sex crime investigators. The Operational Manual policy permits anonymous third-party reporting of crimes. Reports can also be made through community-based victim services agencies, although not through police-based agencies.<sup>43</sup> If a community agency reports an assault to the RCMP, it is given a tracking number, and the victim’s name can only be disclosed to the RCMP with the victim’s consent. After a preliminary assessment that cannot jeopardize

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<sup>39</sup> RCMP Operational Manual. References that follow are to paragraph numbers.

<sup>40</sup> Ibid, 1.3.

<sup>41</sup> Ibid, 1.5.

<sup>42</sup> Amended 2004-08-26.

<sup>43</sup> It should be noted that community-based agencies may not exist in many BC communities.

the identity of the victim, the RCMP may contact the community-based agency to see if the victim will speak to police directly. If the victim is unwilling to proceed, or there is insufficient evidence, the RCMP may advise the agency to notify the victim and provide the agency with a PRIME number. A victim can also report a sexual offence directly to a police-based victim service agency, which will generate a report and forward it to the police for investigation.

In all investigations that do proceed, officers are directed to use special sensitivity when dealing with specific communication needs and coordinate with victim services personnel. In the case of victims who do not agree to cooperate, officers are directed to use specific documentation procedures and to consider videotaping the victim's statement using the KGB procedure, during first response if possible. The discretion not to complete an investigation is very narrow.<sup>44</sup> A number of other provisions direct officers to provide contact information to keep victims and witnesses apprised of the status of the case, and to make appropriate referrals, including to transition houses.<sup>45</sup>

As is the case with VPD policies, consumption of alcohol by the victim or suspect, or lack of corroborating evidence, cannot be the basis for exercising discretion not to complete a full investigation and forward it to Crown Counsel. However, in considering whether to conduct such an investigation, consideration should be given to any requests by the victim not to investigate or to keep complaints confidential because of fear of further victimization.<sup>46</sup> In all instances, victim safety should be of primary importance.

Both the VPD and the RCMP take victim statements and can take KGB statements in cases where victims may not agree or are not available to testify later.

There is no indication in either the VPD or RCMP manuals of how the performance of officers acting as first responders to victims is measured.

## VICTIM SERVICES

International documents cited previously on principles for the fair treatment of victims<sup>47</sup> emphasize the need for a multidisciplinary approach with appropriate referral to victim-centred services, including counseling. However, these recommendations embody an assumption that services will be available and funded, even while in many parts of the world, funding to social and non-government organizations is shrinking in response to the global financial crisis.

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<sup>44</sup> RCMP "E" Division Operational Manual, 8.1. (Numbers indicate paragraph numbers.)

<sup>45</sup> Ibid, 7.3 – 7.9.

<sup>46</sup> Ibid, 8.4.3.

<sup>47</sup> For example, *UN Handbook on Justice for Victims*, supra.

In England and Wales, 36 Sexual Assault and Referral Centres or SARCs (which operate as funded charities) exist to assist victims with medical services, including collection of forensic evidence and referral to other appropriate support services. Independent Sexual Violence Advisors (ISVAs), who are specially trained and contracted by the government, are available at the SARCs to act as supporters to complainants as their cases proceed through the system.<sup>48</sup> Forensic physicians working through the National Health Service, not through policing, are integrated into SARCs and other special rape clinics, where all personnel are specially trained to deal with sexual assault victims.<sup>49</sup> Some centres have specially trained police available to whom victims may speak anonymously before deciding whether or not to report an assault.<sup>50</sup> The government has recognized that the provision of multiple services in a safe and victim-centred environment should be the “accepted standard.”<sup>51</sup>

### Victim services in BC

Law enforcement agencies recognize the invaluable role that victim services workers can play in providing assistance to victims of crime. Of concern is the availability of such services, particularly in remote areas. Some procedural manuals direct officers to refer victims of crime to appropriate non-government organizations, including shelters. These services may not be available in every community. In some communities, even police-based services do not exist.

There are a variety of victim services programs in BC, including staffed departments at the Vancouver Police Department, the RCMP and other municipal police forces; volunteer police-based programs; and non-government community-based programs. 92 police-based victim services programs operate out of BC’s RCMP and municipal police departments.<sup>52</sup> Most use a combination of staff and volunteers.

The Ministry of the Attorney General policy on intimate relationship violence directs police-based victim service programs to refer all victims of family and sexual violence to appropriate community-based services, where these programs exist, and to provide services to victims and their families where they do not. In areas where there are no police-based services, the policy notes that victims should be advised to contact VictimLink BC by telephone. Victim services are to respond to critical incident calls at police and hospitals to address immediate needs; provide information about victims’ rights under the Victims of Crime Act; work collaboratively with justice system personnel to support victims through criminal proceedings; identify and address safety needs, including through development of a

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<sup>48</sup> *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses*, supra, p. 707.

<sup>49</sup> *Stern Review*, supra, p. 49.

<sup>50</sup> *Ibid*, p. 66.

<sup>51</sup> *Ibid*, p. 13.

<sup>52</sup> Police Victim Services of British Columbia, online: <http://www.policevictimservices.bc.ca/victim-services-in-bc/>, accessed March 23, 2012.

personal safety plan; provide information and referrals; and provide emotional and practical support. According to the policy:

*Due to the unique nature of violence in relationships, including the potential for ongoing violence, victim service programs treat domestic violence as a priority when delivering service.<sup>53</sup>*

The Victim Safety unit accesses court and corrections databases in order to notify registered victims of trial outcomes and releases of offenders.

Victim services are described in VPD policies as being undertaken by a special unit of volunteers. The Victim Services Unit can assist with the needs of non-hostile primary and/or secondary victims where no alcohol, drug or psychiatric concerns exist.

The fragmentation of victim services in BC may be a particular problem when investigations span jurisdictions. It is unclear if the infrastructure currently exists to support vulnerable witnesses in the aftermath of crimes and through the charging and trial processes. A more consistent and robust publicly funded victim services model could help victims who are vulnerable achieve the stability they need to participate more ably as witnesses in the trial process.

## CHARGE APPROVAL

Approval of criminal charges generally involves a balancing of the likelihood of a conviction, based on available evidence, and the public interest in seeing accused offenders tried and, if appropriate, punished. The first step in charge approval is to find out what happened and what evidence supports the complainant's story. While written statements are widely used and often preferred, some jurisdictions are moving towards use of video statements from complainants.

Generally in Canada, the Crown may try to secure further evidence in addition to the witness or victim statement before laying a charge, or may decide not to charge, if:

- The complainant has a history of perjury or false complaints;
- The complaint is based on recovered memory (with a significant time gap or after the complainant has undergone certain types of therapy);
- There is corroboration of the suspect's denial;
- The complainant has other motivations than criminal justice;
- The complainant's story changes over time;
- There is evidence of collusion or motivation to make a false complaint;
- and
- The accused's statement of denial is accepted as reliable.<sup>54</sup>

<sup>53</sup> *Violence Against Women in Relationships Policy*, supra, p. 31-32.

<sup>54</sup> *Trauma, Trials and Transformation*, supra, p. 222-223.

The decision whether to charge or not is complex and requires evaluation based on the individual information available in a particular case. According to one expert in sexual assault cases:

*The charge assessment process is a judgment call fraught with difficulties. Opinions will vary depending on the knowledge, experience, and even the worldview of the person evaluating the facts. ... The Crown and police agencies deal with the subjective nature of decision-making by drafting policies, writing practice manuals, training personnel, and seeking second or third opinions in difficult cases.<sup>55</sup>*

We were unable to locate any studies in Canada assessing charge approval by Crown prosecutors when witnesses are perceived as vulnerable and potentially in need of assistance to testify. In the UK, a study of the use of special measures to assist vulnerable victims found:

*Lack of injury, delay in reporting and a prior sexual history have consistently been identified in previous research as influential factors in prosecutors' assessments of credibility and of the prospect of conviction in rape cases. Witness credibility involving less than 'ideal' victims in alleged sexual assaults has always troubled prosecutors who are regarded as either operating on overly 'masculinist' assumptions, or as giving undue weight to the perceived masculinist assumptions of jurors and judges (Lees, 1996; Bronitt, 1998; Temkin, 2000). It appears that little has changed, despite the measures that could help prosecutors to assess witnesses' credibility independently.<sup>56</sup>*

The same study found that prosecutors continue to be wary of approving charges in cases where the victim may require testimonial aids, at least in cases of child sexual assault, even though there had been an increase in the number of cases being brought to court that otherwise would not have been, had such special measures not existed.<sup>57</sup>

### **Crown Counsel – Provincial Policy On Witnesses**

The BC Ministry of the Attorney General's Crown Counsel Policy Manual provides that in assessing charges, Crown Counsel must ascertain whether there is a "substantial likelihood" of conviction and whether prosecution is required in the public interest. Counsel must evaluate what material evidence is likely to be admissible; the weight likely to be given to the evidence; and the likelihood that viable defences will succeed.<sup>58</sup> In exceptional cases that may not meet the

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<sup>55</sup> Ibid, p. 223.

<sup>56</sup> *Are special measures for vulnerable and intimidated witnesses working?*, supra, p. 45.

<sup>57</sup> Ibid, p. 45-46.

<sup>58</sup> Ministry of the Attorney General, Crown Counsel Policy Manual, Charge Assessment Guidelines, ARCS/OCRS File Number 55100-00, effective October 2, 2009, p. 3.

substantial likelihood test, usually those involving high risk violent or dangerous offenders, the evidentiary test may also consider what material evidence is arguably admissible; whether it is reasonably capable of belief; and whether it can be overborne by an incontrovertible defence.<sup>59</sup>

The public interest test considers a broad range of factors, among them:

- whether the victim was a vulnerable person – a child, elder, spouse or common law partner;
- whether the offence was a hate crime, motivated by bias or prejudice based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor;
- whether the offence was likely to be repeated;
- whether the offence was widespread in the area in which was committed; and
- whether the offence was committed by or to benefit organized crime.

Additional factors to be considered are the youth, age, intelligence, physical or mental health, and other personal circumstances of the victim.

Engagement in the sex trade and addiction could easily fit into one or more of the categories noted above, although it might be preferable if such vulnerabilities were stated explicitly.

To apply the charge assessment standard, the Report to Crown Counsel should identify the evidence supporting the charge, if possible provide a written statement of the victim or witness, and include any necessary documentation.

Generally, in cases where victims are identified as vulnerable, vulnerability is interpreted as an aggravating factor in favour of charging. The public interest in prosecuting must be weighed against the prospect of a successful prosecution (including whether the witness would be credible) and the potential damaging effects of trauma on the witness.

As noted previously, Crown policy elsewhere<sup>60</sup> provides guidance on the *treatment* of all victims and witnesses and indicates that special consideration should be given to the needs of those who have experienced sexual violence or violence in relationships. However, it does not contain any particular direction on charge approval regarding witnesses who are vulnerable as a result of alcohol or drug use or addiction, or involvement in the sex trade. This is not to say that these issues are

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<sup>59</sup> Ibid.

<sup>60</sup> Criminal Justice Branch, Ministry of the Attorney General BC, Crown Counsel Policy Manual, May 20, 2003.



not regularly dealt with in practice, only that they are not the subject of discrete policy.

Two of the factors that are not explicitly referred to in policy but that may come into play in charge approval are witness credibility and witness availability. Few rapes are witnessed. When a complainant reports a sexual assault, initially the only proof she has is her story of what happened. As noted previously with regard to charging rates, police may not believe that a complainant has experienced a sexual assault; that is, a non-consensual sexual experience. Crown Counsel also may not believe a complainant, particularly if there is indication in the police report that the individual exhibited characteristics that might lead to questions about her memory or mental health. Additionally, in order to bring a case from charge approval to trial, prosecutors must be able to consistently locate the victim and have some assurance that she will appear at court dates prepared to testify.

With regard to sexual offences, once charges are approved, Crown Counsel are directed to advise victims as soon as possible of the dates and outcomes of all hearings related to the offence. They are also advised to refer victims to victim services. They are to inform investigating officers in writing of decisions to lay charges when the victim is unwilling to testify, in order that the victim can be informed. They are also not to consent to deletion of any protective bail terms without first consulting the victim and others as appropriate, such as the bail supervisor, victim services personnel, and investigating officer.

Crown Counsel are directed to contact the victim early to conduct interviews and prepare for trial, and to determine the reason for any reluctance to testify. Crown Counsel should also notify the victim of any possible stay of proceedings.

Crown policy also directs that, while a reluctant witness may be subpoenaed to testify, if a judge wants to hold the victim in contempt for failing to attend, the Crown's position consider the potential for re-victimization arising from such a finding.

## **PREPARATION FOR TRIAL**

After charges have been laid, there may be a considerable delay before the trial actually takes place. Victims are often notified of trial dates long in advance but commonly meet with prosecutors shortly before trial and may have long periods without contact, even though they may feel emotionally consumed by a pending trial until it takes place.

Among the recommendations from other jurisdictions to support vulnerable witnesses' participation in the criminal justice system are legal requirements that

prosecutors and defence lawyers be trained in interviewing techniques to minimize trauma and to assist the witness's testimony.<sup>61</sup>

As noted above, the Bernardo Investigation recommended that prior to trial, point persons be assigned to explain the criminal process to victims of sexual violence. Studies in five European countries (Belgium, France, Germany, Denmark and Ireland) found that most victims of crime were dissatisfied with the amount of contact they had had with prosecutors prior to trial, with 82% saying they would have preferred more formal preparation for the trial process.<sup>62</sup> Those more satisfied with their experience perceived the legal process to be fairer. While these studies did not evaluate witness performance or conviction rates in conjunction with the amount of prosecutorial contact and trial preparation received, given that repeat victimization is common with vulnerable complainants, the perception that legal system is fair should greatly encourage reporting of crimes. Other studies have shown that a thorough understanding of the adversarial legal process lessens the likelihood of re-victimization and allows witnesses to feel more empowered through participating in the criminal justice process.<sup>63</sup>

The structure of the Crown Prosecution Service may make it difficult for witnesses to feel they have significant interaction with Crown Counsel before their trial date. The same prosecutors may not have conduct of files for pre-trial and trial processes, and a prosecutor may receive the file for a pending trial within a relatively short time before a trial takes place. Nonetheless, studies in the US have shown that complainants are more likely to perform well as witnesses (and thus appear more credible) when prosecutors have initiated and maintained contact with them prior to trial.<sup>64</sup>

In the United States, prosecutors work with complainants to develop their courtroom skills and allow them to feel comfortable testifying.

*In the USA, for example, it is widely accepted that rape complainants require additional support and assistance in advance of trial if they are to cope with the onerous demands of the adversarial process. This enhanced support is provided by prosecutors who meet with complainants prior to trial with the specific aim of providing practical guidance on the requirements of giving oral evidence. This form of intervention is generally regarded as essential if complainants are ultimately to perform effectively in court.<sup>65</sup>*

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<sup>61</sup> *The Protection of Women as Witnesses in the ICTR*, supra.

<sup>62</sup> I. Bacik, C. Maunsell and S. Gogan, *The Legal Process and Victims of Rape* (Dublin: Dublin Rape Crisis Centre, 1998), p. 8.

<sup>63</sup> C. Hartley, "A therapeutic jurisprudence approach to the trial process in domestic violence felony trials" (2003) 9(4) *Violence Against Women* 410, p. 422.

<sup>64</sup> A. Konradi, "Understanding rape survivors' preparations for court" (1996) 2 *Violence Against Women* 25, p. 49.

<sup>65</sup> *Witness preparation and the prosecution of rape*, supra, p. 172.

*The sensitivity with which lawyers handle survivors, whatever the circumstances of the crime, is as crucial as their litigating skills. The human element is what makes sexual crimes unique. Not only can victims experience a catharsis if the offender is prosecuted, a witness who is gently guided through the whole process improves our chances in the courtroom of getting a conviction.<sup>66</sup>*

This process begins with a basic explanation by the prosecutor of the court procedures and roles of participants, as well as familiarization with the building. It also includes mock direct and cross examination. Prosecutors explain the aim of direct examination and cross examination and make witnesses aware of the techniques that are often used in cross examination – for example, rapid fire questioning, “bundling” of different questions into one query, and repetition of questions in order to get a witness to change her testimony. They advise witnesses to pay close attention to the wording of questions and not to be hesitant to ask for a question to be shortened, clarified or restated. Complainants are encouraged not to allow defence counsel to put words in their mouths and to inform the court if counsel misstates their testimony. Prosecutors also try to prepare witnesses for the “emotional triggers” that may arise in court, including the likelihood that they will have to describe the assault in graphic detail and view physical exhibits.

In the US, there is no bar to rehearsing witness testimony in advance of trial, so coaching the witness is not a fear for prosecutors. However, where this is a concern, a complainant could be given a different factual scenario for role play purposes. In England, safeguards to prevent witness coaching in the guise of witness preparation have been identified, including supervision or conduct of any such programs by a member of the Bar, use of substantially different factual material, and notification of opposing counsel in advance of any familiarization program with invitation for comment.<sup>67</sup> In 2005, detailed guidance on witness preparation was issued by the Standards Committee of the Bar Council, endorsing these methods and providing guidance for witness preparation in the criminal justice system; however, testimonial contamination resulting from witness coaching remains a fear among victim support groups, which primarily allow the Crown to undertake pre-trial activities with witnesses rather than engaging in such activities themselves.<sup>68</sup>

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<sup>66</sup> L. Fairstein, *Sexual Violence: Our War Against Rape* (New York: Berkeley Publishing Group, 1995), p. 12, cited in L. Kelly, *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (London: HMCPSI, 2002), p. 29.

<sup>67</sup> Louise Ellison, *Witness preparation and the prosecution of rape*, *Legal Studies*, Vol. 27, June 2007, pp. 171-187, at p. 183.

<sup>68</sup> *Ibid.* According to Ellison, the Crown Prosecution Service provides only the barest orientation to lay witnesses, although a number of specialized training groups offer familiarization programs for expert witnesses.

## TRIAL

Some special measures already exist in Canada to allow complainants to give their evidence using a number of testimonial aids and to protect the identities of vulnerable witnesses. These are discussed below and generally include screens, closed circuit television to allow testimony from another location, support persons, use of videotaped statements, banning the public from the courtroom and publication bans. In this section, consideration is given to the trial process when special measures are not employed, the pitfalls for complainants, and the critical issues of credibility that may arise when a witness is a drug user or involved in the sex trade. For want of space, we have not distinguished generally between testifying at preliminary hearings and at trial, although there may be differences in witness experiences because of the different evidentiary principles that apply.

It must be kept in mind that in Canada, Crown prosecutors do not “represent” the victims. They represent the state, in whose interest it is to see that crimes are prosecuted and offenders punished. Thus, while a defendant has counsel specifically looking out for his or her interests, a victim does not.<sup>69</sup>

In England, judges are required to undergo specific training to hear cases of sexual and gender-based violence, and only these judges are chosen to hear such cases.<sup>70</sup> The CEDAW Committee also specifically found that judicial sensitivity training was appropriate to prevent re-traumatization in cases of sexual and gender-based violence.<sup>71</sup>

### Complainant testimony

From the perspective of the justice system, a credible complaint is one that is internally and externally consistent; includes physical evidence of the alleged activity; and is corroborated by a neutral third party.<sup>72</sup> From the perspective of legal counsel, the goal of trial is to present sufficient evidence of the type and quality needed to satisfy the court’s standard of proof. In criminal cases, the standard is one of beyond a reasonable doubt. Significant discrepancies in a witness’s story may be sufficient to raise a reasonable doubt.

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<sup>69</sup> While it is possible for a complainant to hire a lawyer to represent her interests, many complainants cannot afford to. The first plaintiff to be represented by counsel during a criminal rape trial in Canada was “Jane Doe”, the fifth victim of “balcony rapist” Paul Callow in Toronto. She also won the right to be present in the courtroom while Callow testified. The case is not publicly reported, but is referred to in Elizabeth Sheehy, “The Victories of Jane Doe,” *Sexual Assault Law, Practice and Activism in a post-Jane Doe Era*, above, note 16.

<sup>70</sup> *Stern Review*, supra.

<sup>71</sup> *Karen Tayag Vertido v. the Philippines*, Communication No. 18/2008, Views of 16 July 2010, CEDAW/C/46/D/18/2008, para. 8.9 (b)(iv).

<sup>72</sup> Daylen et al, p. 222.

A complainant's testimony is often the strongest evidence available in a case, and the complainant's demeanor will be evaluated by the court to determine whether it comports with the complainant's version of events as a measure of credibility. Because of the historical role of *viva voce* testimony in the common law courtroom and the abiding predisposition of the judiciary and legal counsel towards it as the most compelling form of evidence, there is great pressure on victims and witnesses of crime to present their stories in the courtroom by giving evidence in chief. If the complainant is unavailable, either physically or because of psychological or psychiatric issues, the Crown may choose to proceed with proving the case using other forms of evidence. These could include the complainant's written and signed or videotaped police statement (subject to exclusion under hearsay rules); records of 911 calls (also subject to hearsay rules); forensic evidence, including expert testimony; or a record of a confession by the accused. However, these are often given less weight than direct testimony by the complainant.

Some of the disadvantages experienced by vulnerable witnesses stem from the justice system's assumptions of what is needed to ensure a defendant a fair trial. For example, statements under oath are assumed to be more credible, although there is no empirical research that supports this. It is assumed that witnesses are more likely to be truthful when facing the accused in an open court. Those who lack confidence, who have cognitive difficulties, or who are suffering from trauma as a direct result of the incident in question may be able to give a complete account of what happened in an emotionally supportive environment, but may become confused or withdrawn when they perceive themselves to be exposed to public view or under attack. As noted above, in Canada testimony that appears to be rehearsed is suspect, which means that witnesses may have had limited opportunities to tell their side of the story before they appear in court.

### Cross examination

In addition to providing their version of the key events of an experience through direct examination, witnesses and victims are expected to undergo cross examination by counsel for the accused aimed at highlighting inconsistencies in their evidence and discrediting it. In Canada, a broad right of cross examination has been found by the Supreme Court to be inseparable from the truth finding process. The following passage from one of the leading cases exemplifies the judicial view of the utility of cross examination:

*There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth*

*and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence.<sup>73</sup>*

There is an assumption that a confrontational process of cross examination is ideally suited to eliciting the truth in a witness's statement, when in fact the opposite may be true. Much has been written on the potentially damaging effect generally on witnesses of being subject to cross examination. Indeed, this is the primary reason that many are unwilling to testify in court. As described by Louise Ellison, who has written extensively on the adversarial process and the vulnerable witness,

*[the function of cross examination is to] impugn the credibility of the witness so as to persuade the fact finder that it would be unsafe to rely on anything the witness has said in chief. Frequently this results in what many regard as the degradation of witnesses through unduly intrusive questioning on apparently irrelevant matters and the introduction of evidence whose probative value is outweighed by its potentially prejudicial effect.<sup>74</sup>*

Complainants often refer to cross examination as a form of secondary victimization that may be more traumatizing than the original assault.

### Assessment of credibility

Perceptions of credibility figure large in witness assessment. Psychological studies on the interpretation of human behaviour have shown that average persons, including both professionals and lay persons, can distinguish whether a person is lying or telling the truth at levels only slightly better than those achieved by flipping a coin.<sup>75</sup> This suggests that issues of credibility arising in the context of the adversarial court are more reflective of the stereotyped preconceptions of the fact-finder than the truthfulness of the witness or the effect of the mode of presenting evidence. In keeping with this idea, psychological studies have also shown that female rape complainants were perceived to be more credible if they became visibly upset while giving evidence rather than calm and relaxed.<sup>76</sup> This is despite the fact that witnesses who are upset may find it extraordinarily difficult to articulate information in the logical and sequenced manner required for effective evidence, leaving many witnesses in a "damned if you do, damned if you don't" situation. The dangers of such preconceptions should be obvious and are particularly treacherous

<sup>73</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595, p. 663.

<sup>74</sup> Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001), p. 88.

<sup>75</sup> *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses*, supra, p. 736.

<sup>76</sup> *Ibid*, p. 737.

when coupled with “rape myths” that some first responders (such as police) and triers of fact (such as judges) may subscribe to, for example, that a woman who is under the influence of drugs or alcohol may have invited sexual advances or that a sex worker cannot be raped.

Some witnesses may perform badly on the stand due to both past trauma and the way in which they are subjected to the questioning process; that is, some witnesses may be more prone to change their responses, and therefore appear less credible, in certain situations. Evidence from England suggests that those who have been intimidated or subjected to severe mental or physical abuse may be more suggestible or prone to give erroneous answers to leading questions. In order to avoid confusion during direct examination, prosecutors are advised to use short, plain words; not to ask convoluted or leading questions, but rather open-ended ones; and to check that victims have understood all the words used.<sup>77</sup> Presumably prosecutors should also be prepared to object to questions by opposing counsel, although these concerns may be diminished if the special measures discussed elsewhere in this paper are used.

In 2006, following the passing of legislation introducing enhanced special measures for use with vulnerable and intimidated witnesses in England and Wales, the Home Office published a consultation paper with further proposals to strengthen the existing legal framework and improve care for victims. Among the changes put forward was a proposal to permit general expert evidence in rape cases to explain the diverse, often complex behaviours exhibited by complainants and a proposal to amend the *Youth Justice and Criminal Evidence Act* to make video-recorded statements by adult complainants in serious sexual offences automatically admissible as evidence in chief.<sup>78</sup> Research of this nature should be undertaken in Canada, along with research on addiction and court testimony.

Ellison has conducted extensive research into accommodation of vulnerable and intimidated witnesses. She has suggested that another significant change required is amending the hearsay rules to allow more admission of out-of-court and third-person statements. In particular, she has suggested allowing words spoken by victims to confidantes to be repeated in court as evidence of the truth of the events recounted as a way of compensating for the frequent lack of corroborative evidence in sexual assault cases:

*Relaxing the hearsay rule would be another way of restoring the credibility of vulnerable witnesses. At present, out of court statements can be used negatively to undermine a witness's credibility where they differ from live oral*

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<sup>77</sup> *Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial – Practice guidance*, para. 9.5, online: <http://www.cps.gov.uk/publications/prosecution/pretrialadult.html>, accessed March 23, 2012.

<sup>78</sup> *Witness preparation*, supra, p. 171.

*testimony; but consistent statements have no evidential status and cannot add credit to a witness's account unless they come within limited exceptions.*<sup>79</sup>

Broadening the scope of hearsay exceptions to allow introduction of contemporaneous statements could assist witnesses when recall and articulation of details is at issue.

There are restrictions in the *Criminal Code*<sup>80</sup> on introduction of the sexual history evidence of the complainant as a means of suggesting that a witness is likely to have consented to the act in question or should not be believed. While the doctrine of recent complaint (the idea that sexual assaults reported long after they have occurred are less believable) is no longer accepted in evidentiary law in Canada, there are pervasive myths that still colour the understanding of reporting of sexual violence. Unfortunately, analysis of these issues is beyond the scope of this paper. One suggestion worth noting that has been put forth is a mandatory warning by judges to counsel on the use of demeanor evidence and sexual history evidence in cases of sexual assault.<sup>81</sup>

Jurisprudence on sentencing has recognized the particular vulnerability of sex workers as an aggravating factor.<sup>82</sup> However, note should be taken of the tone of some judicial comments in these very cases, which reflect the existing social stigma regarding sex work. In *R. v. Resendes*,<sup>83</sup> for instance, while sentencing a “john” for the robbery of a sex worker, the Court said: “The fact that the victim is a prostitute does not disentitle her to the same protection of the law accorded to everyone.” In *R. v. Jakeer*,<sup>84</sup> the Court found that, “Whatever views one may hold about prostitutes or the work they engage in, it must be recognized that they are entitled to be safe and secure in that no one has the right to take advantage of them and cause them injury.” While these comments do go specifically to credibility, they exhibit a bias against sex work as a profession that may colour evaluation of a sex worker’s testimony.

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<sup>79</sup> *The Adversarial Process and the Vulnerable Witness*, supra, p. 137.

<sup>80</sup> See s. 276.

<sup>81</sup> Ibid.

<sup>82</sup> See, for example, *R. v. Douglas*, 2007 ABCA 321; and *R. v. Kruse* (2005) (cited in Coordinating Committee of Senior Officials [Criminal] Missing Women’s Working Group, *Report and Recommendations on Issues Related to the High Number of Missing and Murdered Women in Canada*, 2012, p. 72), in which the Court found that, “... in this particular case, because the victim was a sex trade worker, alone in a hotel room with Mr. Kruse, I consider her to be a vulnerable victim and have found that this is [sic] should be an aggravating factor in this sentencing,” (para. 61); and *R. v. Ali*, 2006 BCPC 462, para. 17.

<sup>83</sup> (1988), 20 O.A.C. 335.

<sup>84</sup> Cited in *Report and Recommendations on Issues Related to the High Number of Missing and Murdered Women in Canada*, supra; para. 9.



### Real and perceived credibility issues associated with addiction

As noted previously, those with substance abuse issues are not simply more vulnerable as witnesses; they are more vulnerable as victims. Leaving aside for the moment the circumstances that occasioned the Missing Women Commission of Inquiry, the Stern Report in the United Kingdom reported police experts frequently stated that:

*[M]en who rape will seek out those whom they deem to be vulnerable and unlikely to be able to perform well as a witness in a court case. A defence barrister told us, “a significant percentage of defendants come into the category of those that prey on/take advantage of vulnerable people.” We were told by a senior police officer that there are men who cruise around looking for drunk or vulnerable women.<sup>85</sup>*

Police interviewed for the Stern Report also referred to the “night-time economy” as a “harm-producing area” that was very problematic in relation to safety and sexual assaults. They referred to the vulnerability brought on by intoxication, the problems of waiting for victims to be sober enough to provide informed consent for forensic examinations, and the difficulty of taking such cases through courts because of the victims’ clouded memories. They also recounted that those suffering from mental health problems as a result of abuse and neglect had often internalized a “lack of self-care” which contributed to the use of drugs and alcohol as coping mechanisms, making them more vulnerable to abuse.<sup>86</sup>

Use of alcohol and street and prescription drugs may hinder or diminish both long and short-term memory. However, the effects of substance use and abuse on memory is highly variable, dependent on the type of substance, the amount and regularity with which it is consumed, interaction with other drugs, and individual characteristics such as weight, age, and biochemistry. While it is widely believed that alcohol intoxication and sedative use may impair a witness’s ability to coherently recall events that occurred during the use of these substances, there is relatively little research on these issues in the legal community/available to legal practitioners.

Stress and trauma such as those experienced by complainants/survivors of crimes and witnesses may exacerbate memory problems, although this is also an area in which further research and understanding is needed.

Perhaps more significant is the stigma associated with the use of illegal drugs – the perception that those who use recreational and addictive drugs are not reliable witnesses. This perception is likely magnified when the witness is also involved in the sex trade, aspects of which are illegal. In the adversarial system, the defendant’s

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<sup>85</sup> *Stern Review*, supra, p. 111.

<sup>86</sup> *Ibid.*

counsel will see his or her own role as to vociferously advocate for the defendant by attacking the witness's credibility. This means that a lawyer will often be verbally aggressive with the witness on the stand. The idea of accommodating a witness's perceived frailties with regard to memory and communication skills runs directly counter to the principles of cross examination. It is much more likely that the fact a witness has used or is addicted to illegal drugs will be used to impugn the person's credibility and to suggest that the witness is more likely to lie or fabricate, as a result of his or her engagement in illegal activities and possible motivation to protect or attack others involved in crimes.

### Addiction as a disability

Mental illnesses occurring independently of addiction may be sufficient to bring a witness into the category of mental disability, under which she can qualify for special measures to aid witness testimony. An approach that does not appear to have been considered with regard to witnesses in Canada, or which at least is not documented, involves approaching alcohol and drug addiction as disabilities. In other areas of the law, notably in employment<sup>87</sup> and social benefits entitlement law,<sup>88</sup> both alcohol and drug addiction have been recognized as disabling conditions requiring accommodation. There is room for a similar approach to be taken in the treatment of victims and witnesses who are vulnerable because of addictions. For example, the recognition that those who with *bona fide* addictions are disabled would enable presumptive access of these vulnerable witnesses to the special measures in the *Criminal Code* on the basis of physical and mental disability (discussed below), without the need for special applications by Crown Counsel.

At the same time, it should be noted that disability may be and is used to undermine a complainant's credibility. As is the case with addicts, the disabled complainant's ability to form long-term memories, communicate with those in positions of authority, or articulate effectively on the witness stand may all be used to suggest that the complainant ought not to be believed, even when apparent cognitive limitations are more socially constructed than biomedical.<sup>89</sup>

Janine Benedet and Isabel Grant note that disabled witnesses' frailties are magnified in the criminal justice process: a witness may have real conditions affecting her memory that demand accommodation; however, the long delay before trial may exacerbate the effects of these conditions and create a situation whereby a witness

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<sup>87</sup> *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57; *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, leave to appeal to SCC refused [2006] S.C.C.A. No. 140.

<sup>88</sup> In Ontario, denial of disability benefits to alcoholics was found to infringe their rights under the Ontario Human Rights Code: *Ontario Disability Support Program v. Tranchemontagne* (2009), 95 OR (3d) 327 (ON SCDC).

<sup>89</sup> Janine Benedet and Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues*, (2007) 52 McGill L.J. 515 – 552, para. 89.

who might have been able to give evidence is precluded from participating, rather than accommodated.<sup>90</sup> Parallels exist with the situation of witnesses living with addictions.

Possible accommodations that Benedet and Grant suggest include:

- limits on cross examination, or using a less confrontational method that could include a list of questions read by someone familiar to the complainant, recognizing that traditional cross examination may not further truth-seeking;
- flexible interpretation of the hearsay rule, to admit prior consistent statements and third party statements, instead of simply prior inconsistent statements; and
- rigorous application of rules prohibiting inappropriate use of sexual history evidence.

Ironically, and unfortunately, accommodations themselves may be perceived as undermining a witness's credibility, according to one expert in the United Kingdom, where special measures for vulnerable witnesses have been in place since the mid-1990s:

*One concern that has been raised, particularly by prosecutors, is the possibility that the disclosure of a witness's vulnerability, specifically where such vulnerability relates to a personal characteristic of the witness, may prejudice that person's credibility. For example, the witness may be alcohol or drug dependent, or may suffer from a personality disorder. Such factors may quite legitimately bring the witness within the scope of the Scottish legislation [permitting the use of testimonial aids] since the mood swings and paranoia that may be associated with such vulnerabilities may lead to fear or distress in giving evidence, affecting the quality of that evidence. However, the disclosure of such vulnerabilities could, it is claimed, be used by the defence to undermine the witness's credibility. Issues around the witness's right to privacy may also be significant. In all cases the wishes of the vulnerable witness must be taken into account but are not decisive.<sup>91</sup>*

As will be discussed below, the legislation on special measures in the United Kingdom uses a different definition of vulnerability that makes it more possible for witnesses to qualify for special measures outside any claim of disability.

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<sup>90</sup> *Hearing the Sexual Assault Complaints of Women with Mental Disabilities*, para. 100.

<sup>91</sup> Sue Moody, "Vulnerable Witnesses: Rights and Responsibilities" presented at International Society for the Reform of Criminal Law 19<sup>th</sup> International Conference, June 2005, Edinburgh, p. 10.

## Therapy

Women who have been assaulted and who are trying to cope with that trauma are often eager to undergo counseling or other therapy, particularly if they are struggling with addictions and self-medicating as a way to manage trauma. Counseling to conquer an addiction may be a critical step in readying oneself to testify at trial, particularly because the credibility of addicts is so suspect. Within the criminal justice system, lawyers and judges may have concerns that a victim's evidence could be tainted by certain types of therapy. In particular, therapies with the goal of retrieving memories, those employing hypnosis, and those employing group therapy or sharing of experiences are seen as potentially compromising a witness's evidence by potentially affecting or changing memories.<sup>92</sup> Furthermore, in cases where the survivor of a crime seeks compensation for injuries suffered, significant recovery or healing, including emotional recovery, may weaken the case for compensation.<sup>93</sup>

In some cases, victims and witnesses may postpone seeking therapy or counseling until after trial, a situation that not uncommonly requires months or years of waiting. Situations such as this can be alleviated by seeking out mental health professionals experienced in dealing with court proceedings. It is not assured, however, that the most vulnerable witnesses will have access to such health care providers.

In England and Wales, the prosecution service is responsible for vetting cases to identify those in which therapy might have a material impact on the evidence.<sup>94</sup> Guidelines for therapy include ensuring that the witness not discuss the evidence which s/he will be giving in criminal proceedings; only general support should be given to assist with the process of appearing in court. Therapists should also be informed of the potential impact of their work on evidence. Generally, therapy focusing on self-esteem and self-confidence is not seen to be problematic. Therapy is not discouraged, providing that evidence can be obtained prior: the Stern Review found that number of victims reporting doubled when those who did report were encouraged to seek counseling from ISVAs.<sup>95</sup>

In cases where allegations arise while therapy is already underway, English Crown prosecutors are advised to make a decision as to how to proceed at a multi-disciplinary meeting that includes the therapist.<sup>96</sup>

We were unable to locate any specific information dealing with victims or witnesses and drug and alcohol detoxification programs, in Canada or elsewhere.

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<sup>92</sup> *Trauma, Trials and Transformation*, supra, p. 96.

<sup>93</sup> *Ibid*, p. 97.

<sup>94</sup> *Provision of therapy*, supra, para. 4.1-4.2.

<sup>95</sup> *Stern Review*, supra, p. 104.

<sup>96</sup> *Provision of therapy*, supra, para. 11.5.

### Disclosure of therapeutic records

Of equal or greater import is the problem that a defendant may apply for additional disclosure if a complainant is undergoing or has undergone therapy. While Canadian jurisprudence<sup>97</sup> and subsequent changes to the law<sup>98</sup> have restricted the use of therapeutic records in court, sexual assault complainants' records do not attract a class or blanket privilege. Whether they are disclosed will depend on whether the court finds them relevant to the matter at trial. Women complainants may have never had the opportunity to see the records or to correct or dispute their contents before they are produced.<sup>99</sup>

Benedet and Grant have found that the experiences of discrimination faced by women with disabilities are common to all women who complain of sexual assault. At the same time, they note that disabled women face particular challenges in terms of the documentation available that can be used to diminish their credibility:

*Women with mental disabilities often live heavily documented lives, with records kept by health care workers, support services, group homes, schools, adapted work placements, and counsellors. These women usually have no opportunity to read what is written about them in these files, nor do they have an opportunity to correct or supplement their own records. When they complain of sexual assault, a whole new set of records may be generated by doctors, counsellors, and other individuals and institutions involved in their care.<sup>100</sup>*

The same could be said of women with addictions. Women who are street-engaged because of drug use or involvement in the sex trade, or both, are likely to have extensive medical records at clinics and hospitals, and in some cases records pertaining to drug treatment programs, counseling or previous dealings with police. The prospect of having these records disclosed in court may serve to strongly inhibit women from testifying or having any contact with the legal system. It may also affect Crown prosecutors' evaluations of their perceived credibility as witnesses. The *actual* disclosure of such records may also serve to affect the credibility of such witnesses, particularly in jury trials. While judges are always charged with weighing the probative value of evidence against its prejudicial effect, special vigilance is appropriate in cases where the witnesses have been identified as vulnerable because of addiction or social status.

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<sup>97</sup> See *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754; *R. v. Mills*, [1999] 3 S.C.R. 668.

<sup>98</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 246.1

<sup>99</sup> *Hearing the Sexual Assault Complaints of Women with Mental Disabilities*, supra, para. 74.

<sup>100</sup> *Ibid*, para. 67.

## THE LAW IN CANADA ON SPECIAL MEASURES

A number of testimonial aids are available to vulnerable witnesses in Canada. In 2006, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)* came into force. This package of amendments to the *Criminal Code* and the *Canada Evidence Act*<sup>101</sup> put into place a number of special measures to make it easier for child victims and vulnerable adults to testify in court. The amendments make available testimonial aids that include screens to prevent the witness from seeing the accused, witness testimony by closed circuit television, support persons and use of video-recorded statements.

Upon application by the Crown prosecutor, the provision of testimonial aids to children (those under 18 years of age) and witnesses with a mental or physical disability is mandatory, unless the court believes it would interfere with the proper administration of justice. The court *may* also grant such applications in circumstances where witnesses would otherwise be unable to present a “full and candid account” of what happened, in which case counsel making the application must provide evidence in support of this assertion. For the purposes of this paper, we will primarily address how the changes affect adult witnesses; references as to how the provisions apply to children are omitted.

In cases where the court has discretion to consider an application, the factors that must be considered when deciding whether to make special measures available are:

- the age of the witness,
- whether the witness has a mental or physical disability,
- the nature of the offence,
- the nature of any relationship between the witness and the accused, and
- any other circumstance that the judge considers relevant.

Since the legislation was implemented, there have been a number of challenges that various aspects of it contravene the open court principle and the rights of the accused under ss. 7 and 11 of the *Charter* to confront the accuser. All of these challenges have failed; provisions have been upheld under s. 1 as reasonable in a just and democratic society, validating the importance of having those testify who might not otherwise face serious difficulty in doing so.

### Safety of witnesses

Under s. 486(1), a judge may order that all or some members of the public be excluded from the courtroom for all or part of the proceedings, to ensure, among other things, the proper administration of justice through protection of those involved in proceedings (s. 486(2)). The Supreme Court of Canada set out the

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<sup>101</sup> R.S.C. 1985, c. C-5.

criteria for an exclusion order in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*.<sup>102</sup> Interests of the potentially affected parties must be balanced against the constitutional principle of openness in court proceedings and freedom of expression, issues that also arise in the context of publication bans. An order under s. 486(1) excluding the public may be made in cases where the complainant in a sexual offence would otherwise be too nervous to give evidence.<sup>103</sup>

The judge may also order that a witness can testify outside the courtroom by closed circuit television if it is necessary to protect the safety of the witness (s. 486.2(4)).

Under 486.4(1) the presiding judge may issue publication bans prohibiting the publication, broadcast or transmission of information in respect of the proceedings, if the offence involves rape, indecent or common assault, and a number of other crimes involving sexual intercourse with minors and sexual indecency. Under 486.5(1), a prosecutor, complainant or witness may apply for an order that information that may identify that person be subject to a publication ban, if it is necessary for the proper administration of justice. Subsection 485.5(2) extends such protection to any justice system participant. Factors to be considered include:

- the accused's right to a fair and public hearing;
- the possibility of a real and substantial risk to the victim or other participants, including through intimidation or retaliation;
- society's interest in encouraging the reporting of offences;
- whether there are effective alternatives available to protect the identity of the participant; and
- the effects of the proposed order and its impact on freedom of expression.

Discretionary publication bans require careful consideration and balancing of competing *Charter* rights on a case by case basis, following the test set out in *New Brunswick*, elaborated upon in *Dagenais v. Canadian Broadcasting Corp.*,<sup>104</sup> and *R. v. Mentuck*.<sup>105</sup>

### Emotional well-being of witnesses

A number of the changes introduced by the Act aim to provide emotional support for vulnerable witnesses and potentially prevent re-traumatization. Section 486.1(1) allows a witness who is mentally or physically disabled to have a support person of the witness's choice (usually a victim services worker or a family member) present and close to the witness while the witness testifies. Section 486.1(2) extends this possibility to any witness who might not otherwise be able to

<sup>102</sup> [1996] 3 S.C.R. 480 [*"New Brunswick"*].

<sup>103</sup> See *R. v. Lefebvre* (1984), 17 C.C.C. (3d) 277 (Que. C.A.).

<sup>104</sup> [1994] 3 S.C.R. 835.

<sup>105</sup> 2001 SCC 76.

give a full and candid account; application must be made by the prosecutor or witness.

In addition, under s. 486.2(1), a judge may make an order that a witness testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused, provided such an order would not interfere with the proper administration of justice. This provision recognizes that witnesses may experience profound fear and discomfort seeing the accused in court and feeling that they are being watched by the person. Not all these methods protect the witness from being seen by the accused; for example, a witness who testifies by closed circuit television may still be seen by those in court, including the accused.

Under s. 715.2, witnesses with physical or mental disabilities may be permitted to adopt as their evidence in chief video testimony recorded within a reasonable time after the alleged event. However, they must still testify in court to adopt the evidence and be subject to cross examination. The court may also make an order prohibiting the use of the video for any other purposes.

Under s. 846.3(2), if the judge is of the opinion that it is necessary in order to obtain a full and candid account of the acts complained of, the judge may order that a self-represented accused cannot cross examine a witness. In this case, counsel will be appointed to conduct the examination.

In the case of an accused charged with criminal harassment (stalking), the accused may be prohibited, on application from the prosecution, from cross examining the complainant.

In the event that any of these applications are granted, no adverse inferences should be drawn from them (i.e., if there is a jury, they are not entitled to assume the accused is guilty because the witness requests special measures).

### Use of special measures

A survey conducted by the Department of Justice reviewing the use of testimonial aids and their success reveals that very few applications have been made by vulnerable adults, but they are less likely to be granted than those applications by child witnesses.<sup>106</sup> By way of example,

*[t]wo-thirds of the survey respondents [judges] said that the provision [for screens and closed circuit television] is never used in cases involving vulnerable*

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<sup>106</sup> Nicholas Bala, LL.M., Joanne J. Paetsch, B.A., Lorne D. Bertrand, Ph.D., and Meaghan Thomas, J.D. *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary*. Canadian Research Institute for Law and the Family, 2009.



*adult witnesses, and one-third reported that these applications are occasionally unsuccessful.*<sup>107</sup>

Perhaps because these provisions are only rarely applied in the case of adults, some aspects of their use are unsettled. For example, BC has no provision for paying counsel appointed by court (although presumably there are arrangements existing through legal aid or Court Services),<sup>108</sup> which may be a serious issue if the accused is self-represented because he or she cannot afford to hire a lawyer.

There is some direction from the BC Supreme Court that the courts' discretion extends primarily to whether or not to grant an application, and not to deciding which testimonial aids are most appropriate.<sup>109</sup> However, there are also indications that testimonial aids are not easily granted.

If a witness fails to apply for a screen or other special measures at the preliminary hearing, it is likely that a later application for use of special measures at the trial will be denied.<sup>110</sup> In the event that a witness does not testify well at pre-trial hearings because of pressure, it may be possible to seek and present expert evidence to explain poor recall<sup>111</sup> on application for testimonial aids at trial; however, there is always a risk this may not be successful. It is not known how much Crown Counsel inform witnesses of the possibility of applying for special measures. Post-trial studies in New Zealand indicate that victims and witnesses are not always made aware of the possibility of applying for alternative ways of giving evidence.<sup>112</sup>

Applications for accommodations are more onerous if the complainant is an adult who is not disabled rather than a child, as these applications must be supported by evidence put before the court; provisions applying to children and those with disabilities are granted automatically. These applications may delay the trial or preliminary hearing, a significant issue for some witnesses who may have problems with memory or who wish to conclude proceedings in an expeditious way in order to seek counseling.<sup>113</sup>

Even seemingly innocuous procedures to facilitate *viva voce* witness testimony in court have been met with resistance. In *R. v. Forster*,<sup>114</sup> the Crown applied for a screen and support person to aid the testimony of the complainant, a woman who was bipolar and suffered pain from a broken hip. The complainant claimed she had been raped by her neighbour. The Court accepted she was both mentally and physically disabled, so it is unclear why Crown Counsel was required to present

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<sup>107</sup> Ibid, p. 64.

<sup>108</sup> Ibid, p. 57.

<sup>109</sup> See *R. v. S.B.T.*, 2008 BCSC 711.

<sup>110</sup> *Trauma, Trials and Transformation*, supra, p. 259.

<sup>111</sup> Ibid, p. 333.

<sup>112</sup> *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses*, p. 715.

<sup>113</sup> Ibid, p. 296.

<sup>114</sup> 2006 BCPC 237.

additional evidence to show that she was afraid of testifying. The test applied by Judge Gove was whether such aids were necessary to obtain a “full and candid account” from the witness; the judgment is emphatic that the issue not whether the witness chooses to have aids.<sup>115</sup> In his brief reasons, Judge Gove appears to give weight to the testimony of the police investigator’s description that the victim’s account of what happened was “straightforward and matter-of-fact”<sup>116</sup>, even though the victim also related that she was nervous and fearful of the accused. Judge Gove remarked that “...witnesses, I dare say over the centuries, often are nervous, do not want to see the person that they have accused, and frankly, do not want to testify.”<sup>117</sup> In considering the factors of age, disability, nature of the offence, and relationship with the accused, Judge Gove found that a screen was not necessary, and that a support worker could be present, “not standing in the witness box, but sitting nearby in the counsels’ row of chairs near to where the witness box is located.”<sup>118</sup> It is perplexing why the application was granted only in part, since there is no indication that a screen and a support person would have “interfered with the proper administration of justice,” by increasing the likelihood that the complainant would not testify truthfully.

Similarly in *R. v. Pal*,<sup>119</sup> and *R. v. M.A.C.L.*,<sup>120</sup> applications to allow complainants to testify behind screens were denied because the Courts found insufficient evidence that the complainants were fearful of those accused.

### Special measures in other jurisdictions

It is useful to compare experiences in Canada and in BC regarding special measures with those in the United Kingdom and other countries.

The rights of vulnerable and intimidated witnesses were codified in the United Kingdom prior to consideration of such legislation in Canada. Sue Moody notes that studies conducted in the 1990s in England and Wales leading up to the introduction of the first legislation showed two distinct groups of excluded witnesses: on one side were witnesses willing to testify, whose vulnerability stemmed from such personal characteristics such as learning disabilities, but who were often excluded from the criminal justice system as unreliable or too difficult to accommodate; on the other side were witnesses who were pressured to give evidence even though they were reluctant to do so or distressed by the prospect.<sup>121</sup> The first category of witnesses was recognized as vulnerable and the second as intimidated, although in

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<sup>115</sup> Ibid, para. 7.

<sup>116</sup> Ibid, para. 4.

<sup>117</sup> Ibid, para. 6.

<sup>118</sup> Ibid, para. 9.

<sup>119</sup> 2007 BCSC 1493.

<sup>120</sup> 2008 BCPC 272.

<sup>121</sup> “Vulnerable Witnesses: Rights and Responsibilities,” *supra*, p. 4.

practice there is often conflation of the two categories. These studies led to proposals for accommodating legislation.

In 1990, the first UK legislation was passed protecting children as vulnerable witnesses. In 1997, these measures were enhanced to cover a limited range of vulnerable adult witnesses, namely those with certifiable mental illnesses or severe learning disabilities.<sup>122</sup> In 2004, new legislation was enacted to extend existing measures to allow consideration of a witness's personal characteristics, including vulnerability arising from the nature of the circumstances of the offence and exposure of the witness to intimidation for giving evidence. Similar legislation was enacted in 2004 in Scotland.<sup>123</sup> The new English legislation also extended protections to vulnerable defendants. The definition of vulnerable witness was widened to include anyone for whom there is a significant risk that the quality of their evidence may be diminished by reason of "fear or distress" in connection with giving evidence. Barriers to giving evidence are now recognized as occurring in context: "It is the *process* itself which renders [witnesses] 'vulnerable.'"<sup>124</sup> According to Susan Moody of the English Crown Prosecution Service:

*This definition is to be welcomed as it emphasizes the responsibility of the legal system to adjust its practices and procedures to suit witnesses' different circumstances and acknowledges the distress and trauma that giving evidence may cause to certain witnesses. A more flexible approach should also enable witnesses to give evidence who might otherwise not be able to do so or who would be unable to provide comprehensive, accurate accounts under the normal conventions.*<sup>125</sup>

The functional rather than categorical approach to vulnerability allows a much broader application of the law to victims who could benefit from the assistance of testimonial aids.

One of the testimonial aids that has been widely used in the United Kingdom is videotaping of witness evidence. Since 2003, in all sexual assault cases and in many other cases where witnesses may not be able to give the best evidence in court, video recordings are taken very shortly after the victim has reported the crime. In practice, various studies have criticized the technical and evidentiary quality of the videos. They are not always well done and often found not to be ideal as evidence. However, this is not surprising given the "learning curve" for both police and prosecutors adapting to the use of such evidence.<sup>126</sup>

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<sup>122</sup> Ibid, p. 2.

<sup>123</sup> *The Vulnerable Witness* (Scotland) Act, 2004.

<sup>124</sup> "Vulnerable Witnesses: Rights and Responsibilities," *supra*, p. 3.

<sup>125</sup> Ibid.

<sup>126</sup> *Stern Review*, and Ministry of Justice (United Kingdom), *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*, 2011.

One result has been that because of fears for the evidential quality of videotaped statements from child complainants, in a number of such cases, prosecutors negotiated a plea bargain or discontinued without even viewing the evidence to determine its viability. By way of explanation, some prosecutors explained that they simply did not have time to review the tapes at the early stages of cases.<sup>127</sup>

At the same time, “research on the outcomes of criminal cases seems to support the contention that video-tapes of the witness’s statements (which are disclosed to the defence in advance) may well be one of the key factors in bringing about an early guilty plea.”<sup>128</sup>

This seems to indicate that while practical issues remain, the use of videotaped evidence has played a role in bringing cases to resolution that might not otherwise have been brought to court.

New Zealand has also recently introduced special measures similar to those available in Canadian legislation. Under the *Evidence Act 2006*, the use of video recording of evidence in chief is available to any complainant who may be vulnerable by reason of age, pre-existing disability, fear or intimidation, at the discretion of the court. According to commentators:

*A primary benefit of pre-recording evidence is that it preserves information that might be forgotten, and as the evidence is recorded (in the witness’s own words if a cognitive interview/narrative form technique is used), the effects of any contamination or distortion of memory over time is reduced.*<sup>129</sup>

It is suggested that early recording may improve prosecution and defence decision-making, charging decisions and early resolution of cases. It also reduces or eliminates the need for direct oral evidence at trial, potentially allowing recovery to begin earlier.<sup>130</sup> This may even result in a greater willingness of victims and witnesses to give evidence through these less formal processes, with reduced stress and better evidentiary outcomes. However, video evidence in chief that is followed by *viva voce* cross examination preserves many (if not most) of the difficulties that vulnerable witnesses experience testifying. Pre-trial cross examination, while not specifically provided for, is not disallowed and has been used in at least two cases at the High Court level.<sup>131</sup>

A provision available in England and Wales through legislation that has not been incorporated into Canadian legislation is the use of intermediaries for witnesses

<sup>127</sup> *Are special measures for vulnerable and intimidated witnesses working?* supra, p. 45-46.

<sup>128</sup> “Vulnerable Witnesses: Rights and Responsibilities,” supra, p. 9.

<sup>129</sup> *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges*, p. 724, citing A. Baddeley, M.W. Eysenck and M.C. Anderson, *Memory* (Sussex: Psychology Press, 2009).

<sup>130</sup> *Ibid*, p. 725.

<sup>131</sup> *Ibid*, p. 707.

with communication difficulties. The role of the intermediary goes beyond that of a support person: intermediaries are there to help with questioning of witnesses by explaining terms that the witness does not know or by rephrasing questions. Most often, intermediaries are used to explain the terms that may be used to a witness before court. However, safeguards prevent intermediaries from discussing the facts of the case with the witness or being left alone with the witness, in order to ensure that there is no suggestion or contamination of evidence. This also deserves consideration.

## **FOLLOW UP (POST-TRIAL)**

### **Applications for compensation and restitution**

International guidance on the rights of victims stresses the importance of compensation and restitution as recognitions of victims' rights and as providing support to vulnerable and intimidate witnesses. Compensation is money that is paid to a victim of a crime by the state, using tax payers' money or surcharges on fines and penalties collected from offenders, as is the case in BC under the *Crime Victim Assistance Act*, 2002. Victims of crime, immediate family members and, in some cases, witnesses may be eligible for compensation for certain types of violent crimes to pay for:

- medical or dental services or expenses;
- prescription drug expenses;
- disability aids;
- counselling services or expenses;
- vocational services or expenses;
- protective measures, services or expenses;
- repair or replacement of damaged or destroyed personal property;
- home modification, maintenance or moving expenses;
- vehicle modification or acquisition;
- homemaker, childcare or personal care services or expenses;
- maintenance for a child born as a result of the prescribed offence;
- income support;
- lost earning capacity; and
- transportation and related expenses.<sup>132</sup>

In other jurisdictions, statutory compensation has been used as a way of building trust between victims of crime and the authorities.

*We heard of the beneficial role of the compensation scheme. A person who works within a local Crime and Disorder Reduction Partnership (CDRP) to help and support very disadvantaged women in street prostitution told us that the*

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<sup>132</sup> *Crime Victim Assistance Act*, S.B.C. 2001, c. 48.

*partnership is doing 'surprisingly well' with securing compensation for women working in prostitution who have been violently raped. As she told us, 'the police vice liaison officer will not give up on getting them their money' and, although the amount they receive is reduced to reflect their criminal records, 'it is not about the cash amount, but the fact that they deserve the recognition of it. It additionally communicates that they [the authorities] care'.<sup>133</sup>*

The degree to which victims in the Downtown Eastside are able to benefit from the statutory compensation scheme is unknown, although anecdotally, researchers have heard that those who are not formally employed may be excluded.

Restitution conceptually refers to return of property. In practice, it is court-ordered payment from the offender to the victim for quantifiable damages arising directly from the crime. Studies have shown that restitution is an important factor that influences victims' levels of satisfaction with the criminal justice system.

Restitution is available under s. 738 of the *Criminal Code*, but rarely ordered in criminal cases in Canada. Canadian crime victims in BC have no right to make a direct application to the court for restitution; applications must be made by Crown Counsel. Unless a victim can refer to very discrete losses (for example, for replacement of destroyed property) resulting from the crime, it is unlikely she will receive restitution, and courts will not consider restitution for services such as counseling (although these may be available through compensation, as noted above). Victims are entitled to outline the financial impact of the crime in their victim impact statements. If an offender fails to pay the restitution ordered by the court, it is up to the victim to pursue payment through civil remedies.

### **Victim impact statements**

Under s. 722 of the *Criminal Code*, victims may make victim impact statements at the time of sentencing an offender, which will aid the court in determining the effects of the crime on the victim. The victim impact statement describes the harm done to or loss suffered by the victim. A wide variety of forms of victim impact statements are acceptable. The victim impact statement is one of the few ways in which a victim can participate directly in the trial process. Many victims find that the opportunity to present their own experiences of a crime is cathartic and aids in the healing process. While use of victim impact statements is not unique to any particular type of victim or crime, from the perspective of a vulnerable or intimidated witness, it assists in building confidence in the criminal justice system. Victim services sometimes assist victims in drafting their statements.

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<sup>133</sup> *Stern Review*, supra, p. 107.

## Communication on the release of offenders

A final measure mentioned in many law enforcement policy manuals and best practices guides with regard to vulnerable and intimidated witnesses is the importance of ensuring that victims are kept informed when offenders are released back into the community. Conditions of release may require that the offender refrain from contacting the victim or notify police before moving residence. A timely response will assist victims in feeling that they are not at continuing risk. In the case of victims who are in unstable housing, it may be necessary to put special programs in place to facilitate police contact. It is not known what resources corrections personnel have to monitor offenders after their release.

### 3. RECOMMENDATIONS

The following is a list of recommendations arising from some of the issues that have been discussed:

- Checklists should be used to help police identify victims/witnesses who are vulnerable and intimidated, whether because of individual characteristics or because of the nature of the crime involved, with specific procedures to be employed in these instances.
- Single points of contact should be identified in each investigation, among police and Crown Counsel, so that vulnerable and intimidated witnesses experience continuity in their dealings with the criminal justice system.
- Police, prosecutors and defence lawyers should be trained in interviewing techniques that minimize victims' trauma.
- Police and victim services should maintain close contact with complainants and their families throughout investigations and should be mindful of the importance and sensitivity of communication for those who are vulnerable.
- In order that witnesses know what to expect, appropriate materials should exist to walk them through the process, from familiarizing them with the layout of the courtroom and the roles played by different parties to explaining cross examination.
- A holistic approach to victim support should be provided throughout the investigative process, and not merely directly before trial; specifically:
  - Arrangements should be made for accompaniment to court and pre-hearing court visits;
  - Prosecutors should have witness coordination supports, including specially trained workers and police personnel;

- Prosecutors should work with victim services to facilitate open communication with complainants and witnesses, particularly during periods of unexpected delays during the proceedings;
- Prosecutors should be able to engage specially trained community organizations to ensure thorough preparation of complainants and witnesses, including role plays; and,
- Other supports to be provided by victim services could include providing intermediaries for witnesses who experience difficulties in communicating.
- More research is needed into the effects of drug and alcohol use on memory and aids to support those experiencing dependency or addiction.
- More research is needed on bias and perceptions of credibility among police, counsel and the judiciary.
- Judges, lawyers, law enforcement officers and medical personnel should undergo appropriate training regarding sexual and gender-based violence to avoid re-victimizing complainants and to ensure that personal mores and values do not affect decision-making.
- Specially trained prosecutors and judges should hear cases involving women who are marginalized because of addictions and/or participation in the survival sex trade.
- Practical recommendations, such as putting strict limits of a maximum of two hours for complainants waiting to give evidence, would help to reduce stress.
- Changes are needed to the law of evidence to better allow vulnerable witnesses, including those who have been sexually assaulted, those suffering from addictions, and those in the sex industry, to take part in court processes. This may involve a more flexible interpretation of the hearsay rule to permit admission of corroborating evidence or prior consistent statements.
- Due attention should be paid to witnesses' privacy concerns and the relevance of health, counseling and other records for which disclosure is sought.
- Special measures should be made more readily available for those with drug and alcohol issues.
- Use should be made of expertise from non-government organizations and personnel in Vancouver Drug Treatment Court and Community Court in designing programs for witnesses vulnerable because of addictions.
- Victim services should be funded more consistently to allow for provision of victim care and support through the court process, including referrals to counseling, housing, appropriate drug treatment prior to testimony, and other services as necessary.



- Community organizations that are expected to play an intermediary role with complainants should be properly funded. Law enforcement agencies should refer complainants to organizations that can serve their needs, but also should be prepared to learn from these organizations about best practices.
- An evaluation process should be established whereby complainants and witnesses can provide feedback, preferably to a neutral third party, on how they were treated by police and Crown Counsel, and what their experience was testifying; this could be included in regular performance reviews and could also provide base-line data for a reconsideration of current policies and practices.
- Complainants need to be assured that they will not face retaliation for participating in trials. If complainants are difficult to locate because of insecure housing, special systems should be established to ensure they can be informed about offender releases.