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REVIEW OF MULTICULTURALISM AND JUSTICE ISSUES: A FRAMEWORK FOR ADDRESSING REFORM

Professor Brian Etherington

Faculty of Law
University of Windsor

May 1994

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EXECUTIVE SUMMARY

Purpose and Scope

Multiculturalism and justice issues raised in the reports and documents listed in the Appendix are reviewed and identified in this study. Most were prepared for the Law Reform Commission of Canada (LRCC) pursuant to a reference by the Minister of Justice to investigate and report on the extent to which minorities were ensured equal access to justice in the Canadian criminal justice system. The LRCC was abolished in 1992 before it was able to prepare a report on its research. The other reports listed in the Appendix were prepared pursuant to Department of Justice Canada initiatives focussing on multiculturalism and justice issues, including some arising outside the criminal justice system. Most of the reports reviewed were prepared after consultation with members of minority groups involved in multiculturalism and justice issues. The importance of Department of Justice Canada initiatives on multiculturalism and justice issues has increased significantly by the demise of LRCC and the potential void created in terms of law reform agencies.

This review attempts to summarize and synthesize the justice-related issues presented in the documents and organize them within a framework of justice issue categories. Additional information or research which could be of assistance is identified, as well as shortcomings of past approaches to multiculturalism and justice issues. Finally, suggestions are made for alternate perspectives for information gathering and policy development.

Background, Multiculturalism Initiatives, Perspectives and Coming to Terms with Terms

In this study, there is a pronounced focus on criminal justice system issues and relative lack of analysis on non-criminal access to justice concerns because 30 of the 36 reports reviewed were prepared pursuant to the Ministerial reference to the LRCC. Since it was the mandate of this study to summarize and synthesize the listed documents, this should not be viewed as an acceptance of such an imbalance in the study of multiculturalism and justice issues. An imbalance in favour of criminal justice issue analysis is potentially harmful to the interests which can be furthered by multiculturalism policy. The continual linking in the discussion of problems confronted by members of racial and ethnic minorities with the criminal justice system raises the danger of a general association of race and ethnicity with criminal behaviour. There is also a danger that a continual focus on criminal processing explanations for the over-representation or possible over-representation of racial and ethnic minorities as accused or convicted persons may deflect attention and resources from addressing explanations and causes which lie outside the criminal justice system. Attention may be diverted from socio-economic and political disparities or structural discrimination which may require more fundamental economic and social structural reform.

For the most part, the reports reviewed reflect an openly multiculturalist and anti-racism perspective. They refer to the obligations and mandate of the government and justice system under the policy of multiculturalism embodied in the *Multiculturalism Act*, 1988. Multiculturalism is generally described as reflecting the cultural, racial, and religious diversity of society and pledging assistance for minority groups in overcoming discriminatory barriers,

particularly those based on race, nationality, ethnicity or religion. The policy's restatement in the Act which focussed on equality concerns and the right of members of minority groups to equal access and opportunity, is in keeping with Canada's constitutional standards embodied in the *Charter of Rights and Freedoms* and the nature of our international obligations. Most of the reports recognize the need for society and government institutions to place greater emphasis on anti-racism concerns and everyone's equal right to full participation in the structures and institutions of society if our aspirations for a multicultural and just society are to be met.

The dangers of oversimplification and the failure to recognize the diversity of experiences, needs and interests of the constituencies of multiculturalism policy are also acknowledged. Yet, there are many recurrent perspectives and themes reflecting the experience of different minority communities with the justice system. The most important shared finding is that members of many racial and ethnic minorities have strong perceptions that they are discriminated against by the criminal justice system.

The review suggests that multiculturalism in its modern form is becoming synonymous, to a large extent, with combatting discrimination and racism. Thus, approaches to law reform to address multiculturalism issues must be guided by an explicit anti-racism and anti-discrimination outlook. But there still are substantial issues on the constitution of racism, its existence, appropriate measures to combat it, and the way remedial measures may collide with other fundamental values such as free speech, freedom of contract and merit in employment.

Modern notions of equality must look beyond mere formal equality to recognize that inequality and discrimination can result from a law or policy that is neutral on its face but has a disproportionately negative impact on members of a minority group. This concept of equality, which recognizes the significance of adverse effect or indirect discrimination, has been widely adopted by legislatures and courts in non-criminal contexts such as employment discrimination law. The LRCC reference papers express a willingness to apply this understanding of equality and equitable treatment to the criminal law context despite the tension that may be created with the more traditional orientation — focussing on uniformity, consistency and certainty in treatment — to reforming the criminal process adopted by the LRCC in the past.

This review discusses differences on the meaning that should be given to the term "racism." Most of the reports would require that there be an intention or belief that discriminatory relations between groups are morally and scientifically justifiable for there to be racism as opposed to racial discrimination, where a member of a minority group is discriminated against by conduct or omission which may be intentional or unintentional. Despite suggestions by some that racism should be defined simply by results or effects without requiring any form of belief or intention, this review suggests this may be counter-productive in terms of the objectives of changing behaviour and policies. If defined too broadly the term may lose any value or significance as a condemnatory description of behaviour. It is more important to focus on the kinds of problems involving racism or discrimination that need to be identified and dealt with in the justice system rather than focus on a more precise definition of racism.

Finally, Chapter 2.0 deals with the major transformation of Canadian society since the 1960s in terms of its racial, cultural, ethnic and religious heterogeneity. The review concludes that the changing demographics of the country, coupled with concerns of increasing intolerance, and considered in the context of widely shared perceptions of injustice (particularly in the

criminal context) among members of minority groups, make it imperative for issues concerning equality, equitable treatment, racism and systemic or institutional discrimination to be identified and addressed as soon as possible.

Research Issues

Chapter 3.0 discusses the difficulties in determining the extent perceptions of injustice in the criminal justice system describe the general operation of the criminal justice system. There is a lack of Canadian research on racial and ethnic minorities and their treatment both as victims or accused in the criminal justice system. Several reasons for this paucity, including the absence of officially collected data on race, ethnicity and crime in Canada, are discussed. Arguments for and against the collection of such data are canvassed; the reluctance of some representatives of minority communities who are fearful of its abuse is noted.

This review also discusses the complex problems of collection and analysis, the limited reliable use of such data, the need for uniformity in data collection and definitions of race and ethnicity, and concerns about the validity of such information without alternative sources of information. These problems suggest that if governments do gather such information great care must be taken in developing strategies and techniques for its collection. As well, minority communities must be consulted to develop implementation policies for data collection, public release of data and the interpretation of data.

The review discusses the paucity of research on the question of over-representation of minorities (other than aboriginals) as accused or prisoners but notes there is tentative evidence indicating over-representation of blacks in some regions of the country. While over-representation is not, in itself, proof of discrimination or racism in the operation of the criminal justice system, there are difficulties proving and locating racism or discrimination within the system through the use of empirical research. The difficulties and complexities of distinguishing between justice system factors and other factors as causes of over-representation are canvassed. The inconclusive nature of much of the research done in the past 30 to 40 years, mostly in the United States, is discussed at length.

The review concludes that empirical research to date has failed to yield definitive conclusions on the presence and location of racial discrimination within the criminal justice system, but the focus of modern research has shifted to investigating the extent to which racial and ethnic minorities are subject to systemic discrimination because of a disproportionate negative impact experienced when certain facially neutral factors — such as education, employment history and status — are considered in discretionary justice system decisions. Clearly, more empirical work is required, particularly research based on a structural or systemic discrimination model capable of revealing both criminal justice system and non-justice system explanations for over-representation.

Most reports call for further and better empirical research on these issues. However, they also warn of the dangers of discounting the validity of experiential surveys. Narrative accounts made at hearings by community representatives or in other forms by minority group members who have survived mistreatment in the justice system are as deserving of respect as conventional statistical research. The prevalence of recent experiential accounts of differential treatment of

minorities and the perception among members of visible minorities of racial discrimination in the justice system dictate that initiatives to combat racism and prevent discrimination should be undertaken.

Criminal Justice System Issues

Administration of Justice System Issues

In Chapter 4.0, the focus is on issues arising from laws, practices and policies affecting law enforcement, pre-trial, trial, and post-trial processes. Particular emphasis is placed on the exercise of discretion by justice system actors.

Police are clearly the most visible justice system actors and perceptions of their racism or discrimination in the performance of their duties have grown in minority communities in recent years because of police shootings of black and aboriginal persons in urban centres and revelations of police practices before commissions of inquiry. But, there has been little study in Canada on the exercise of broad police discretion concerning patrolling, stop and search, detention, search and seizure, arrest, charging, pre-charge release, post-charge release, and the use of deadly force. Although some preliminary studies may suggest differential treatment, the extent to which minority perceptions reflect the reality in any general sense concerning the exercise of discretion in these important process decisions remains unclear in Canada. This review also notes concerns that there may be a different rate of response by police to calls and complaints from minority community members.

The pivotal role played by crown prosecutors in the exercise of discretion in decisions affecting charging, staying proceedings, diversion, plea bargaining, bail, jury selection, and speaking to sentence has been largely ignored in Canada until very recently. Nevertheless, several reports reviewed in this study recommend the establishment of explicit, publicly known guidelines for the exercise of a prosecutor's discretion to prosecute, guidelines which would require a prosecutor to consider if the charges may reasonably give rise to accusations of discriminatory treatment. Several reports also recommend the adoption of policies of openness and more specific and public guidelines for the exercise of discretion in plea bargaining, including a directive that race or ethnicity not be a consideration in initiating plea discussions or in reaching a plea agreement. Crown prosecutors also must be sensitive to the needs of minority victims/complainants and witnesses to ensure they are treated with respect in the justice system.

There is concern about the potential for disadvantage for minorities in bail, plea bargaining and trial processes as a consequence of prejudice, cultural insensitivity or unawareness by defence counsel. In addition to measures to increase the presence of racial and ethnic minorities in the profession and cross-cultural training, one report recommends increasing the use of a minority community approach to legal aid as a method of ensuring greater access to culturally sensitive legal representation.

Attention has focussed more on the attitudes of the judiciary toward minorities but, to date, studies linking disparities in sentence to race in Canada have been inconclusive. Contemporary research focussing on sentencing has shifted to arguments that members of minorities are subject to systemic discrimination because of a disproportionate negative impact

experienced when certain "neutral factors" are considered in sentencing. The reports reviewed identified a number of issues to be addressed on equitable treatment in the sentencing context including the collection of sentencing data on disparity in treatment necessary for policy development, including recourse to alternative sanctions (other than incarceration); the development of sentencing policy principles, guidelines and factors to be employed in the exercise of judicial discretion; the relevance of racial prejudice as motivation for criminal activity as an aggravating factor in sentencing; the relevance of racial provocation as a mitigating factor in the sentencing of a minority offender; the relevance of ignorance of law arising from cultural or religious difference as a mitigating factor in sentencing; and the preparation of pre-sentence reports. This review advocates creating a national sentencing commission to develop, oversee and coordinate sentencing policy in Canada and to monitor progress and effectiveness on issues concerning the treatment of racial and ethnic minorities in sentencing.

Issues arising from race and ethnicity concerns in jury selection are numerous and complex. The primary issues are the extent to which pre-trial and in-court jury-selection procedures allow for intentional or systemic barriers to minority jurors and whether or not minority accused should be entitled as of right to a racially or ethnically representative jury. The review includes numerous recommendations to combat possible discrimination in juror selection, both in pre-trial and in-court challenge processes, but finds there is little support in the reports for a guaranteed right to a racially or ethnically representative jury.

In the discussion on corrections, there are recommendations that the National Parole Board and Correctional Services of Canada place a high priority on research on corrections issues relating to the treatment of racial and ethnic minorities, in particular: the size and character of the minority prison population; and whether or not minority offenders serve more time than non-minority offenders before parole and, if so, whether or not the longer time period is due to imposition of additional requirements attributable to racial bias or indicators of recidivism that are strongly correlated to race or ethnicity. Information is needed on the accommodation of minority religious practices for inmates, at both the federal and provincial level. Treatment and educational programs should be studied to determine their relevance for the needs of minority inmates and existing local initiatives for programs designed specifically to meet minority needs should be developed into a national policy on programs sensitive to the needs of minority inmates. Finally, there is a need for more ethno-culturally sensitive after-care facilities and programs to help combat recidivism.

There is a significant uniformity in the reports for measures to address concerns about racism and discrimination in the exercise of discretion within the justice system. The four types of measures most often repeated are an increase in minorities as justice system actors at all levels; implementation of cross-cultural and anti-racism training for justice system actors; community liaison programs to improve relations between system actors and minority communities; and monitoring bodies or complaint agencies to uncover abuses and to provide access to remedies to minority community members.

Recommendations to increase the representation of racial and ethnic minorities as justice system actors at every level are numerous. Equitable representation of minorities as significant justice system actors is important for access to justice for several reasons. It should help to reduce actual bias and the perception of bias as characteristics of the justice system. This can be done, in part, by sending a clear message to members of minority groups that it is their justice

system too. It can also serve as an important part of effective cross-cultural training by increasing the likelihood that majority actors who may have had little contact with minorities will be more aware and understanding of racial and cultural difference where it does exist and less likely to assume differences where they do not exist. It may also make them more receptive to more formal cross-cultural or anti-racism training. Increased representation by minorities should also make it more likely that instances of racism and discrimination will be detected, identified and addressed in a meaningful fashion. Finally, there will be role models for members of minority groups which will make it easier to recruit minorities to such positions in the future and break the self-sustaining cycle of under-representation.

Measures such as recruitment outreach programs and reform of regulations affecting dress and physical stature have been accepted by many police organizations. But several reports suggest that attaining employment equity objectives in policing may depend on adoption of equity legislation such as the new *Police Services Act* (1990), in Ontario. And, most agree that it is vitally important that employment equity policies apply to promotion decisions as well as hiring.

This review notes the importance of increased representation of racial and ethnic minorities as judges, prosecutors and defence counsel. Recent initiatives to improve the representativeness of the profession and the judiciary are discussed. The review notes that attempts to apply employment equity measures to positions in the justice system are dependent on members of minorities gaining access to the profession through access to legal education. Although there is much to be done, there are several promising initiatives by law schools in Canada in the areas of admissions, and broader education equity programs which seek to provide support for minority students. Several law societies have also undertaken measures to help bring visible minorities and aboriginals into the legal profession.

The need for more, and more effective, cross-cultural or race-relations training has been identified as a priority by policing experts, members of minority communities and governments. More recently, attention has focussed on the need for such training for other participants in the justice system. In policing, the repetition of such recommendations since the 1970s has resulted in the fairly widespread introduction of cross-cultural or anti-racism training programs in police services across Canada, particularly in large urban services. Yet, the review notes there is little agreement or study on the effectiveness of different types of training, trainers, and training techniques. The review recommends that much more empirical study on existing programs must be done to determine the most effective methodologies and techniques.

There is little detailed discussion on objectives, techniques and other training issues in the lawyer/judiciary context. However, recent initiatives by judicial councils and education centres to provide cross-cultural training are discussed, albeit with concerns about the lack of evaluation and methods to ensure effectiveness.

Several reports stress the importance of consultation and liaison with minority communities for all justice system actors, but particularly for police and prosecutors. Liaison with the minority communities can provide important two-way communication but its primary significance would rest in its ability to make justice system actors more familiar with other cultures and more directly aware of justice system concerns of minority community members.

Concerning monitoring bodies and complaints procedures, police have been the subject of much study and recent legislation in several jurisdictions, most notably Ontario and Quebec. The essential elements of an effective and acceptable public complaints system are accountability, independence and accessability. Accessability requires public-education measures for members of racial and ethnic minorities to enhance their awareness of the procedures and their ability to use them. There should be formal provision for significant civilian involvement. The process for making complaint should be simple and well-publicized. The process should allow for informal resolution of complaints through mediation, provided the scope for withdrawal due to intimidation by police is minimised and attempts at such intimidation are treated as serious disciplinary offences. There should also be provisions for dealing with complaints that are system-wide and reflect on police service policy. Adjudicators should have the power to go beyond the facts of individual disputes to recommend changes to police practices or policies. There are already numerous bodies to which police are accountable, some very recently created, making it undesirable to recommend new procedures or structures until the operation of the present ones have been closely monitored and properly evaluated.

This review expresses a general concern that procedures for making complaint or obtaining redress against lawyers have received very little scrutiny, particularly in relation to minority concerns. It is particularly important because of the self-regulated nature of the legal profession and concerns expressed in several reports about the extent to which lawyers are sufficiently educated or sensitized to the particular needs and skills required in order to properly represent minority clients. There is also concern that minority complainants may not make appropriate disciplinary bodies aware of their concerns because of ignorance or fear of procedures. The knowledge and perceptions of minority group members concerning complaint processes will likely be heavily influenced by whether or not hearings are made open to the public and on other appropriate public legal education measures. The review notes a recent trend in many jurisdictions to make law society disciplinary proceedings more public and emphasizes the important public legal education and confidence benefits of open procedures.

In policing the courts, there is concern that formal mechanisms for pursuing complaints against judges through provincial and federal judicial councils are not well known to the public and may be regarded as unresponsive and remote. Some councils, particularly the federal council, may be hampered by the lack of sufficient remedial powers, the lack of public lay representation, the lack of public education concerning their operation, and the holding of hearings in-camera. There is an absence of consistent practice on in-camera hearings of complaints against judges. Several recent reports advocate a presumption of openness for judicial councils with accompanying legislation to structure criteria under which the decision to close proceedings would be made at the discretion of the council. The Law Reform Commission also advocated the creation of legislated codes of judicial conduct for all levels of the judiciary, to be developed, published and widely disseminated with the advice and involvement of representatives of minority communities.

The review discusses a recommendation for the creation of a Multicultural Criminal Justice Advisory Council to promote a more comprehensive approach to ensuring that the exercise of discretion by justice system actors provides equitable and respectful treatment for members of racial and ethnic minorities. This new body could be modeled on the Advisory Council on the Status of Women, with a mandate to heighten society's awareness of multicultural issues, study the impact of existing practices and policies on minorities, inform the public of

progress or delay on multiculturalism concerns, identify areas of concern to various minority communities, and publish reports and studies on its work. Such a body could be particularly useful to identify general problem areas, in particular systemic problems, and identify system-wide solutions. It could also be involved in the collection of criminal justice data. To be effective, it is proposed that this body be independent of government, with full-time staff and the power to determine its own agenda and research programs.

The review notes the importance of information gathering and analysis on the use of risk indicators in the exercise of discretion at critical stages of the criminal justice process: the decision to charge; the decision to allow or deny pre-trial release; sentencing; and parole or other forms of conditional release. The issue to be confronted (and addressed with appropriate non-discriminatory guidelines if necessary) is whether or not the criteria used as risk indicators at these critical junctures result in systemic discrimination by causing the unjustified detention of accused persons from racial and ethnic minorities.

The review discusses several recommendations on the language of the accused, victims and witnesses. Most fundamental are measures to ensure that minority persons enjoy their *Charter* right to an interpreter if they do not understand the language of the proceedings. There is concern that the *Charter* right should be supplemented by legislative provisions to ensure that all accused, suspects, victims, and witnesses have access to competent, ethical and impartial translators during all pre-trial and trial stages of the process. Finally, the review notes concerns that cultural and language barriers can be serious impediments to access to justice for victims from racial and ethnic minorities. It recommends provisions of better and more accessible official language training, culturally sensitive public legal education, legal aid, police and social support services, and suggests these may be of particular importance to minority women.

On the issue of rules of evidence, the review mentions some concerns on whether or not present options on witness oaths are sufficient to honour commitments to equitable treatment and respect for all cultural minorities and suggests reforms to accommodate any form of oath which the witness finds disrespectful to cultural or religious beliefs. A more widely debated issue is whether or not Canadian law should recognize some form of privilege for communications with religious advisers. There is no general privilege for religious advisers under present law and there are conflicting opinions on the enactment of a general privilege for such communications in several of the reports surveyed.

Substantive Criminal Law Issues

This review identifies two categories of issues in this area: those which arise when minority religious or cultural practices conflict with statutory criminal law; and those which arise from attempts or failures on the part of our statutory criminal law to protect racial and ethnic minorities from discriminatory and violent racist behaviour on the part of others.

The review discusses the extent to which the *Charter* and Canada's international obligations may require an accommodation or exemption for minority religious or cultural practices and considers the extent to which such accommodation can be made without sacrificing fundamental social values or policies embodied in our criminal law or constitution. Many of the reports maintain that our constitutional principles and international commitments require that the

law attempt to accommodate core practices of religious collectives to the fullest extent which is consistent with competing fundamental values and rights. The *Charter* also places an important limit on the principle of accommodation, in that any practice violating another person's constitutional rights should not be accommodated.

There is little consensus in the reports on the extent of the need for reform to bring about a more accommodative posture through legislative or judicial action. The Canadian tradition has been for courts to refuse to grant exemptions or accommodate minority religious or cultural practices. But the reports differ on the need for a change in general approach and desirable outcomes on specific issues raised by clashes between minority religious practices and drug laws, weapons laws, bigamy offences, and parental-care offences.

The review discusses arguments concerning the potential for accommodation on an individual basis through judicial use of the common law principles concerning fault and responsibility in criminal law. This would involve judicial findings in individual cases that an accused's religious beliefs or cultural background could operate to negate the mental state (mens rea) required for the criminal offence or to provide an affirmative defence. The review notes that these arguments are not yet favoured in Canadian courts but discusses how they might impact on our criminal law and suggests possible limits necessary to ensure they do not undermine fundamental norms of our criminal law such as prohibitions against the infliction of violence or abuse on others, particularly women and children. The extent to which fundamental principles of criminal responsibility should accommodate minority religious and cultural differences deserves some consideration.

Concerning the protection of racial and ethnic minorities from discriminatory and violent racist behaviour on the part of others, the review discusses the limitations and criticisms of existing *Criminal Code* offences, particularly those concerning hate propaganda, and discusses the arguments for and against the creation of new criminal offences or sentencing provisions to punish certain forms of racist behaviour. The review recognizes the validity of traditional Law Reform Commission arguments against the creation of racism offences, but concludes it is difficult to overcome the concerns of members of racial and ethnic minorities that a failure to create a criminal offence against overt racism may represent a failure to recognize it as behaviour our society regards as serious wrongdoing. The review suggests several arguments to overcome LRCC concerns about problems of definition and the philosophy of restraint in the use of criminal law to regulate behaviour. It suggests the creation of specific offences such as racial assault to deal with particularly abhorrent racist behaviour, or the alternative of creating a special sentencing provision to specify that racist motivation would be considered an aggravating factor in sentencing.

Non-criminal Justice System Issues

The review prefaces the final four chapters to emphasize the importance of addressing multiculturalism and justice issues in the non-criminal justice system context. The criminal justice system does not exist in isolation and many of the barriers to access to justice faced by minorities originate in institutions which are generally perceived to be extrinsic to the criminal justice system. Where individuals are rejected by, or perceive rejection by dominant groups in society, the potential for conflict between them and the values of the majority may increase. It is

critically important to ask whether or not the broader non-criminal justice system provides access to justice to racial and ethnic minorities in their pursuit of economic and social justice or their attempts to gain redress for wrongs suffered in those areas of activity.

Although the focus shifts to the civil justice system, the review continues to address discrimination problems and to look for substantive and procedural devices to address, remedy and avoid such discrimination. The review also notes recurring difficulties associated with "two-way ignorance": the ignorance of different cultural contexts and values by actors within the justice system and regulatory regimes; and the absence of knowledge of the law, legal rights and responsibilities, and avenues of redress by members of cultural minorities. The review acknowledges that many of the measures proposed to combat racism, discrimination and ignorance in the exercise of discretion in the criminal justice system - education and employment equity for justice system actors, cross-cultural training, complaint mechanisms, and monitoring and advisory bodies - can be applied to civil justice system concerns.

While urging greater recognition of the impact of cultural differences in civil justice system issues, the review suggests caution, particularly in the family law context. It maintains that while judges must be better informed as to cultural differences relevant to cases before them and might be assisted by some mechanism for cultural consultation, some minority cultural values must be regarded as simply not acceptable in Canadian society. The review argues for care in recognizing minority values because of the risk of ghettoization and stereotyping of the minority community on the one hand and the inappropriate use of cultural context on the other to conceal discriminatory attitudes (such as gender bias) which are severely detrimental to a large segment of the cultural group.

Civil Justice System Issues

Family and Custody Issues

The review canvasses several issues on the impact of cultural or religious differences on family law issues such as separation, divorce, custody and access, state intervention for child protection, adoption, division of property, and support and maintenance. It notes that practitioners and academics have only recently turned their attention to such issues. Questions to be addressed include: what significance should cultural or religious difference be given in applying vague or open-ended legal standards such as the "best interests of the child" or "child in need of protection"; and what significance should minority cultural or religious values be given if they clearly clash with constitutional or majority values (such as gender equality) which have become imbedded in our substantive family law. The review notes the development of a critical perspective relative to the application of family law concepts in minority communities, but suggests the need for more research on the impact of cultural differences on family law issues and the potential barriers to access to justice faced by minority community members. Finally, the review mentions concerns that cultural differences can impede access to justice by preventing minority group members, particularly women and children, from learning of their legal rights and entitlements, or approaching justice system actors to seek enforcement of their rights.

Employment Discrimination Issues

The review summarizes recent important developments in employment discrimination to further the ideals of equality, equity and accommodation inherent in multiculturalism. Significant judicial and legislative developments on a number of substantive issues — the recognition of adverse effects or systemic discrimination, the development of an employer's duty of reasonable accommodation, attempts to give meaning to the notion of undue hardship which defines the limit of an employer's duty of accommodation, and the imposition of a duty of accommodation on unions — are discussed extensively in the review. However, the review notes that much of the recent concern and criticism on employment discrimination focuses on the inadequacy of present procedures and mechanisms for dealing with complaints of past wrongdoing. Concerns with mechanisms and procedures for advancing substantive goals extend to arguments for a more proactive systemic approach to promoting equality and equity in employment.

This review discusses federal legislation and recent provincial initiatives on employment equity. The inadequacy of a complaint-driven mechanism to redress past wrongs on an individual basis (like present human rights processes) or to address structural racism or systemic discrimination has led to employment equity legislation that imposes positive obligations on employers to eliminate barriers and create plans to increase the representation of designated groups in the workplace to be commensurate with their presence in the community. Criticisms of the operation of the federal legislation and calls for reform to clarify and enhance enforcement mechanisms and remedial powers are canvassed in the review. Finally, the new Ontario bill on employment equity is summarized, with some discussion on its attempt to reach a compromise on the critical issue of mandatory "quotas" or "goals" and deadlines.

In the discussion on dispute resolution processes for employment discrimination complaints, there is an outline of the widespread dissatisfaction with access to human rights procedures and appropriate remedies at both federal and provincial levels. In particular, it describes the serious complaints of lack of access and undue delay in Ontario and the proposals for reform suggested in the 1992 Ontario Human Rights Code Task Force report, *Achieving Equality*. The report recommends sweeping reform to introduce a more consumer-oriented, community-driven and proactive approach to human rights issues. Critical to the suggested reforms are recommendations to empower the claimant community by giving it direct access to hearing its claims, and the ability to direct the presentation of the claim and to choose the preferred form of dispute resolution. This would require creating three new permanent and independent agencies for human rights enforcement. The review also discusses briefly the wider issue of the appropriate use of alternative dispute resolution in other areas to meet the needs of members of minority communities.

Public Legal Education Issues

Several reports attempt to assess public legal education (PLE) needs of racial and cultural minorities and some attempt to focus on the needs of particular minority groups. This review identifies several common themes in the identification of PLE needs: for more culturally sensitive PLE to be made more accessible to members of minority communities; for more English- and French-language training for adult learners to overcome language as a barrier to PLE; for greater provision of PLE in the first language of minority communities, particularly for immigrants; for a multi-media approach to PLE; and for PLE programs or mechanisms to be

developed by or in consultation with members of cultural communities. Members of minority communities tend to rely heavily on government social service agencies or non-governmental social service organizations for legal information or referrals to legal information services. These agencies must be involved in the development and delivery of culturally sensitive PLE and must have the resources and capacity to deliver PLE to members of minority communities. Recent initiatives, particularly in Ontario, to create special legal aid clinics to provide services to members of minority racial and cultural communities are considered. The review expresses concern about the special problems that minority women, especially recent immigrants, might face in accessing legal information because of traditional community values concerning the roles of women and men. Finally, the review notes the importance of outreach PLE measures to overcome the reluctance of some minorities to contact or get closer to the Canadian justice system.

Immigrant Experience Issues

The emphasis in this chapter is on problems peculiar to members of racial and cultural minorities who are also immigrants to Canada, and problems they may share with others but which are felt more severely by immigrants.

Refugee Determination Issues

The review discusses the recent history of Canada's refugee determination policy, including the December 1992 amendments, and describes the *Charter*-based criticisms and concerns about the policy's shortcomings in terms of Canada's commitment to multiculturalism. These concerns range from the inadequacy of interpreter services provided to claimants to new powers granted to senior immigration officers to make determinations about eligibility and exclusion without a right to a hearing or counsel, to concerns about access to competent and ethical legal (or paralegal) services because of language and cultural differences.

Access to Language and Job Training

The review notes widespread concern in the reports on access to language training, job training and other social services for other categories of immigrants under present legislation and programs. The review cites several studies which argue that existing immigration categories for admission and sponsorship of family members, coupled with government policy on access to language and employment training skills upgrading programs, operate to ghettoize immigrant women, particularly those from racial minorities, in low-skill and low-wage occupations. The review notes that, for a number of years, these criticisms have been voiced by immigrant women's organizations as well as the Canadian Human Rights Commission (CHRC). The review acknowledges the government's 1992 announcement of several new programs to increase opportunities for basic language training and concludes that the programs should be monitored closely, particularly to determine how well they provide new opportunities for immigrant women.

Domestic Workers Issues

The plight of domestic workers admitted to Canada under the special immigration policy for temporary entry of migrant women as domestic workers is discussed in the context of the history of this policy and the traditional exclusion of domestic workers from aspects of employment standards or collective bargaining legislation. The potential for this program to ghettoize immigrant women and particularly visible minority women is highlighted. The review discusses the impact of recent amendments to the program (April, 1992) which increase educational and training requirements for admission to the program, relax the criteria for obtaining landed status at the end of two years, and promise counselling and PLE to inform domestics of their rights. It calls for close scrutiny of the operation of the new scheme.

Other Immigrant Issues

The review suggests that further empirical research is necessary to determine the extent to which barriers are presented for immigrants by the failure of our academic institutions, professional organizations, state institutions and employers to recognize non-North American and non-European educational qualifications, credentials and work experience in all jurisdictions in Canada. These issues have particular significance for the development of strategies to increase the representativeness of legal system actors.

The Relationship Between Race/Ethnicity/Culture, Gender, Class and Age

The review identifies the need for more research on the relationships between culture, race, gender, and class as explanations of disadvantage, in order to determine the important differences on particular access to justice issues. Such a multi-factor analysis would recognize the limitations of multiculturalism as a critical perspective, avoid the dangers of failing to recognize diversity within minority groups, and permit identification of those who may be doubly or triply disadvantaged by structures, practices and norms of society. The discussions on the particular problems of immigrant and visible minority women in several of the reports — in terms of access to language and job training, social services, public legal education on family law and other legal rights, protection from spousal violence, and access to safe shelter counselling and legal services — demonstrates how race, gender and class can together create a devastating disadvantage.

The review suggests that those interested in advancing the interests of multiculturalism in the justice system have much to learn from the experiences and history of other critical perspectives on the law, such as feminism. In recent years, there has been a significant impact of feminism on the law and law reform in a number of areas. The process has been gradual, brought on by the lobbying efforts of women's organizations; the increasing presence of women in law schools, the profession and its governing entities, legislative bodies and (most recently) the bench; an increasingly strong tradition of feminist scholarship; and a corresponding increase in the incorporation of feminist perspectives in law school courses. The review notes the potential for similar developments in multiculturalism as a critical perspective on law and law reform if similar measures are pursued.

Minority Youth and Justice System Issues

There is little research on juvenile justice and racial and ethnic minorities in Canada but several issues need attention: whether or not there is over-representation of minority youth in detention in Canada; whether or not there is over-representation of minority youth in transfers to adult court on criminal matters and, if so, the extent to which it results from overt or subtle racial bias; and the extent to which alternative measures programs adequately address minority youth concerns. The review discusses concerns about the rise of youth gangs in some urban centres and, while stressing the need for extreme caution to avoid further stereotyping of excessive immigrant and minority participation in criminal gang activity, notes the concerns expressed in some reports about the vulnerability of minority youth, particularly immigrant youth, to gang activities. Some government reports argue that addressing the language, and cultural and psychological needs of new Canadians could reduce their vulnerability to gang involvement. Finally, the reports stress the need for a coordinated approach involving all levels of government, police, schools, and non-governmental community organizations to satisfactorily address the problem of youth gangs.

1.0 INTRODUCTION

1.1 Purpose and Scope

The purpose of this report is to review and identify issues raised in the multiculturalism and justice reports and documents listed in the Appendix. These documents are from two sources. Most were prepared by the Law Reform Commission of Canada (LRCC), pursuant to a reference by the Minister of Justice to investigate and report on the extent to which minorities were ensured equal access to justice in Canada's criminal justice system. Unfortunately, the Commission was still consulting and analyzing these research reports when it was abolished by the federal government in the spring 1992. The other reports found in the Appendix were prepared pursuant to Department of Justice Canada initiatives focussing on multiculturalism and justice issues. The demise of the LRCC and the potential void left in terms of reform agencies heightens the importance of Justice Department initiatives such as this one on multiculturalism and access to justice issues.

This review attempts to synthesize and summarize the justice-related issues presented in the documents and arrange them within a framework of justice issue categories. Throughout the report, source documents for each issue are identified. In the discussions on the issues attempts to identify further information or complimentary research and, where possible, indicate sources of additional necessary or helpful information, have been made.

In fulfilling its mandate to identify, summarize and synthesize, the report attempts to identify shortcomings of past or current approaches to multiculturalism and justice issues and make suggestions for alternate approaches and perspectives to assist in information gathering and policy development.

This review is comprised of eight chapters. Chapter 2.0 discusses the background, including the multiculturalism and justice initiatives, that led to the reports reviewed, and identifies the perspectives and assumptions which underlie them. There is also a brief discussion on some of the central terms of multicultural and justice issues and a brief description of the changing makeup of Canadian society. Chapter 3.0 discusses prevalent issues on the collection, analysis and use of various types of research on multiculturalism and justice issues. Chapter 4.0 deals extensively with matters raised by the Ministerial reference, multiculturalism and access to justice in the context of the criminal justice system. Chapter 5.0 discusses prevalent issues in the civil justice system context, most notably family law and employment discrimination issues. Chapter 6.0 offers a brief discussion of issues surrounding the development and delivery of culturally sensitive and relevant public legal education and, to a very limited extent, legal aid. Chapter 7.0 deals with access to justice concerns from the perspective of the immigrant experience. And, Chapter 8.0 briefly discusses the relationship between race/ethnicity/culture and gender, class and age. The focus is on justice system problems confronted by women and youth in minority groups.

1.2 Methodology

Two research assistants initially prepared summaries of the documents listed in the Appendix, and a draft outline with commonly used justice issue categories was written. This draft outline was reviewed by three consultant/advisors and Department of Justice Canada officials and their comments were incorporated in a draft report which was further reviewed by the consultant/advisors and Justice officials before preparation of the final draft.

2.0 BACKGROUND, MULTICULTURALISM INITIATIVES, PERSPECTIVES AND COMING TO TERMS WITH TERMS

2.1 Multiculturalism and Justice Initiatives

It is important to note the highly pronounced focus in the documents on criminal justice system issues and the relative lack of analysis on non-criminal law access to justice concerns. Thirty of the 36 reports reviewed[1] were prepared pursuant to a reference by the Minister of Justice to the Law Reform Commission of Canada (LRCC). The Minister's reference asked the LRCC to study the *Criminal Code* of Canada and related statutes to examine the extent to which these laws ensure that Aboriginal persons and persons who are members of cultural or religious minorities have equal access to justice and are treated equitably and with respect. The Commission was also directed to carry out its task in a manner that stressed "new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society."

The different nature and magnitude of the claims which aboriginal peoples make in relation to aboriginal justice concerns made it inappropriate to study and discuss them within the rubric of multicultural justice issues[2] and the work on the Minister's reference was divided into two components: an aboriginal justice review, and a racial and ethnic minorities justice review. Prior to its abolition in March 1992, the LRCC published Report No. 34, *Aboriginal Peoples and Criminal Justice*, on aboriginal justice issues. Unfortunately, the Commission was still consulting and analyzing research documents on the multiculturalism and justice component when it was disbanded.

The other six documents listed in the Appendix were prepared as a result of Department of Justice Canada initiatives and therefore have a broader perspective on non-criminal justice system concerns of racial and ethnic minorities. Nevertheless, as this report attempts to synthesize and summarize the documents, it deals more comprehensively with multiculturalism and criminal justice issues.

This should not, however, be viewed as condonation of this current imbalance in the study of multiculturalism and justice issues. There are several reasons why such an imbalance in favour of criminal justice issues can be potentially harmful to the interests which can be furthered by multiculturalism policy. First, despite the best of motivations for such research, it has the potential danger of continually linking discussion of problems confronted by members of racial and ethnic groups with discussion of the criminal justice system, and subsequently, the potential of linking race and ethnicity with crime and deviance in general. In short, it can lead to unfortunate connections between race and crime which simply further harmful stereotypes.[3] Second, and this is alluded to in several

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[1] Contract Documents (C.D.) 2.1 to 2.30 are listed in the Appendix.

[2] The reasons for studying and working on aboriginal justice concerns separately are discussed in several of the Contract Documents. See *Background* (C.D. 2.8); Kaiser, *The Criminal Code of Canada: A Review Based on the Minister's Reference* (C.D. 2.3); and Etherington, et al., *Preserving Identity by Having Many Identities: A Report on Multiculturalism and Access to Justice*, (C.D. 2.34) pp. 7-8.

[3] As Professor Li pointed out, it is important to emphasize the absence of any empirical evidence showing some racial or ethnic groups are more prone to crime because of their superficial physical differences.

reports,[4] there is the danger that a focus on criminal processing explanations for the over-representation or possible over-representation of racial and ethnic minorities as accused or convicted persons may deflect attention and resources from addressing explanations and causes which lie outside the criminal justice system. Thus, it may divert attention from socio-economic and political disparities and structural or institutional discrimination which may require more fundamental economic and social structural reform. In this way, focussing on the criminal justice system may actually serve the political interests of the dominant groups in society. In any event, attention should not be deflected from other areas of the law such as human rights, domestic relations, immigration policy, and employment and pay equity.

2.2 Perspectives and Assumptions Underlying the Reports Reviewed

A significant number of the reports were prepared with an open multiculturalist and anti-racism perspective. Most refer specifically to the obligations and mandate of the government and justice system under the multiculturalism policy embodied in the *Multiculturalism Act*, 1988.[5] This policy is described by Etherington, et al., as reflecting the cultural, racial, and religious diversity of society and pledging assistance for minority groups in overcoming discriminatory barriers, particularly those based on race, nationality or ethnicity. The policy under the Act is also viewed as guaranteeing the freedom of Canadians to preserve and enhance their cultural heritage while enjoying the right to equal treatment and protection under the law in a manner which respects and values diversity.[6] And the policy's recent restatement in the Act,[7] particularly as it focuses on equality concerns and the right of members of minority groups to equal access and opportunity, is in keeping with Canada's constitutional standards and guarantees[8] and the nature of our international obligations.[9]

Most reports recognize the changing nature of Canadian society from a relatively

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[4] See Etherington, et al., C.D. 2.34, pp. 19-20; Brodeur, *Access to Justice and Equality of Treatment* (C.D. 2.2); and Anand, *Visible Minorities and Access to Justice* (C.D. 2.1).

[5] S.C. 1986-87-88, c. Bill C-24. See Etherington, et al., C.D. 2.34; and C.D. 2.8.

[6] S.C. 1986-87-88, c. Bill C-24. See Etherington, et al., C.D. 2.34; and C.D. 2.8.

[7] See s. 3 of the *Multiculturalism Act*.

[8] Canada's commitment to multiculturalism is found in several sections of the *Charter*. Section 27 provides:

> This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Although some have expressed concern that s. 27 only interprets and fails to guarantee any multicultural rights, it may significantly impact on the way individual rights and freedoms are interpreted in cases raising issues such as linguistic rights and minority religious rights in a number of areas including education, alternate cultural designs for living, and the protection of group dignity and cultural integrity. See the discussion of these issues in Kallen, "Multiculturalism, Minorities and Motherhood: A Social Scientific Critique of Section 27," in *Multiculturalism and the Charter: A Legal Perspective*, Can. Human Rights Foundation (1987).

Other sections of the *Charter* and their interaction with s. 27, such as sections 15 (equality), 28 (sexual equality), 23 (minority language education) and 2 (freedoms of expression, religion and association), are relevant for multicultural concerns as well. See for example, *R.* v. *Keegstra* (1990) 61 C.C.C. (3d) 1 (S.C.C.); *R.* v. *Edwards Books*, [1986] 2 S.C.R. 713; and *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143, where the Supreme Court made use of s. 27 as an aid in defining Charter rights and freedoms or as an aid in defining reasonable limits on Charter rights and freedoms under other sections of the *Charter*. In *R.* v. *Keegstra*, C.J. Dickson held:

> This Court has taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultures is a value to be protected and enhanced.

[9] C.D. 2.8, pp. 2-4 and Etherington, et al., C.D. 2.34, pp. 11-13. See also Brodeur, C.D. 2.2; Kaiser, C.D. 2.3; and Young and Gold, *The Criminal Law and Religious and Cultural Minorities* (C.D. 2.4). For reference to international commitments see *International Covenant on Civil and Political Rights* Art. 27; and *International Convention on the Elimination of Racial Discrimination*, s. 2(1). See also Woehrling J., "Minority Cultural and Linguistic Rights and Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1985) 31 McGill L.J. p. 50.

homogenous society, composed of and controlled by two dominant cultures, to a significantly more complex multicultural society with increasing diversity in terms of race, ethnicity, religion and culture. These reports recognize this diversity and the government's multiculturalism policy to preserve and promote it as great strengths of the Canadian social fabric. But, they also recognize the need for society and government institutions to place a greater focus on anti-racism concerns and everyone's right to participate fully in the structures and institutions of society if we are to achieve our aspirations for a multicultural and just society.[10]

Several reports are careful to point out the dangers of over-simplification and the failure to recognize the diversity of experiences, needs and interests of the constituencies of multiculturalism policy.[11] Yet, many reports identify recurrent perspectives and themes that arise in the experiential accounts and complaints of members of different minority communities concerning the criminal justice system. Perhaps the most important shared finding is that members of racial and ethnic minorities have strong perceptions that they are discriminated against by the criminal justice system.[12] Closely related to this perception of injustice within the system is the recognition that the key issue in a review of the justice system is racism for most Canadians in minority groups. Consequently, many reports acknowledge that approaches to law reform to address multiculturalism and justice issues must be "guided by an explicit anti-discrimination and more particularly, anti-racist outlook."[13] And, indeed, some reports point to the danger that the general official policy of multiculturalism could be used to obfuscate and cloak cultural and racial stratification and prevent issues of racism from being addressed directly.[14]

Finally, it is important to note that most of the documents reviewed were prepared after consultation with members of minority groups interested in multiculturalism and justice issues. The LRCC reports were prepared after some consultation with experts, members of affected communities, government policy makers, and justice system actors. And, additional sessions had been scheduled when it was abolished. The report prepared for the Department on multiculturalism and access to justice issues entitled, *Preserving Identities by Having Many Identities: A Report on Multiculturalism and Access to Justice*, was prepared following a two-day roundtable discussion involving representatives of racial and ethnic groups, academics, and government officials. The remainder of the non-LRCC reports (contract documents 2.31 - 2.36) were prepared as a

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[10] C.D. 2.3, pp. 8-10; Etherington, et al., C.D. 2.34, pp. 13-14 and 16; Kaiser, C.D. 2.3.

[11] See Etherington, et al., C.D. 2.34, pp. 7-9. See also C.D. 2.8, pp. 6-7:

> While there may be some commonality of interest among multicultural groups concerning criminal justice reform, one must constantly bear in mind that different groups have had different experiences with our systems and processes and the nostrums and solutions that might work so as to alleviate some of the difficulties or grievances of one group may be inappropriate or prove ineffective as regards another group.

[12] See C.D. 2.8, p. 7. Both C.D. 2.8 and Brodeur, C.D. 2.2, point out that this finding has been widely reported in the criminological literature since at least 1982. See also Kaiser, C.D. 2.3, and the reports of various task forces or inquiries on the treatment of racial or ethnic minorities by the criminal justice system -- e.g., the Lewis Task Force on Race Relations and Policing in Ontario (1989), the Donald Marshall Jr. Inquiry in Nova Scotia, the Bellemare Commission Report in Quebec (1988). It is important to note that perceptions of discrimination can arise in two very different forms. The first is a perception that minorities are singled out and treated differently as potential offenders by law enforcement agencies and other justice system actors. The second is a perception that minorities are treated differently in terms of adequate protection when their basic rights are being violated by others.

[13] Kaiser, C.D. 2.3, p. 134.

[14] Etherington, et al., C.D. 2.34, p. 5; and Kaiser, C.D. 2.3, p. 134.

result of consultations with focus groups composed of members of affected communities and consultations with representatives of racial and ethnic organizations.[15]

2.3 Coming to Terms with Terms

2.3.1 Multiculturalism

There is little attempt in the reports to address the modern meaning of multiculturalism in Canada or its historical development from its adoption as government policy in 1971, to the enactment of the *Multiculturalism Act* in 1988.[16] Further, there is little in the way of critical perspectives on multiculturalism as government policy.[17] However, there is some discussion on what the modern meaning or purpose of multiculturalism policy in the context of justice system issues should be.

Although some reports still acknowledge the culture retention purpose in the commitment of the *Multiculturalism Act* to the freedom of all Canadians to preserve, enhance and share their cultural heritage, most reports reflect the greater focus on equality, anti-discrimination and anti-racism objectives for the policy. There is a concern not only for equal treatment and equal protection under the law for members of minority groups, but also for the government to undertake positive measures to ensure equal access and opportunity for employment and advancement within the institutions of society, while respecting diversity.[18] Multiculturalism is now synonymous, to a large extent, with combatting discrimination and racism. However, there are still numerous issues concerning the constitution of racism, the extent to which it exists and how it is proven, appropriate measures to combat it, and the manner in which remedial measures may collide with other fundamental values such as free speech, freedom of contract and merit in employment. Consistent with this modern focus, multiculturalism must not be viewed as some "symbolic security blanket" which smothers the concerns of members of visible minorities about racism in our society.[19]

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[15] Although the majority of the reports were not prepared by members of affected minority groups, it must be noted that the authors did go to considerable lengths to try to obtain the perspective of minority community members.

[16] The only report that attempts to provide some history of multiculturalism as government policy is Etherington, et al., C.D. 2.34, pp. 3-14.

[17] After noting that the meaning, objectives and significance of multiculturalism policy had been controversial from its inception, Etherington, et al., C.D. 2.34, pp. 4-5, wrote:

> Some have argued that true cultural pluralism was not possible where the two dominant cultures were given pre-eminence by the policy of official bilingualism. Others argued that our multiculturalism policy was supported by mere symbolic multi-ethnicity without providing the structural bases to support the ongoing retention of coherent cultural communities and traditions. More importantly, guarantees of culture retention did not necessarily translate into social or economic equality for members of cultural groups or equal access to participation in the structures of power. Finally, the official policy of multiculturalism has been depicted as actually supporting the continuation of the vertical mosaic by obfuscating and cloaking issues of cultural, racial and class stratification. (Footnotes omitted.)

For a more recent criticism of multiculturalism policy see Bissoondath, "A Question of Belonging: Multiculturalism and Citizenship", in ed., Kaplan, *Belonging: The Meaning and Future of Canadian Citizenship* (McGill-Queen's University Press, 1992). In addition to repeating most of the criticisms referred to above, Bissoondath suggests that multiculturalism policy's accentuation of the merits of diversity may actually threaten social cohesion by encouraging division and failing to make any reference "to unity or oneness of vision" (p. 373). He also suggests it may actually get in the way of measures to combat racism by transmitting an image that diminishes "a unified whole in favour of an ever-fraying mosaic" (p. 381). Further, Etherington, et al., C.D. 2.34, p. 13, report: "During our Roundtable discussions several participants expressed the need to focus on equality concerns and some even suggested that continued attribution of assumed cultural differences and assumed interest in culture retention to immigrants and visible minorities could detract from the ability to obtain equality objectives."

[18] C.D. 2.8, pp. 2-8; Etherington, et al., C.D. 2.34, pp. 13-14; Kaiser, C.D. 2.3; Brodeur, C.D. 2.2; Young and Gold, C.D. 2.4, pp. 1-15.

[19] Kaiser, C.D. 2.3, p. 134.

2.3.2 Equality, Equal Access to Justice, Equitable Treatment and Respect

Several reports outline the meanings of equality, equal access to justice and equitable treatment to be used in discussions of multiculturalism and justice issues.[20] All reports addressing the topic agreed that modern notions of equality must look beyond mere "formal equality" to recognize that inequality and discrimination can result from a law or policy which is neutral on its face but has a disproportionately negative effect on members of a minority group. In recent years, the Supreme Court of Canada and legislatures in Canada have adopted a notion of equality incorporating this concept of adverse effect or indirect discrimination in numerous non-criminal contexts, such as employment discrimination law. The reports reflect a basic recognition of the principle that equal treatment does not always mean equality and that often differential treatment to accommodate diversity will be required to ensure real equality or equitable treatment.[21]

The LRCC reports express a willingness to apply this modern definition of equality and equitable treatment to the criminal law context, despite the tension this may create with the LRCC's traditional orientation to reforming the criminal process. While acknowledging that in the past the Commission had proclaimed the virtues of a uniform, consistent, and comprehensive approach to law reform, the reports recognize that the objectives of equality, equitable treatment and respect require that:

> ...cultural distinctiveness be recognized, respected and, where appropriate, incorporated into the criminal justice system. They require that differences between members of various groups be considered by police, Crown prosecutors, defence lawyers, judges, legislators, and all other participants in the criminal justice system, and indeed at times that the structure of the criminal justice system itself be adjusted to allow greater recognition of these differences.[22]

2.3.3 Systemic or Adverse Effect Discrimination

The definition of adverse effect or systemic discrimination adopted in most of the reports is borrowed from leading employment discrimination and *Charter of Human Rights* decisions.[23] It is simply stated as arising when laws, practices or policies which are intended to be neutral have a discriminatory impact on a prohibited ground on some groups.[24] But, several reports go on to argue that not every rule which has an unequal

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[20] This is especially the case for the LRCC documents as the Minister's reference specifically directed them to evaluate the criminal justice system under these terms.

[21] C.D. 2.2; Etherington, et al., C.D. 2.34, pp. 14-15 and 65-66; *Equal Access to Justice, Equitable Treatment, and Respect* (C.D. 2.11); and C.D. 2.3.

[22] C.D. 2.11, p. 2-3. For a fuller discussion of these issues, see LRCC, *Aboriginal Peoples and Criminal Justice*, Report No. 34 (1992), pp. 1-2.

[23] See *O'Malley and Ontario Human Rights Comm.* v. *Simpson-Sears Ltd.* [1985] 2 S.C.R. 536; *Alberta Human Rights Comm.* v. *Central Alberta Dairy Pool* (1990) 72 D.L.R. (4th) 417 (S.C.C.); and *Andrews* v. *Law Society of B.C.* [1989] 1 S.C.R. 143.

[24] A common example cited in several reports is the case of minimum height and weight restrictions which tended to restrict the number of

impact on members of a minority group constitutes systemic discrimination. It is also necessary that the unequal impact is unnecessary and unjustified.[25] To illustrate, one report poses a hypothetical situation where "having a permanent address" is a predictive factor for persons in all age groups, cultures and races to be more likely to appear at trial if released on bail. This would make it reasonable for bail-hearing judges to consider it as a factor in their decision. If one then assumed that members of a specific minority group — e.g., Koreans — were twice as likely to be homeless in Canada, fair application of bail criteria would result in a disproportionate negative impact on Koreans in bail decisions. But, the report argues that if one accepts the assumptions posited this would not be a case of systemic discrimination (by the criminal justice system), or necessarily indicate some problem that lies within the criminal justice system.[26] In determining whether or not a practice or rule that results in an unequal impact is unjustifiable, one must look to the extent to which the result can be explained by legal factors such as seriousness of the offence or criminal record, rather than non-legal factors such as race, gender or age.[27]

2.3.4 Racism

Several reports attempt to define the term "racism." Most draw a distinction between the term racism, which requires that there be an intention or belief that "discriminatory relations between groups are morally and scientifically justifiable,"[28] and "racial discrimination" wherein a member of a minority group is discriminated against by conduct or an omission which may be intentional or unintentional.[29] In this view, discrimination is an important element of racism but racism requires both prejudice (the negative attitude, opinion or belief toward members of an identifiable group) and expressed or implied negative conduct or omissions resulting from such attitudes or beliefs.

Although some authors take the position that the term racism should be defined merely by results or effects without requiring any element of belief or intention on the part of the racist actor,[30] there is concern that such an approach would be counter-productive. Well-meaning people could, as a result, be described as racist and they could then react defensively when they would more likely respond positively if informed that their practices or policies have discriminatory effects or adverse consequences for

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women and members of some ethnic groups who could qualify as police officers. See Etherington, et al., C.D. 2.34; C.D. 2.11; and see Jain, "Recruitment of Ethnic Minorities in Canadian Police Forces" (1987) 42 Relat. Ind. 790, p. 793.

[25] C.D. 2.2, p. 31; and C.D. 2.11, pp. 11-13.

[26] C.D. 2.11, p. 12. It should be noted that it is difficult to conclude that the predictive factor of permanent address is inappropriate if, in fact, homeless Koreans are less likely to appear at trial than Koreans with a permanent address.

[27] Brodeur, C.D. 2.2, p. 26; and C.D. 2.11, pp. 12-13. C.D. 2.11 also concludes that even where rules with a disparate impact on some group are independently justified it might be appropriate for the justice system to look for alternate measures or practices to offset the unequal impact on the groups and thereby provide more equitable treatment and respect.

[28] Art. 2(2), UNESCO Declaration on Race and Racial Prejudice (1978), cited in C.D. 2.11, p. 4.

[29] Hamid, *Note on Racism*, (C.D. 2.30), pp. 2-4; C.D. 2.11, pp. 4-5; and Brodeur, C.D. 2.2, pp. 11-12. Brodeur views the diverse definitions of racism as resulting from the interplay of two principles. The first is differentiation, where group members are defined as alien and different, and this justifies their exclusion from society. Any difference, from religion to appearance, can serve as the basis for discrimination and marginalization. Under the second principle of subordination, excluded groups are defined as inferior and submitted to a state of inferiority. Both principles may operate in varying degrees of intensity, with racism reaching its peak when differentiation is grounded in biological differences between hypothetical racial genotypes.

[30] Wildsmith, "Getting at Racism: the Marshall Inquiry" (1991) 55 Sask. L.R. 97, p. 105.

members of some groups. The concern expressed in the LRCC reference reports is that disputes about whether such unintentional policies or practices are properly described as racist could interfere with the objectives of changing behaviour and policies. Consequently, they choose to focus on the kinds of problems, involving racism and/or discrimination, that need to be sought out and dealt with in the criminal justice system rather than focussing on a more precise definition of racism.[31]

Other writers stress the importance of recognizing the existence of structural or institutional racism. Structural racism is defined as:

> ...inequalities rooted in the system-wide operation of a society which exclude substantial numbers of members of particular ethnic categories from significant participation in its major social institutions. The crucial issue here is not that of equal opportunity for those with equal qualifications, but beyond this, the question of the access of members of particular ethnic groups to the very qualifications (skills, resources) required by the majority ethnic group or groups for full participation in the life of the society.[32]

For structural racism to exist, there must be racial prejudice plus institutional power.[33]

There appears to be general agreement that racism is not restricted to bigoted attitudes and behaviour based on race but refers to similar attitudes and behaviour toward national, religious, geographical, linguistic, ethnic or cultural groups.[34]

2.4 The Changing Needs of Modern Canadian Society

Canadian society has undergone a major transformation since the 1960s in terms of its racial, cultural, ethnic and religious heterogeneity. Beginning in the 1960s, traditional European and North American source countries for immigrants (mostly white) have been replaced by Asian, Caribbean, South American and African countries.[35] As a result, there has been a significant increase in the visible minority population in Canada, particularly in the major urban centres. For example, in Toronto where one-third of the

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[31] C.D. 2.11, pp. 4-5.

[32] Hughes and Allen, *The Anatomy of Racism: Canadian Dimensions* (1974), p. 106.

[33] Hamid, *Racism in Canada*, (C.D. 2.10), pp. 1-2, citing Esmeralda Thornhill, "Presentation to the Marshall Inquiry", 25 November, 1988. See also Bolaria and Li, *Racial Oppression in Canada* (1988), who suggest that institutional racism can include the following:

- an ideology of racial domination based on a conception of racial hierarchy (cultural and/or biological);
- the use of such an ideology to justify unequal treatment;
- the manifestation of such an ideology in social structures in that it gives rise to prescribed norms and regulations designed to prevent subordinate groups from equal participation in social institutions; and
- racial exclusion based on formal, rational, systematic, and often legalized practices (as opposed to irrational and haphazard).

[34] See C.D. 2.11, pp. 3-4; Hamid, C.D. 2.10, p. 9; and Article 1(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969).

[35] During 1956-62, 17 of the top 20 source countries were European and provided over 90 percent of all immigrants. In 1980-89, 10 of the top 20 countries were Asian. In 1980-89, the place of birth of immigrants to Canada was Asia 46 percent, Europe 27 percent, Caribbean, Central and South America 15 percent, United States 5 percent, Africa 5 percent. See *Demographics of Ethnic Groups*, (C.D. 2.9), pp. 4-6.

population are immigrants, the visible minority population was 17 percent as early as 1986.[36] There are predictions that within the 20 years approximately 20 percent of the population of most major Canadian cities will consist of non-white minorities.[37]

Although such immigration and the resulting diversity have brought huge benefits to Canadian society, concern has been expressed, even among its supporters and promoters, that increasing diversity can result in increasing incidents of prejudice, racism and bigotry.[38] And some recent reports suggest that such negative elements have actually grown in recent years.[39]

The changing demographics of the country, coupled with concerns of increasing intolerance, and considered in the context of widely shared perceptions of injustice (particularly in the criminal context) among members of minority groups, make it imperative for issues concerning equality, equitable treatment, racism and systemic or institutional discrimination to be identified and addressed by our policy makers and justice system actors as soon as possible.

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[36] C.D. 2.9, pp. 8-9.

[37] Canadian Human Rights Commission, 1989 *Annual Report*, cited in C.D. 2.8, p. 4.

[38] Reitz, "Less Racial Discrimination in Canada, or Simply Less Racial Conflict?: Implications of Comparisons with Britain" (1988) 14 Can. Pub. Pol. 424. See also C.D. 2.8, pp. 4-5.

[39] The *Police Challenge 2000* (1990) report notes a recent Environics poll had shown that 17 percent of Canadians were bigots and that almost one-half of Canadians were becoming increasingly concerned about the growing number of visible minority Canadians in this country. Quoted in C.D. 2.8, p. 5.

3.0 RESEARCH ISSUES

3.1 Dearth of Research Data Available on Multiculturalism and Justice Issues in Canada

According to Brodeur's study of existing empirical research, there is widespread agreement among researchers that there is a perception of criminal injustice widely held by members of racial and ethnic minorities, that such perceptions are supported by specific incidents which have been widely reported and studied by commissions of inquiry, and that the critical issue to be resolved by researchers is the extent to which these perceptions are descriptive of the general operation of the criminal justice system.[40] Nevertheless, it is difficult to make the comparison between perceptions and the general experience because of what has been referred to as "a crippling dearth of Canadian research on racial/ethnic minorities and criminal justice."[41] The same is also true of Canadian research on treatment of racial and ethnic minorities within the non-criminal justice system.[42] In both areas of the justice system there has been some writing on differential treatment of aboriginal people, with some based on empirical work. Yet, such writing has been referred to as inconclusive on the issue of bias in conviction and sentencing.[43] The situation is even worse in the area of other racial and ethnic minorities, where empirical work is virtually non-existent.[44]

Several reasons can be offered for this paucity of research. One is that racial and ethnic minorities have been highly marginalized, and in fact, perceived as alien to our society. Another is the absence of members of these groups among the researcher population. It has been strongly suggested, in the criminal research context, that the reason there is a vast body of research on racial and ethnic minorities in the United States and virtually none in Canada, is at least in part due to the two countries different policies, which differentiates between racial and ethnic minorities, on government collection of criminal justice data. In short, some contend that the availability of data on racial and ethnic minorities in the United States, as compared to the almost complete absence of such data in Canada, is largely the reason why there is so little research on racial and ethnic minorities and the criminal justice system in Canada.[45]

3.2 The Collection of Data Concerning the Race and Ethnicity of Offenders and Victims

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[40] Brodeur, C.D. 2.2, pp. 15-20.

[41] Brodeur, C.D. 2.2, p. 21; and Etherington, et al., C.D. 2.34, pp. 21-22.

[42] Etherington, et al., C.D. 2.34, pp. 56-63.

[43] Clark, *Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders* (1989), cited in Etherington, et al., C.D. 2.34, p. 21.

[44] For the exception see studies done for the Royal Commission on the Donald Marshall Jr. Prosecution, Clairmont, Barnwell, and O'Malley, "Sentencing Disparity and Race in the Nova Scotia Criminal Justice System", Appendix 4 in *Discrimination Against Blacks in Nova Scotia: The Criminal Justice System*, Research Study Vol. 4, (1989).

[45] Brodeur, C.D. 2.2, pp. 22-23, notes that most of the systemic research in the United States relies heavily on data banks gathered from government authorities data collection. He also notes that one of the leading researchers in the world on these issues is Professor John Hagan of the University of Toronto. Other than some very early work on the treatment of aboriginal persons, all of his subsequent work has focussed on U.S. racial and ethnic minorities, probably because of the availability of data. Hagan has made this point in calling for the gathering of such data in Canada. See Hagan, "Toward a Structural Theory of Crime, Race and Gender: The Canadian Case" (1985), 31 Crime and Del. 129-146, p. 133.

in the Criminal Justice System

Despite recommendations by Brodeur[46] and others calling for the official collection of data concerning the race and ethnicity of offenders and victims that come into contact with the justice system, the collection of such data remains a controversial issue in Canada.[47] Most reports addressing this issue do recommend data collection for the following reasons:

- It is necessary to provide information with which to combat racism and racial discrimination within the justice system. If properly collected at all levels of the system it can assist in determining whether the criminal justice system is treating people of different racial or ethnic groups fairly.[48]
- Race/ethnicity data can be helpful in determining what kinds of programs or personnel would be most useful within the correctional system or in other areas of the process. They can even be useful, if properly collected and used in conjunction with other data, to identify groups who are most likely to be coming into the criminal justice system, and identifying reasons for this likelihood.[49]
- Some have argued that race/ethnicity data can be of great value to the development of broader structural/contextual approaches to the treatment of minorities by the justice system.[50] This involves use of such data to try to identify and address non-criminal justice system problems.
- In general, "Since no sound policy can be made in an information vacuum, collecting such data is a necessity for a society whose population is rapidly evolving towards racial/ethnic diversification."[51]

Nevertheless, there are many who oppose the collection of race/ethnicity data for offenders and victims for the following reasons:

- The recording of official data on the racial and ethnic background of offenders would present the risk of greater harm to minority communities through its subsequent misuse by the media, and others, than any benefits to be gained by its gathering. There is a genuine fear, particularly among some minority community leaders, that the public release of such data could be

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[46] Brodeur, C.D. 2.2, p. 23, states:

> We recommend that self-reported racial/ethnic data should be recorded concerning offenders and victims that come into contact with the criminal justice system, as well as criminal justice personnel who monitor offenders and victims. (Self-reported means persons would be expected to identify themselves in terms of race or ethnicity.)

[47] During the Windsor Roundtable several participants suggested that federal government measures to require the collection of such data in 1990 were strongly resisted by police forces and some cabinet ministers and were ultimately abandoned. See also discussion in Doob, *Report on Workshop on Collecting Race and Ethnicity Statistics in the Criminal Justice System* (1991) , pp. 27-28, on the difficulties encountered by the Canadian Centre for Justice Statistics in terms of the complexity of collecting racial origin information in police Uniform Crime Reports and the resistance of many police forces in the use of the new report form.

[48] Doob, *Report on Workshop* (1991), pp. 9-10.

[49] Ibid.

[50] Etherington, et al., C.D. 2.34, p. 24.

[51] Brodeur, C.D. 2.2, p. 25.

sensationalized by some media outlets and that such coverage might foster racism.[52] This concern is accentuated by what many perceive as an existing tendency in the media to highlight the racial elements in the reporting of crime or alleged criminal behaviour.[53]

- A related concern is that such official statistics are often quite susceptible to misinterpretation or misuse for purposes other than what they were intended in a manner which further disadvantages already disadvantaged groups. One of the reports notes that although police authorities generally take the position that they do not collect or record such information, they appear to be able to provide statistics on racial rates of criminality when it may serve their interests to do so.[54]
- There has also been some concern expressed that collection of such information might imply racial discrimination and could thereby violate the *Charter of Rights and Freedoms*. Nevertheless, the likelihood of success on such a *Charter* challenge was discounted given the lengthy U.S. experience with such data collection.[55]

Related to these concerns about the misuse of race and ethnicity data are a host of issues concerning the complexity of such data collection; the limited reliable use of such data; the need for uniformity in data collection and definitions of race and ethnicity; and concerns about the reliability and validity of such information without alternative sources of information. For example, using police-gathered data to describe "crime" or rates of criminality is generally naive, and relying on such information to determine the amount of crime committed by different groups may be seriously misleading.[56] Apart from the problems of missing data from unreported or uncleared crimes, the fact that a disproportionate number of visible minority persons were arrested or charged may merely indicate differential exercise of police discretion concerning patrolling and surveillance, "random" virtue testing,[57] stopping and investigation, deciding to give the offender a second chance, etc. In short, official statistics are likely only to be useful if used in conjunction with other data collection techniques, some of which require police cooperation, which is often not available.[58] There are also fears of systemic bias or high

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[52] Etherington, et al., C.D. 2.34, p. 24; Brodeur, C.D. 2.2, p. 24; and Doob, *Report on Workshop* (1991), p. 10.

[53] A particular example of this is the sensationalism of the so-called Asian gangs in major cities in Canada, a phenomenon that has received a great deal of attention from police and the media. This has tended to lead to a public perception that gang behaviour is more prevalent among Asians than other groups, although this remains highly debatable. (Comments of Professor Li.)

[54] Etherington, et al., C.D. 2.34, p. 24, note the example of a police spokesperson in February 1989, providing statistics on the high rate of participation in violent crime by black youth in the Jane-Finch area. "Police Tally of Crimes by Blacks Draws Fire", *The Toronto Star*, February 4, 1989, p. 1. Doob, *Report on Workshop* (1991), p. 4, notes that in the Toronto municipal election in 1991, support for collection of "race-crime statistics" at the police level "to find out about crime" seemed to be a socially acceptable proxy for attracting votes from those who think that non-whites are largely responsible for violence in Canada. Subsequently, he notes the irony that those in the academic community who are most in favour of collecting race/ethnicity data want to do so to determine whether already disadvantaged racially or ethnically defined groups are being further disadvantaged by the criminal justice system.

[55] Brodeur, C.D. 2.2, p. 24.

[56] Doob, *Report on Workshop* (1991), p. 4, points out that apart from other problems the missing data problem (large numbers of crimes not reported to police and large numbers of offences not being "cleared"), makes it difficult to interpret the data for the purpose of finding out what "race" committed crimes.

[57] This term means exactly what it says, testing someone's virtue at "random," if they have any illegal drugs or stolen goods to sell, etc. This type of activity is most frequently carried out by plainclothes or undercover officers.

[58] See Etherington, et al., C.D. 2.34, pp. 25-26, for a discussion of these issues.

unreliability levels if data are collected from the perspective of the decision-maker in the system and concern that if data are to come from victims or offenders there may be a reluctance to disclose data or purposive mis-attribution of crime from one group to another.[59]

These problems and concerns suggest that if the government is to become involved in gathering such information, great care must be taken in the development of strategies and techniques for the collection of race and ethnicity data concerning persons who participate in criminal behaviour or who come into contact with the criminal justice system. The difficulties associated with any one method of information collection (i.e., police reporting or self-reporting in random surveys) are likely to be overcome only if a variety of research methodologies and sources are used. And it is important to attempt to gather information concerning the treatment of suspects and accused at all stages and levels of the process. The problems associated with the absence of uniform definitions or categories for racial or ethnic identification must also be addressed, particularly if information on the treatment of the accused at different stages of the process is to be useful. Finally, proponents of official race and ethnicity data collection stress the need for consultation with minority communities to develop implementation policies for data collection, the public release of data, and the interpretation and use of data.[60]

3.3 Other Research Issues: Problems of Proof

3.3.1 Are Minorities Over-represented in the Criminal Justice System?

There is little empirical data on the extent to which racial and ethnic minorities, other than aboriginal persons,[61] are over-represented in our criminal justice system. However, there are now some preliminary indications that some visible minorities are over-represented in our corrections system. Studies in both Quebec and Nova Scotia have indicated that young black males are disproportionately represented in correctional populations.[62] Consequently, several reports recommend there be a high priority given to research on the size and characteristics of the racial- and ethnic-minority prison population in order to determine, among other things, the degree (if any) of over-representation of minorities within the corrections system.[63]

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[59] Doob, *Report on Workshop* (1991), pp. 4-5.

[60] See Brodeur, C.D. 2.2, p. 24; and Doob, *Report on Workshop* (1991), pp. 4-5. In general, see Doob for further discussion of measures necessary to ensure that useful and reliable data are collected.

[61] On the extent of aboriginal over-representation, see Laprairie, "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" (1990) Can. J. Criminology, pp. 429-440.

[62] See *Are Minorities Over-represented in the Criminal Justice System* (1991), (C.D. 2.20), p. 1; and C.D. 2.2, p. 29, citing a preliminary study of the Quebec Youth Protection Authority showing that young black males were increasingly over-represented in the juvenile correctional institutions (Pare, "La coleur de la misere des jeunes amoches", *Le Devoir*, February 26, 1991, p. B-1). For similar statements about the over-representation of Blacks in Nova Scotia prisons, see Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1989), 12 Dal. Law Rev. 377, pp. 381-382. See also statements made in the *Report of Inquiry into the Prosecution of Donald Marshall Jr.*, p. 150, that "Blacks... are disproportionately represented in our penitentiaries and prisons but almost totally absent from the public life of our province."

[63] C.D. 2.20, p. 7; and Brodeur, C.D. 2.2, pp. 44-49.

But the mere fact of over-representation does not, by itself, result in a conclusion that it is due to racial discrimination within the criminal justice system. As Brodeur points out, the prison population is largely made up of males between 19 and 26 years old. This does not indicate judges are prejudiced against young males, but rather that they see more of them in court than women or older persons. Young males seem to be disproportionately involved in criminal behaviour as it is presently defined in our criminal law, and they end up being over-represented in prison.[64] It is important to recognize, however, that over-representation does not, in itself, indicate that minorities are more frequently or more completely involved in criminal behaviour. Other explanations, including subtle and systemic discrimination both within and outside the criminal justice system, are explored in the following sections of this report.

3.3.2 The Difficulty Proving Racism or Discrimination in the Operation of Various Aspects of the Criminal Justice System — Distinguishing between Justice System Factors and Other Factors

Doubt by the general public on the capability of the criminal justice system to ensure fair and equal treatment for members of racial and ethnic minorities has probably never been as high as at present. This is due, in part, to the prevalence of experiential accounts of racial discrimination in the system provided in recent commissions of inquiry investigating the system's operation.[65] Yet despite this, empirical attempts to prove and locate racial discrimination as a significant factor within the criminal justice system, albeit very limited in Canada to date (but very extensive in the United States), have been largely inconclusive.[66]

Although empirical attempts to deal with issues of over-representation and discrimination are discussed in several of the reports,[67] Brodeur provides the most comprehensive discussion of the extensive research done in the United States and the very limited and preliminary work done in Canada. He begins by pointing out the importance of distinguishing between "legal factors" and "extra-legal factors" in performing and interpreting empirical studies which address issues of over-representation. Legal factors are such things as the seriousness of the offence charged, the prior criminal record of the accused, whether or not the accused was granted bail or not, and etc. These variables are the product of the legal system, either defined by it or a feature of the process. Extra-legal factors include age, gender, race, socio-economic status, and/or employment history. In general, the more the outcome of a criminal case is explained by extra-legal factors, the higher is the probability that the system is

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[64] C.D. 2.20, p. 3, citing Brodeur, C.D. 2.2, p. 26.

[65] See for example, the Royal Commission on the Donald Marshall Jr. Prosecution, The Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, The Alberta Public Inquiry Into Policing on the Blood Reserve, the Ontario Task Force on Race Relations and Policing (Lewis Task Force, 1989 and 1992), the "Comité d'enquête sur les relations entre les corps policiers et les minorités visible et ethnique au Québec" (The Bellemare Commission, 1988).

[66] The intention here is not to depict empirical and experiential studies as mutually exclusive but rather to emphasize the importance of considering both kinds of evidence and to point out some of the difficulties in attempting to perform and analyze empirical research on the impact of race and ethnicity in the criminal justice system.

[67] See Etherington, et al., C.D. 2.34, pp. 16-25; C.D. 2.20, pp. 1-7; and Brodeur, C.D. 2.2, pp. 25-49.

discriminatory.[68]

Brodeur suggests that the paucity of Canadian research on these issues and similarities between Canada and the United States in the criminal justice area make the use of U.S. research on over-representation and discrimination issues legitimate.[69] He then discusses three periods of U.S. research on causes of over-representation. During the initial period (1930s to mid 1960s), the simplest statistical methods, using aggregate percentages without any control for legal variables such as seriousness of offence or criminal record, were used to find evidence of over-representation and immediately infer that this could only be explained by racial discrimination. In the second period (late 1960s to early 1980s), Brodeur describes the general trend as one of critical reinterpretation of the evidence of over-representation that reduced the influence of extra-legal variables such as race or ethnicity on the criminal justice process to insignificance.[70] In short, the research concluded there was no evidence of overt racial discrimination. Brodeur concludes that British and Canadian research, though limited, also found that legal considerations outweighed extra-legal factors such as racial stereotypes.[71]

In the third period, which began in the late 1970s and continued through the 1980s, the research recognized the lack of evidence of overt biases but moved toward the discovery of possible subtle biases or indirect discrimination.[72] For example, one study showed the indirect influence of extra-legal factors on sentencing by demonstrating that non-whites and labourers were more likely to be denied bail which, in turn, was employed as a legal factor in determining longer prison sentences after conviction.[73] Thus, it could be inferred that some legal factors, such as making bail, are proxies for extra-legal factors such as race or occupation and contribute to screening their real but indirect effect. Other research in this period pointed to the need for more study at earlier stages in the criminal process — such as arrest, charging and deciding whether or not to proceed with prosecution — rather than mainly at the sentencing stage, in order to determine a truer

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[68] Brodeur, C.D. 2.2, pp. 25-26.

[69] There may be significant problems with this suggestion, particularly given the very different socio-political and legal histories of the two countries in terms of the experiences of Black minority communities. For example, Canadian Constitutions have never attempted to expressly subordinate or ascribe a lesser value to black persons, as did the American Constitution from its inception (see Article 1, section 2 of the United States Constitution which ascribed a value of three-fifths of a person to slaves in allocating taxes and positions in the House of Representatives).

[70] See, in particular, references to Hagan's work of reanalysing 20 studies made before 1973 and concluding that there was generally only a slight relationship between extra-legal attributes of the offender -- such as race -- and sentencing (Hagan, "Extra-legal Attributes and Criminal Sentencing: An Assessment of a Sociological Perspective" (1974) 8 Law and Society Rev., pp. 357-83). See also references to Kleck's findings that except in the South, the evidence was contrary to a hypothesis of widespread overt discrimination against black defendants and the effect of race was seen to be mostly a proxy for legal factors like seriousness of offence and prior record (Kleck, "Racial Discrimination in Criminal Sentencing: A Critical Reevaluation of the evidence with additional evidence on death penalty" [1981] 46 Amer. Soc. Rev., pp. 29-48).

[71] Brodeur, C.D. 2.2, p. 33.

[72] Brodeur uses the definition used by Zatz, "The Changing Forms of Racial Ethnic Biases in Sentencing" (1987) 24 Journ. of Res. in Crime and Del. 69-92, p. 83:

> By "overt" I refer to main or direct effects of race/ethnicity (or gender or class) on court processing and sanctioning. "Subtle" forms of bias exist where membership in a particular social group influences decision making indirectly or in interaction with other factors, with the outcome favouring one group over another. Such biases are no less systematic or harmful than overt bias; they simply differ in form. They have become institutionalized, and thus are less glaring and harder to find. As a consequence, research that tests only for main effects (i.e., overt bias) and does not investigate all the possible manifestations of discrimination may erroneously conclude that discrimination does not exist when, in fact, it does.

[73] See Brodeur, C.D. 2.2, pp. 34-35.

picture of subtle or indirect discrimination. Brodeur also points to several studies during this period which tended to show that police are not equally responsive to victims and complainants from racial and ethnic minorities.[74] There was also a growing recognition that the research methods necessary to trace subtle forms of discrimination needed to be much more elaborate and complex than previously.

Nevertheless, Brodeur concludes that even with the modern recognition of the need for more complex methodologies to expose indirect or subtle discrimination in sentencing or pre-sentencing process decision-making, the results of the most recent empirical studies on over-representation and discrimination continue to be ambiguous and equivocal. For example, two recent studies of case attrition (arrests not resulting in prosecutions) and sentencing in California, concluded that age, race and poverty factors bore almost no relation to case attrition and that the accused's race was not related to the sentence imposed once there were controls for relevant crime, prior record and process variables. They found racially equitable sentencing.[75]

In one of the very few Canadian studies of these issues, Clairmont and Barnwell conclude there is little support for the proposition that the race of the offender directly affects the sentence.[76] In one of two studies for the Donald Marshall Jr. Commission, the researchers concluded that race and ethnicity was so inextricably tied to social factors, such as low socio-economic status, that it was very difficult to determine which variable acted as a proxy for the other one:

> ... there is little support for the proposition that on average the race of an offender directly affects the sentencing he will receive.... Finally, a structural discrimination model, which posits in collaboration with socio-economic factors, direct and indirect race effects via defence strategies, resources and personal assessment is weak and without statistical significance. The variables that do clearly control sentencing variance are "legal" factors such as criminal record, severity of injury and embeddedness of the particular case (e.g., offender a probation violator). In these regards this research is consistent with recent work on

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[74] Brodeur, C.D. 2.2, p. 36.

[75] Brodeur, C.D. 2.2, p. 39, citing Petersilia, Abrahamse and Wilson, " The Relationship Between Police Practice, Community Characteristics and Case Attrition" (1990) 1 Policing and Society pp. 23-38; and Klein, Petersilia and Turner, "Race and Imprisonment Decisions in California," 247 Science pp. 812-816.

[76] Two studies were done on racial discrimination in sentencing in Nova Scotia for the Marshall Inquiry. The first study focussed on disparities in sentencing for theft convictions and appeared to demonstrate harsher sentences for Blacks that appeared to hold up when some legal variables were taken into consideration. However, subsequent statistical analysis revealed that much of the disparity could be accounted for by court process factors such as a not guilty plea or a negative pre-sentence report or by socio-economic factors. See Clairmont, Barnwell, and O'Malley, "Sentencing Disparity and Race in the Nova Scotia Criminal Justice System," *Report of the Royal Commission on the Prosecution of Donald Marshall Jr.* (1989) Appendix 4, Vol. 4.

In a second and more extensive study of sentencing in assault convictions, Clairmont and Barnwell pointed out the theft study was flawed because data were not collected on crucial variables such as recent prior convictions, the type of priors, and the embeddedness factor (whether the offender was already under sentence). They found no statistically significant correlation between extrinsic socio-economic factors such as employment and education, which might have established structural discrimination. See Clairmont and Barnwell, "Discrimination in Sentencing: Patterns of Sentencing for Assault Convictions," *Report of the Royal Commission on the Prosecution of Donald Marshall Jr.* (1989) Appendix 5, Vol. 4, pp. 183-184.

> discrimination in sentencing in both Canada and the United States which has generally found (research methods have also improved!) that such discrimination has become much more subtle, sporadic and driven into earlier stages of the charge/conviction/sentencing process or into the "backroom" of the court.... In sum, this research has shown that the race impact on sentencing either directly or indirectly is quite weak.[77]

Despite the conclusions in these studies, most of the research suggests that:

> ...while the limited sub-project undertaken for this study on sentencing can hardly be seen as definitive, it does support the hypotheses that Blacks receive harsher sentences for the same offence than non-Blacks. At the surface level, Blacks are not getting the absolute discharges nor indeed the discharges of any kind at a level comparable to non-Blacks. While it may well be that education, age, employment and other social/legal characteristics are more important directly than race, clearly a strong case can be made for the adverse effects of discrimination since the evidence is that employment, income and education are areas which influence sentencing, and where both the legacy of past racism and the implications of current racism effect discriminatory outcomes for Blacks.[78]

Brodeur refers to the apparent disparity in these two statements of findings as an illustration of the "wide margin for interpretation that is created by the dichotomy between overt and subtle discrimination, the adjective subtle acting as a semantic medium through which a weak impact of race is transformed into a strong case for racial/ethnic discrimination."[79]

Perhaps a fairer comment might be that results of empirical research performed to date have failed to yield definitive conclusions concerning the presence and location of racial discrimination within the criminal justice system, but that modern research has shifted its focus to investigating the extent to which racial and ethnic minorities are subject to systemic discrimination because of a disproportionate negative impact experienced when certain facially neutral factors — such as education, employment history and status — are considered in discretionary justice system decisions. Clearly more empirical work is called for, particularly research based on a structural or systemic discrimination model which is capable of revealing both criminal justice system and non-justice system explanations for over-representation.[80]

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[77] Ibid.

[78] Head and Clairmont, *Discrimination Against Blacks in Nova Scotia: the Criminal Justice System*, Vol. 4 of the *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, (1989), pp. 43-44.

[79] Brodeur, C.D. 2.2, pp. 41-42.

[80] Brodeur, C.D. 2.2, pp. 42-46, identifies from the uncertain results of existing research the following as main issues to be resolved by further research:

3.3.3 The Validity and Merit of Different Research Methodologies and Sources of Data

While most reports call for further research on the incidence of racial discrimination within the justice system, they do not advocate inaction pending more conclusive results. Some have warned of the dangers of discounting the validity of experiential surveys, stressing their importance to authentically express the opinions of the "person in the street." They emphasize that statements made at hearings by community representatives or in other forms by minority group members who have survived negative experiences in the justice system are as deserving of respect as conventional statistical research.[81] For most, the prevalence of recent experiential accounts of differential treatment of minorities by police and other justice system actors and the perception among members of visible minorities of racial discrimination in the justice system dictate the need for initiatives to combat racism and prevent discrimination.[82]

- Where is differential treatment occurring in the criminal justice process? (At the front end or back end of the system.)
- What is the nature of differential treatment? (Whether or not racial and ethnic minorities are treated more harshly or more leniently at different stages of the process.)
- Who is the object of the differential treatment? (Minority victims and complainants as well as offenders.)
- What are the factors that are the cause of differential treatment? He identifies four possible answers:
    - differential treatment is the product of the criminal law;
    - differential treatment is the product of extra-legal racial/ethnic bias in the enforcement of the criminal law;
    - differential treatment of minority victims/complainants is the result of their specific behaviour; or
    - differential treatment of minority offenders is the result of their differential involvement in crime, caused by a variety of structural-contextual factors, such as extra-justice system structural discrimination.

See also Etherington, et al., C.D. 2.34, pp. 18-22.

[81] Kaiser, C.D. 2.3, pp. 147-148.

[82] Brodeur C.D. 2.2, pp. 42-46 notes that when empirical researchers reduce to statistical insignificance the influence of racial prejudice in an explanation of the fact that one black male in every four is under the control of the justice system in the United States., that research itself stretches its own credibility. See also Etherington, et al., C.D. 2.34, p. 26; Kaiser, C.D. 2.3; and Stephen Lewis, *Report on Racism in Ontario*, prepared for the Ontario government in the aftermath of riots in Toronto in 1992.

4.0 CRIMINAL JUSTICE SYSTEM ISSUES

4.1 Administration of Justice System Issues

4.1.1 Distinction between Justice System Administration and Processing Issues and Substantive Law Issues

As discussed in Chapter 2.0, because of their origins as background reports for the Law Reform Commission of Canada (LRCC), most reports deal with issues of concern for the capacity of the criminal justice system to ensure fair and equitable treatment for members of racial and ethnic minorities. For the most part, such issues can be divided into two categories, one dealing with justice system administration and procedure issues and the other dealing with substantive criminal law issues. In the first category, the issues arising from laws, practices and policies affecting law enforcement, pre-trial, trial and post-trial processes and their impact on the treatment of members of minority groups as offenders and victims are reviewed in this chapter. The exercise of discretion by justice system actors in carrying out criminal justice system procedures is of particular interest. Several studies recognize that problems often arise from the application of the law and not its content. In the second category on substantive law issues, the concern is for issues arising from the definition of what constitutes criminal behaviour and what may constitute a valid defence, justification or excuse to relieve against criminal responsibility.

4.1.2 The Exercise of Discretion by Justice System Actors

Apart from sentencing, there has been little research on the treatment of racial and ethnic minorities by justice system actors at various critical "discretion points" in the criminal justice process. Several reports note the need to focus attention on the extent to which the exercise of discretion by all actors — police, prosecutors, defence counsel, judges, and parole and corrections officials — results in differential treatment for, or impact upon, members of racial and visible minorities. In this part, the areas of concern are identified. In the following two parts, suggested measures to rectify or prevent problems in these areas are identified.

4.1.2.1 Police

Clearly, the police are the most visible justice system actors in terms of perceptions of fairness, equitable treatment, and access to justice. They are the first point of contact for victims of crime, suspects and witnesses and are often regarded as a primary source of legal information.[83] Thus, incidents of abuse of discretionary power against members of racial and ethnic minorities by police can embitter entire

[83] *Police* (C.D. 2.16), p. 1; *Reports of Site Visits to Various Ethnic Organizations by Dept. of Justice Officials* (C.D. 2.35).

communities and give them a negative perception of the entire criminal justice system.[84] There is little doubt that perceptions of racism or racial discrimination in the exercise of power by police officers has increased in minority communities in recent years. This is due in large part to a number of police shootings of black and aboriginal persons in Montreal, Toronto and Winnipeg and revelations of police practices before several commissions of inquiry.[85]

Yet, there has been little study in Canada of the exercise of broad police discretion concerning surveillance and patrolling behaviour, stop and search powers, detention, search and seizure, arrest, charging, pre-charge release, post-charge release, and the use of deadly force.[86] Thus the extent to which perceptions of minority group members reflect reality in general on the exercise of discretion in these important process decisions remains unclear in Canada.[87] Nevertheless, studies of the experience in other jurisdictions suggest differential use of police powers toward racial and ethnic minorities, and suggest that this differential treatment is not entirely explained by legal factors such as the seriousness of the infraction alleged. In short, these studies point to the likelihood of differential treatment resulting from several types of structural discrimination and intentional discrimination.[88]

Three specific areas of police discretion receive some extended discussion in

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[84] Brodeur, C.D. 2.2, p. 78.

[85] Etherington, et al., C.D. 2.34, pp. 22-23; and Brodeur, C.D. 2.2, pp. 78-79. Brodeur notes that perceptions of racial prejudice in policing were expressed by representatives of racial and ethnic minorities before the Lewis Task Force and the Comité Bellemare, and were revealed in the opinion survey conducted for the Royal Commission on the Prosecution of Donald Marshall Jr.

[86] Concerns about the exercise of discretion by police are noted in many reports. See for example, Kaiser, C.D. 2.3. C.D. 2.16; C.D. 2.35; Etherington, et al., C.D. 2.34; and Brodeur, C.D. 2.2.

[87] The evidence that does exist, however, suggests differential treatment. See Andre Normandeau, "Police, Race and Ethnicity in Montreal" (1988) 4 Crimcare J. 3, cited in C.D. 2.16, p. 7. C.D. 2.16, p. 7, also reports a study where it was found that of 661 persons stopped by police in 1987, non-white youth were found to be stopped and questioned three times more often than whites. Non-whites were also more likely to be detained than whites. Cited from an unpublished paper by Normandeau, "La Police et les Minorité Ethnique" (1989), quoted in *Race Relations and Crime Prevention in Canadian Cities* (1990).

See also Consultative Conference, remarks of Esmeralda Thornhill, Edited *Transcript of Proceedings*, Vol. 7, *Report of Royal Commission on the Donald Marshall Jr. Prosecution*, (November 24-6, 1988), pp. 70-71; and Ontario Task Force on Race Relations and Policing, *Transcript of Proceedings*, testimony of Beverly Folkes, Vol. 1, (February 1, 1989), pp. 172-173.

[88] Brodeur, C.D. 2.2, pp. 80-81, citing Reiner, *The Politics of Police* (1985). According to Brodeur, Reiner classifies the explanations for differential treatment into five distinct forms of discrimination. The first four, which are structural forms of discrimination, and the last, which is racial discrimination in terms of personal or group biases are:

- Transmitted discrimination, where the police act as transmitters of the discriminatory attitudes of complainants who request or insist that a suspect be arrested or charged.
- Interactional discrimination, where the police react to a suspect's offensive behaviour towards them. It is not necessarily related to racial prejudice.
- Statistical discrimination, where the higher incidence of stop and search action towards racial and ethnic minorities may be explained by the police belief that certain groups are more likely to carry evidence of some offence (i.e., drugs). According to Reiner, statistical discrimination results more from a concern for efficient policing than from racial bias. But it could also be said that it stems from racial and ethnic stereotypes.
- Institutional discrimination, which results from organizational policy, for example, where police management, as a matter of policy, allocate more resources to high-crime areas and encourage the use of more aggressive tactics.
- Categorical discrimination, which is the transition into police practices of biases against certain categories of persons. It is perhaps the most difficult to trace and prove, even after all other factors have been explored. It is most likely to be embedded on other forms of discrimination and difficult to single out by observational methods.

several reports: the use of deadly force,[89] the use of stop and search and detention practices,[90] and electronic surveillance.[91]

Several studies also suggest that one of the factors contributing to negative perceptions of police in minority communities is differential rates of responsiveness to calls and complaints from minority persons.[92] As Brodeur points out, differential responsiveness can be closely related to negative perceptions. If there is conflict between police and minority communities, the police may lack enthusiasm for answering calls from those communities where they fear they will meet with hostility.

4.1.2.2 Crown Prosecutors

The critical concern with respect to Crown prosecutors is the extent to which they exercise their discretionary powers to disadvantage members of racial and cultural minorities. Here we are concerned with the role played by prosecutors in charging, staying proceedings, diversion, plea bargaining, bail, jury selection and speaking to sentence. In some jurisdictions they are involved in screening charges before they are laid before a justice but, in others, they exercise control over charges with the power to stay proceedings. It was pointed out in Chapter 3.0 that empirical research to date had focused on the police and sentencing and ignored the less visible decisions such as the decision to reject charges against an accused or to prosecute him. One recent American study suggests that although Blacks and Hispanics are as likely as Anglos to have their cases dismissed by prosecutors after charges had been formally laid, there is strong evidence of discrimination in the earlier decision to reject or formally enter criminal charges against an accused.[93] Blacks and Hispanics were less likely to have their charges rejected at the initial screening. But, there is not sufficient evidence to assess whether or not similar discrimination occurs in Canada.

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[89] Not surprisingly, concern about the manner in which deadly force is used by police in relation to minority offenders and suspects is discussed extensively both in Brodeur, C.D. 2.2, pp. 83-85, and C.D. 2.16, pp. 13-24. As C.D. 2.16, pp. 13-14, points out, although the use of deadly force should be an issue of concern for all citizens, it has become a highly visible issue primarily in relation to the shooting of Blacks in Canadian cities. Police shootings of Blacks in the 1970s led to an investigation and new complaint procedures in Toronto. In the 1980s, shootings of Blacks by police in Ontario led to the creation of the Race Relations and Policing Task Force. In Montreal, police have shot and killed six people in the past four years: three Black and three Hispanic. This has led the LRCC to make recommendations for significant reforms of s. 25(4) of the *Criminal Code* to more tightly regulate the use of deadly force by the police.

[90] Concerns about the extent to which members of minority groups, particularly minority youth are subjected to differential treatment and even harassment through the police exercise of stop and search, detention and arrest powers are expressed in C.D. 2.16, pp. 7-9; and Brodeur, C.D. 2.2, pp. 86-87. Brodeur notes there is a fair consensus in the research literature conducted in other jurisdictions to the effect that racial and ethnic minorities, particularly youths, are disproportionately submitted to stop and search exercises. He also suggests that such stop and search exercises may be of dubious legality, but the LRCC *Police* report suggests that common law developments have added to the ability of police to stop and detain citizens without the grounds normally required under the *Criminal Code* for arrest without a warrant. C.D. 2.16 also notes that the scope for such powers to be used for racially based abuse has been noted by some judges, citing J. Sopinka's judgement in *R.* v. *Ladouceur* (1990) 56 C.C.C. (3d) 22 (S.C.C.) and his references to comments by J.A. Tarnopolsky in the Ont. C.A. decision in that case.

[91] Brodeur, C.D. 2.2, pp. 87-88, expresses concern with legal powers given to the Canadian Security Intelligence Service under its enabling legislation to obtain basket warrants for electronic surveillance which could be abused to target a considerable portion of a racial or ethnic community. He suggests this may already have happened in one case involving the British Columbia Sikh community.

[92] Brodeur, C.D. 2.2, pp. 82-83, citing studies done by Ledoyen in 1989 for the Comité Bellemare. See Commission des droits de la personne du Québec, *Enquête sur les relations entre les corps policiers et les minorités visibles et ethniques*, Annexe III, (1988).

[93] See Spohn, Gruhl and Welch, "The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges" (1987), 25 Criminology, pp. 175-191, cited in C.D. 2.2.

Nevertheless, there is criticism that accused persons in minority groups too often are prosecuted on charges that should not be prosecuted because there was not sufficient grounds for arrest in the first place. The argument is that prosecutors fail to adequately screen charges to decide if prosecution is warranted or may actually be the result of discriminatory activity by the police.[94] As a result of these concerns, several reports recommend the establishment of explicit and publicly known guidelines for the exercise of a prosecutor's discretion to prosecute. Such guidelines would require the prosecutor to consider if the charges may reasonably give rise to accusations of discriminatory treatment. In this way, the prosecutor would consider the issue of possible discriminatory treatment for every charge.[95]

Several reports discuss the issue of the prosecutor's role in pre-trial release and plea bargaining situations. Although there has been little research[96] on whether or not the exercise of prosecutors' discretion in these areas disadvantages members of racial and ethnic minorities, several reports recommend the adoption of policies of openness and the promulgation of more specific and public guidelines for the exercise of discretion in plea bargaining. And, several authors recommend that in any proposed guidelines for prosecutors, there should be a directive that race or ethnicity should not be a consideration in initiating plea discussions or in reaching a plea agreement.[97] Previously expressed concerns about differential treatment in the exercise of prosecutorial discretion concerning disclosure[98] should be somewhat alleviated by the 1991 decision of the

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[94] LRCC, *Crown Prosecution Service*, (C.D. 2.17), p. 3, citing Bromley Armstrong, Consultative Conference, Edited *Transcript of Proceedings*, Vol. 7, *Report of Royal Commission on the Donald Marshall Jr. Prosecution*, (November 24-26, 1988), p. 76.

[95] Brodeur, C.D. 2.2, p. 97, advocates guidelines to make prosecutors aware of the possibility of such discrimination and suggests that would act as a remedy or as a preventive measure against discrimination at this early stage of the criminal process. The LRCC in *Crown Prosecution Service*, pp. 3-5, reiterates its recommendation for prosecution guidelines which include whether or not the public prosecutor believes there is evidence whereby a reasonable jury properly instructed could convict the suspect; if so, whether or not the prosecution would have a reasonable chance of resulting in a conviction; whether or not considerations of public policy make a prosecution desirable despite a low likelihood of conviction; whether or not considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and whether or not the resources exist to justify bringing a charge. It then adds the requirement that the prosecutor consider if charges in the circumstances could reasonably give rise to accusations of discrimination.

[96] There is one early study done by Wynne and Hartnagel, "Race and Plea Negotiation: An Analysis of Some Canadian Data" (1975) 1 Can. Journal of Sociology. pp. 147-55. The authors found that native defendants were less likely (12 percent) to experience plea negotiations than were white defendants (31 percent) although they admitted that they had not controlled for certain potentially significant variables such as prior record and type of offence. See also Taylor and Gillespie, "Multiple Association Analysis of Race and Plea Negotiation: The Wynne and Hartnagel Data" (1982) 7 Can. J. of Sociology, pp. 391-401.

Brodeur refers to research in California that showed that Blacks and Hispanics were less likely to be given probation, more likely to receive prison sentences, more likely to receive longer sentences, and more likely to serve longer time. In looking for factors to account for the differences, it was found that minority defendants were more likely to go to trial than plead guilty. Since a plea agreement usually results in lesser charges and lighter sentences, the author hypothesized that minority accused choose to plead not guilty because they are consistently offered less attractive bargains than whites. Consequently she suggested that plea bargaining be closely monitored to see whether minorities were offered less attractive deals. Petersilia, "Racial Disparities in the Criminal Justice System: Executive Summary of the Rand Institute Study, 1983", in ed., Georges-Abeyie, *The Criminal Justice System and Blacks* (1983).

[97] Brodeur C.D. 2.2, p. 100, notes that while there may be insufficient evidence of differential treatment in plea negotiations in Canada to show an urgent need to monitor plea discussions with respect to minorities, there may be sufficient justification to begin such monitoring. See also recommendations 37, 38, and 43 of the *Report of the Royal Commission into the Prosecution of Donald Marshall Jr.* (1988). Recommendation 43 on plea bargaining recommends that a directive on plea bargaining should clearly set out the basis for the exercise of discretion and set out the governing principles of openness, voluntariness, accuracy, appropriateness and equality. Kaiser, C.D. 2.3.

[98] See Etherington, et al., C.D. 2.34 pp. 36-37; and *Report of the Royal Commission into the Prosecution of Donald Marshall Jr.* (1988), recommendation 39, recommending the amendment of the *Criminal Code* to include statutory disclosure obligations.

Supreme Court of Canada in *Stinchcombe* v. *R.*,[99] where the Crown's legal duty to disclose all relevant information to the defence is clarified and strengthened.

Finally, the LRCC report on crown prosecutors notes the importance of ensuring that prosecutors are sensitive to the needs of minority victims/complainants and witnesses to ensure they are treated with respect by the criminal justice system. In the discussion on police, the concern about the police devaluing crime against minority victims or being less responsive to minority communities was noted. Crown prosecutors have a role to play in ensuring that the allegations of minority victims or witnesses are taken seriously and acted upon appropriately.[100]

4.1.2.3 Defence Counsel

Several reports express concerns about the possibility of disadvantage being suffered by persons in minority groups accused in bail, plea-bargaining and trial processes as a consequence of prejudice, cultural insensitivity or unawareness by defence counsel.[101] Most reports recommend a combination of measures to increase racial and ethnic minority presence in the profession, and provide cross-cultural or anti-racism training to members of the profession.[102] One report advocates increasing use of a minority community approach to legal aid, such as that being tried in Toronto, to help ensure greater access for members of minority communities to culturally sensitive legal representation.[103]

4.1.2.4 Judiciary

Most of the reports address the issue of the extent to which judicial attitudes and practices may impact negatively on racial and ethnic minorities in the bail and sentencing processes.[104] But, although attention has become more focussed on the attitudes of the judiciary toward minorities as a consequence of the Royal Commission on the

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[99] [1991] 3 S.C.R. 326.

[100] C.D. 2.17, pp. 7-9, suggests the following measures for prosecutors regarding victims and witnesses:

- taking seriously the accusation of criminal conduct made by the minority complainant and laying charges where appropriate;
- explaining to the complainant or witness the procedures involved in the trial process;
- determining whether an interpreter is needed by the complainant or witness; and
- assisting the complainant or witness in attending trial to give evidence in court.

[101] See Kaiser, C.D. 2.3, pp. 111-112; Etherington, et al., C.D. 2.34; and Brodeur, C.D. 2.2, pp. 100-102. Brodeur refers to a study done by the Centre de Recherche Action sur les relations raciales, *Recherche sur l'aide juridique et les minorités ethniques et culturelles*, the "CRAAR report," (1991) which concluded that not only were racial and ethic minorities dramatically under-represented in the legal profession in Quebec, but there was lack of awareness of racial and ethnic minority issues at all levels of the profession. See also references to similar concerns by aboriginal and visible minority group participants or organizations in *Focus Groups on Public Legal Information Needs and Barriers to Access* (1990) (C.D. 2.32).

[102] Ibid.

[103] Brodeur, C.D. 2.2, citing the CRAAR report and referring to the Metro Toronto Chinese and Southeast Asian Legal Clinic. See further discussion of this issue in relation to the recent announcement by Ontario's Attorney General for plans to create legal aid clinics for blacks in Toronto, in Chapter 6.0, "Public Legal Education Issues."

[104] C.D. 2.20; Brodeur, C.D. 2.2; C.D. 2.3; and Etherington, et al., C.D. 2.34.

Prosecution of Donald Marshall Jr. and its comments on the conduct of the Nova Scotia Court of Appeal, the studies to date attempting to link disparity in sentencing to race in Canada have been inconclusive.[105] The focus of contemporary research has shifted to the suggestion that members of visible minorities are subject to systemic discrimination because of a disproportionate negative impact experienced when certain facially neutral factors — such as employment history and status, education, and pre-trial release — are considered in sentencing.[106] Thus, Brodeur notes that racial prejudice may have an indirect effect on sentencing because judges were shown in one study to impose more severe sentences on offenders who were previously denied pre-trial release,[107] a legal factor which may reflect racial bias.[108]

In addition to the collection of sentencing data on disparity in treatment necessary for policy development, the LRCC reports refer to a number of pressing issues on the question of access to justice and equitable treatment for members of racial and ethnic minorities in the sentencing context. They include recourse to alternative (other than incarceration) sanctions;[109] the development of sentencing policy principles, guidelines and factors to be employed in the exercise of judicial discretion; the relevance of racial prejudice as motivation for criminal activity as an aggravating factor in sentencing; the relevance of racial provocation as a mitigating factor in the sentencing of a minority offender;[110] the relevance of ignorance of law arising from cultural or religious difference as a mitigating factor in sentencing;[111] and the preparation of pre-sentence reports.[112]

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[105] Brodeur, C.D. 2.2, p. 102; Etherington, et al., C.D. 2.34, p. 38; and C.D. 2.20. See also studies done by Clairmont and Barnwell and Clairmont, Barnwell, and O'Malley referred to in note 76.

[106] See Archibald, "Sentencing and Visible...," pp. 382-383.

[107] Hagan and Morden, "The Police Decision to Detain: A Study of Legal Labelling and Police Deviance", in ed. C.D. Shearing, *Organizational Police Deviance*, (1981), pp. 29-47.

[108] See notes 65-67 and accompanying text. Brodeur also refers to several recent American studies claiming to have found evidence of indirect racial discrimination at the sentencing level. See Petersilia, "Racial Disparities...," p. 241; Hagan "The Addictive Sanction," in Hagan, *Structural Criminology* (1988), pp. 95-96; Spohn, Gruhl and Welch, "The Effect of Race on Sentencing: A Re-examination of an Unsettled Question" (1981-1982) 16 Law and Society Review, pp. 71-88; and Mair, "Ethnic Minorities and the Magistrates' Courts" (1986) 26 Brit. Jour. of Crimin., pp. 147-155. The latter two studies claim to show that Blacks received a higher proportion of incarceration sentences, while alternative forms of sentence not involving prison were disproportionately used in the case of non-minority offenders. These findings are similar to those found in the first study done on sentencing of theft offenders in Nova Scotia for the Marshall Inquiry, where unconditional discharges were given exclusively to white offenders. See Clairmont, Barnwell and O'Malley, "Sentencing Disparity...."

[109] C.D. 2.20, pp. 4-7, advocates that in addition to traditional alternatives to incarceration like conditional discharges, suspended sentences with probation, greater attention be paid to, and use made of, alternatives such as community service orders, victim/offender reconciliation programs, compensation, restitution and fine option programs. The report recommends greater involvement by minority community members in speaking to sentence and development and deployment of alternative measures to incarceration in the sentencing of members of their communities. It also recommends the development of alternative sanction programs that are tailored to meet the needs of particular communities.

[110] Ibid, pp. 8-10. The LRCC adopts the recommendation of the Canadian Sentencing Commission that fairness and equitable treatment would be best ensured by creating and implementing national sentencing guidelines that could only be departed from where specified aggravating or mitigating factors set forth in the statute were applicable. It further recommends adoption of guidelines specifying that overt racism or other bigoted behaviour on the part of the perpetrator should aggravate the sentence, while evidence that an offender acted in direct response to racist or other similar provocations should operate as a factor in mitigation. This recommendation is based on the recognition that if the criminal law is traditionally conceived as protecting the individual and society from harm and nurturing society's fundamental values, then provision should be made at the point of sentence for the censure of racist behaviour.

[111] C.D. 2.20, pp. 11-12. The LRCC notes it is within the judge's discretion to consider this in mitigation of sentence at present, but advocates a stronger directive to judges be adopted as a guideline: "that if an event was committed in the context of a genuine mistake or ignorance arising out of cultural or religious teachings, practices or understandings this fact would be taken into account in the mitigation of the sentence that is ultimately pronounced." See also Australian Law Reform Commission, *Multiculturalism: Criminal Law, Discussion Paper 48* (1991), p. 77, for a similar recommendation.

[112] C.D. 2.20, pp. 15-17, recognizes the importance of pre-sentence reports and the risk indicators employed by probation officers in their preparation and recommends that a thorough study of preparation practices be done to evaluate the nature and extent of community liaison and

Finally, reports in both groups advocate the creation of a national sentencing commission, that would develop, oversee and coordinate sentencing policy in Canada, as a good device to develop policy and guidelines, implement specific initiatives, and monitor progress and effectiveness in relation to issues concerning the treatment of racial and ethnic minorities in sentencing.[113] The reports note that several commission and committee reports on sentencing have already recommended the creation of such a permanent sentencing commission and it is currently under study by the Department of Justice Canada.[114]

4.1.2.5 Jury Selection

There are numerous and complex issues arising from race and ethnicity concerns in the jury-selection process which are discussed in several of the LRCC reports.[115] Issues which have received the most attention are the extent to which pre-trial and in-court jury-selection procedures allow for intentional or systemic barriers to minority jurors and whether minority accused should be entitled to a racially or ethnically representative jury. Although numerous recommendations are made to combat possible discrimination in juror selection, there is little support in the reports for a right to a jury which is racially or ethnically representative of the community.

Trial by an Impartial Jury Drawn from a Fair Cross-section of the Community: Should Minority Accused be Entitled to a Racially or Ethnically Representative Jury?

Both the LRCC and the Supreme Court of Canada have identified the random selection of jurors from a fair cross-section of the community and juror impartiality as the two essentials to enable juries to carry out their vital functions in our criminal justice system.[116] For Pomerant, equal access to justice and equitable and respectful treatment of members of minorities requires, at a minimum, that as accused persons they should have the same rights as non-minority accused to be tried by an impartial jury drawn from a fair cross-section of the community, and that as prospective jurors they have the same opportunities as non-minority jurors to be selected for jury service.[117] Further, the process should be open with procedures that make it possible to expose, review and remedy actions which impede such equality and equitable treatment.

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involvement in their preparation, the adequacy of training of report preparers in terms of cross-cultural awareness and sensitivity, and the nature and adequacy of risk indicators employed in the preparation and use of these reports.

[113] Brodeur, C.D. 2.2, pp. 103-104; and C.D. 2.20, at "Sentencing Disparity...," pp. 1-4.

[114] Canadian Sentencing Commission, *Sentencing Reform* (1987) rec. 14.1; Canada, House of Commons, *Taking Responsibility* (1988) *Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Chair, Daubney).

[115] They are discussed most extensively in Pomerant, *Jury Selection and Multicultural Issues* (1992) (C.D. 2.19). See also Kaiser, C.D. 2.3; C.D. 2.2; and Etherington, et al., C.D. 2.34.

[116] Pomerant, C.D. 2.19, citing LRCC, *Working Paper 27, The Jury in Criminal Trial*s (1980); and *Sherratt* v. *R.* (1991) 3 C.R. (4th) 129 (S.C.C.). Pomerant points out that the fair cross-section requirement should promote the participation of minorities as jurors and be beneficial to minority accused.

[117] Pomerant, C.D. 2.19, p. 57.

As a first step to determining the extent to which equal access to justice may be denied in jury-selection procedures, several reports recommend the collection of statistical data and other information about both in-court and out-of-court selection procedures in terms of under-representation or exclusion of qualified prospective jurors from jury pools, panels and individual juries by reason of race, ethnicity, national origin, religion, sex or age.[118]

Undoubtedly, the most contentious jury-selection issue is the suggestion by some that positive "affirmative action" measures are necessary to ensure that juries are racially and ethnically representative with respect to the race or ethnicity of the accused.[119] Kaiser has argued that the failure of a jury to be racially representative in terms of the racial background of the accused should be legislated to be grounds for a challenge to the partiality of a jury.[120] However, this suggestion is rejected by Pomerant and Brodeur. Pomerant points out that although the concept of judgment by a jury of one's peers was part of the Magna Carta, it is a notion appropriate to a time when jurors were generally neighbours and friends who were expected to be witnesses as well as jurors and have independent knowledge of the accused and his circumstances. He points out that for many years Canadian, American and English courts have rejected the notion of a jury of one's peers (in terms of identity of characteristics such as race, age, sex, religion or economic status) in favour of a body representing a fair cross-section of the community that is not the organ of any special group or class. The Canadian approach to jury selection, which requires a random selection from a pool, coupled with the right of a party to challenge prospective jurors acceptable to the opposite party, precludes the possibility of guaranteeing that persons selected for jury duty will be representative of an individual accused.

Canadian law has never recognized the right to be tried by a jury racially or ethnically representative of the accused.[121] The law is premised on the belief that the juror's primary duty is to comply with the oath of impartiality and render a judgment based on the evidence and the judge's instructions on law and should "not ordinarily" be concerned with the racial or ethnic characteristics of the accused in deciding a verdict. Thus, the law should prohibit and remedy attempts by either justice system officials or a party to structure jury selection on the basis of such characteristics. To move to a system of guaranteed representativeness in juries would require abandonment of random selection and the public identification and scrutiny of race, colour, ethnic origin, religion or other such characteristics of both the accused and prospective jurors prior to jury selection and somehow ensure that a particular jury is composed of persons with the required representative characteristics.[122] Further, Brodeur points out the concerns expressed by members of minority communities with the ability of "racially representative" juries to act impartially in trials where the accused was a member of the

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[118] Ibid.

[119] Kaiser, C.D. 2.3, pp. 115-117.

[120] Ibid.

[121] See *R.* v. *Kent, Sinclair and Gode*, [1986] Man. Rep. 160 (Man. C.A.).

[122] Pomerant, C.D. 2.19, p. 15.

white majority and the victim belonged to a racial or ethnic minority.[123]

Consequently, Brodeur and Pomerant opt for a different approach to attempt to ensure that juries become more representative of the entire community in the future. Brodeur recommends adoption of the principle that no one is to be excluded from jury duty, either by in-court or out-of-court procedures, solely on the basis of racial or ethnic origin, whatever the racial or ethnic origin of the accused or the victim in a trial may be.[124] Pomerant urges implementation of a similar principle through numerous amendments to existing in-court and out-of-court selection procedures to ensure that all barriers to minority access to juries are removed and to enable the parties to expose and seek remedies for discrimination by justice system officials, jurors and other parties.[125]

In the area of qualifications, Pomerant recommends the amendment of the *Criminal Code of Canada* to include an anti-discrimination clause for the selection of jurors; the abolition of the Canadian citizenship requirement to allow for selection of landed immigrants and permanent residents provided they can understand and communicate in the language of the trial; a review and rationalization of language requirements in provincial legislation to ensure a uniform standard which requires an ability to understand and communicate in the language of the trial; and a loosening of remaining restrictions in some jurisdictions on the involvement of persons in religious occupations.[126] For the selection of jury pools, currently a provincial responsibility, he recommends adoption of uniform practices to ensure they include every eligible person in the community; measures to control the exercise of discretion of the pool-gathering official concerning qualifications; eligibility and exemptions; the collection of data from all prospective jury-pool members concerning eligibility; and procedures to allow challenges to decisions to disqualify or exempt.[127] Further, he recommends that measures be implemented to ensure that jury panels are chosen from jury pools randomly, by computer, to avoid any form of personal selection or bias, and that the parties or counsel be given access to jury panels at least two weeks prior to their opportunity to challenge prospective jurors.[128]

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[123] Brodeur, C.D. 2.2, pp. 57-58, refers to the manslaughter trial of Police officer Allan Gossett in Montreal for the shooting of Anthony Griffin, a black youth. Gosset was acquitted by an all-white jury, after several black prospective jurors were challenged and excluded on the basis that their membership in the black community might prejudice them against the accused. Brodeur criticizes the apparent presumption that black persons would be unable to judge impartially, whereas the issue of the eventual partiality of a white juror in favour of the accused would never be raised. It is important to note that Brodeur's arguments are really in opposition to arguments that an accused has a right to a jury which is racially representative in terms of the presence of members who are the same race as the accused. His arguments do not have the same force in relation to proposals for a right to a jury which is racially representative in terms of the make-up of the community -- not the accused or the victim.

[124] Brodeur, C.D. 2.2, p. 58; and Pomerant, C.D. 2.19, pp. 15-16.

[125] Pomerant, C.D. 2.19, pp. 17-60, stresses the importance of ensuring that the:

> "... laws relating to the qualification of jurors; the assembly of names for inclusion in the jury pool; the selection of names from the pool to compose jury panels; the criteria and process for disqualifying or exempting prospective jurors; and the rights of the parties to accept or challenge prospective jurors, all operate to ensure such representation."

[126] Pomerant, C.D. 2.19, recommendations 6-12.

[127] Ibid, recommendations 13-20.

[128] Ibid, recommendations 22-23.

In-court Challenge Procedures

The critical issues in terms of in-court selection and challenge procedures have been identified as: Do the provisions of the *Criminal Code* and related statutes and the manner in which they are applied ensure that minority prospective jurors have the same opportunities as anyone else to be chosen for service and that their minority status does not prevent them from being chosen; and do they ensure minority accused that prospective jurors who are not competent or impartial can be readily identified and excluded from jury service.[129]

Pomerant concludes that, largely as a consequence of our courts' reluctance to confront directly juror bias and the systemic exclusion of minorities from jury service, the present law provides only superficial and quite deficient assistance to parties in addressing these issues. For example, although the *Code* provides in sections 629 and 630 for a challenge to jury panels, the only ground for challenge is proof of intentional partiality, fraud or wilful misconduct on the part of the official who selected the panel. Case law has developed a presumption that officials acted properly, and impropriety will not be inferred from the absence of members of a minority group, even where the community contains a large proportion of eligible persons from that minority.[130]

Pomerant recommends broadening the grounds for challenge to the pool or panel and adoption of the American approach whereby evidence of the regular or systematic exclusion from or under-representation in a pool or panel of otherwise qualified persons who are members of a minority is admissible on a challenge to support an inference of improper discrimination.[131]

Although recent judicial and legislative reforms have removed serious concerns about an apprehension of bias in the Crown's favour because the Crown is able to stand aside up to 48 prospective jurors,[132] there continue to be serious concerns about the extent to which peremptory challenge and challenge for cause procedures ensure that minority accused will have an impartial jury and minority prospective jurors will not be excluded due to their race or ethnicity. There has been virtually no study on the exercise of

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[129] Pomerant, C.D. 2.19, p. 32.

[130] Ibid, p. 34.

[131] Ibid, pp. 35-37. In terms of grounds for challenge, Pomerant recommends the following:

- discrimination based on a prohibited ground for disqualification, in selecting a pool or panel;
- failure without good cause to consult sources specified in legislation when composing a pool;
- failure without good cause to include in a pool all qualified persons identified in those sources;
- failure to conduct a random selection of names from a pool to compose a panel; and
- failure to follow the substance of any other procedure or requirement specified by statute in selecting a pool or panel.

[132] Prior to the decision of *R.* v. *Bain* (January 23, 1992) (S.C.C.), the *Criminal Code* gave the Crown the right to stand aside, without giving reason, up to 48 jurors. It also gave them the right to exercise 4 peremptory challenges (without cause or reason). The accused was given four peremptory challenges for charges involving a possible sentence of five years or less, 12 peremptory challenges for charges with potential sentences of greater than five years, and 20 peremptory challenges for charges of high treason or first degree murder. *Bain* ruled these provisions created an apprehension of bias which was contrary to s. 11(d) of the *Charter* and were therefore of no force and effect, although it gave Parliament a six-month grace period to enact reforms. By an *Act to Amend the Criminal Code*, S.C. 1992, c. 41, Parliament enacted new provisions which eliminated Crown stand asides, and provided that Crown and accused would enjoy equal numbers of peremptory challenges in accordance with the numbers for particular offences referred to above.

peremptory challenges in Canada, but it is the primary device used to exclude jurors in the country because counsel have access to only the name, address and occupation of prospective jurors and they are generally prohibited from asking prospective jurors about possible racial biases on a challenge for cause.[133] Thus, it is significant that peremptory challenges may be used simply on a fleeting, superficial analysis of the juror's appearance or demeanour to eliminate prospective jurors who may have cultural or social characteristics and perspectives which counsel suspects will limit their receptiveness to counsel or client claims. There is serious concern that in exercising peremptory challenges lawyers may apply stereotypical views of the attitudes of members of racial, ethnic, religious or gender groups.[134] The fear that the abuse of peremptory challenges could result under Canadian law in the unreviewable exclusion of minority viewpoints from juries, has led some to argue for the abolition of peremptory challenges combined with the creation of more meaningful challenges for cause by questioning prospective jurors to ensure that jurors who cannot act impartially are excluded.[135]

If peremptory challenges are retained, however, which is quite likely given the wide support from members of the profession,[136] Pomerant recommends that data be collected on their use in Canada, particularly in relation to minority prospective jurors. And, it is urged that a procedure similar to that adopted by the United States Supreme Court to facilitate the review of discrimination in the use of peremptory challenges and providing a remedy for it be adopted in Canada.[137] Although, in Canada, there is a

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[133] *R.* v. *Hubbert* (1975) 11 O.R. (2d) 464 (Ont. C.A.); and *R.* v. *Crosby* (1979) 49 C.C.C. (2d) 255 (Ont. H.C.).

[134] Pomerant, C.D. 2.19, pp. 41-42, cites the decision of the Ontario Court of Appeal in *R.* v. *Pizzicalla* (November, 1991), where the court ordered a new trial for a male accused found guilty of sexual assault, based on remarks made by the Crown at trial that he had used 20 of 23 stand asides to exclude all men from the jury, because there might be men who felt that a person in the workplace has a right to fondle, touch, or make passes at people in the workplace. The court held that the Crown had used its stand asides to secure a favourable jury, rather than simply an impartial one. Pomerant argues the more serious problem was the sex discrimination apparent in the Crown's application of the male stereotype that men would approve of sexual harassment.

[135] Ibid, recommendation 30. This same recommendation is discussed in "Minorities Can Face Discrimination in Jury Selection Process: Counsel," *Law Times*, 4, 15 (April 19-25, 1993), p. 3. At a conference presented by the Urban Alliance on Race Relations on "The Justice System: Is it Serving Or Failing Minorities?," two Toronto defence counsel said that prosecutors sometimes use their peremptory challenges to discriminate against minorities, but disagreed on how to remedy this problem. James Lockyer argued for the abolition of peremptory challenges and adoption of U. S. style challenges for cause. Irwin Koziebrocki argued that peremptory challenges were too important to the accused to be abolished and recommended directives from the Attorney General to control abuse by prosecutors. Lockyer pointed out that both sides abuse the peremptory challenge, and gave the example of defence counsel eliminating minorities when a white police officer is on trial. In a straw vote delegates to the conference voted to abolish peremptory challenges.

[136] Pomerant, C.D. 2.19, pp. 48-49, notes that most objections to abolition of peremptory challenges in favour of more open challenges for cause to improve the rationality of the selection process are based on concerns that it will clog the system with lengthy voir dires and involve unseemly questioning of prospective jurors. But Pomerant argues that such fears are based primarily on unfounded assumptions about the American practice. He suggests that in U.S. federal courts where judges question jurors, voir dires average about 2.5 hours, whereas in state courts where counsel are allowed to question, the average voir dire to choose a jury is only 13 hours. He also points out that the view that such questioning about racial bias is unseemly is based on the assumption that most Canadians are inherently impartial and therefore should be spared questioning. Pomerant describes this as a dated notion inherited from Britain without analysis, which may well be inappropriate for modern Canadian society.

[137] See *Batson* v. *Kentucky*, 476 U.S. 79 (1985). Although a minority accused has no right in the United States or Canada to a jury composed in whole or in part of his or her own race, *Batson* ruled that a black accused was denied equal protection if put on trial before a jury from which members of his race have been purposely excluded by the prosecution's use of peremptory challenges. The Court also found that such a practice would constitute racial discrimination against prospective minority jurors. The equal protection clause of the constitution forbid challenging solely on account of race or an assumption that jurors of that race will be unable to impartially consider the State's case. The accused must show that he is a member of cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of the accused's race from the jury. Once the accused makes this prima facie case the burden shifts to the prosecution to provide a neutral reason for challenging prospective jurors of that race. An assumption that the challenged jurors would be unable to be impartial because of their shared race will not rebut the prima facie case. The Court has recently clarified that the *Batson* principle applies to the exclusion of any juror on the basis of race, regardless of the race of the accused. In *Powers* v. *Ohio*, 113 L.Ed. 2d 411 (1991), a white accused could challenge a prosecutor's exclusion of

principle that peremptory challenges should not be used for an improper purpose, there is no procedure for exposing and remedying its improper use.[138]

For challenges for cause, there are significant concerns that the present law limiting the information about prospective jurors available to counsel in advance of jury selection, and limiting severely the ability of counsel to ask questions that might establish a cause for challenge, seriously undermines the ability of counsel to use challenges for cause to ensure a client's right to an impartial jury. On the basis of what amounts to a court-imposed presumption of impartiality,[139] counsel for a Black accused is prohibited on a challenge for cause from asking prospective jurors any questions relating to their prejudices against black people.[140] Given the number of negative perceptions about the extent to which racism and discrimination are present in our justice system and in society as expressed by members of racial and ethnic minorities at recent inquiries and commissions, it is perhaps time to rethink the utility and desirable scope of challenges for cause.[141]

As one empirical study on challenges for cause noted, the growing awareness that Canadian society is marked by racism and other prejudices that could prejudice an accused's right to a fair trial and concern that the mass media can prejudice large segments of the community against an accused should cause us to rethink challenges for cause as a useful device to ensure impartial juries.[142] Pomerant recommends that prospective jurors be subject to questioning to ascertain whether or not there is ground for a challenge for cause; the trial judge should have discretion to decide who will do the questioning; and the law should provide that a lack of partiality may be established by evidence that a prospective juror harbours either general or specific discriminatory attitudes, beliefs or prejudices that will affect his judgment in the case.[143]

Finally, although aware of the reasons for imposing an obligation of complete secrecy on jurors in the *Criminal Code*, Pomerant argues for creating a mechanism to allow a judge to hear evidence from a juror if a verdict was achieved improperly because of the external manifestation of racial or other forms of discrimination by a juror in arriving at a verdict.[144]

4.1.2.6 Corrections

There are several critical issues concerning post-sentencing treatment of minority offenders. One issue which has been studied to some extent in the United States but little

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black jurors.

[138] Pomerant, C.D. 2.19, p. 46.

[139] *R.* v. *Hubbert*.

[140] *R.* v. *Crosby* (1979) 49 C.C.C. (2d) 255.

[141] Pomerant, C.D. 2.19, p. 56.

[142] Vidmar and Melnitzer, "Juror Prejudice: An Empirical Study of Challenge for Cause" (1984) 22 Osgoode Hall L.J. 487, pp. 489-490.

[143] Pomerant, C.D. 2.19, recommendations 34-38.

[144] Ibid, recommendations 39-40.

in Canada is whether or not racial and ethnic minority offenders serve more time in prison than non-minority offenders before being paroled. Two U.S. studies found that black and hispanic offenders served longer proportions of their sentence before being paroled. In one study, this was attributed to racial bias, and in the other, to the racially biased character of some indicators of recidivism used by parole board officials.[145] The extent to which these findings might be applicable in Canada is unknown,[146] although several reports point out that the National Parole Board and Correctional Services of Canada possess the data collection resources and research expertise to find out. The LRCC reports recommend that these organizations give a high priority to research on issues in corrections relating to racial and ethnic minorities with special emphasis on the size and character of the minority prison population; and whether or not minority offenders serve more time than non-minority offenders, and if so, if the longer time served is due to the imposition of additional requirements that are attributable to racial bias or to indicators of recidivism that are strongly correlated to race or ethnicity.[147]

Another issue raised in the reports is the extent to which minority religious practices are accommodated. The report, *Corrections*, suggests that Correctional Services of Canada, through its mission statements, directives, guidelines and Interfaith Committee on Chaplaincy, is striving to ensure that members of minority religious groups have adequate access to culturally sensitive religious counselling. The reports conclude with the suggestion that the situation concerning the accommodation of minority religious practices be monitored at both federal and provincial levels to ensure minority needs are being met.[148]

Several reports express concern about whether or not treatment and educational programs are sufficiently sensitive, or adapted, to meet the needs of minority offenders.[149] Both the *Corrections* report and Brodeur recommend that the relevance of correctional treatment programs for the needs of minority inmates be examined.[150] *Corrections*

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[145] Carroll and Mondrick, "Racial Bias in the Decision to Grant Parole" (1976) 11 Law and Society Rev. 93; and Petersilia, "Racial Disparities in the Criminal Justice System: a Summary" (1985) 31 Crime and Del. 15. The first study found racial bias in that parole officials applied more stringent criteria to black offenders, by requiring them to participate in institutional treatment programs as a condition of release. Petersilia questioned the extent to which some indicators of recidivism being used were actually impartial, such as employment or family stability criteria. Both studies are cited in LRCC, *Corrections* (1992) (C.D. 2.21), p. 11; and Brodeur, C.D. 2.2, p. 105.

[146] The corrections research article, "Changes in the Profile of Minority Offenders" (1989) 1 Forum on Corrections Research 6, found that between 1984 and 1989 the number of Caucasian inmates (while increasing slightly) declined as a proportion of all inmates in federal prisons, while the proportion of inmates from other racial groups increased. However, the study was unable to pinpoint the reason for the increase in minority offenders, pointing to possible differences in sentencing patterns, in how long they served before release, and in how well they did after release. But, the study concluded it was likely that minorities were actually experiencing much more imprisonment in recent years.

[147] Brodeur, C.D. 2.2, p. 105; and C.D. 2.21, pp. 11-12.

[148] C.D. 2.21, pp. 5-8.

[149] Ibid, pp. 2-5. Most often cited are the Donald Marshall Inquiry recommendations that provincial and federal correction services should:

- implement programs to recruit and hire Aboriginals and Blacks to positions in the service;
- implement cross-cultural training programs to sensitize correctional workers at all levels to needs of aboriginal and black offenders;
- implement discipline program for discriminatory conduct by workers;
- offer institutional programs to meet the cultural and religious needs of aboriginal and black offenders in institutions where they were present in significant numbers; and
- support rehabilitation programs for aboriginal and black inmates and former inmates that take account of their background and needs.

See *Report of Royal Commission on the Donald Marshall Jr. Prosecution*, (1989) Vol. 1, p. 160.

[150] Brodeur, C.D. 2.2, p. 106; and C.D. 2.21, p. 10.

indicates that some programs designed specifically to meet the needs of minority inmates exist at the local level but suggests examining the need for a national policy on educational or treatment programs sensitive to the needs of minority groups.

Finally, one report raises the issue of the need for more ethno-culturally sensitive after-care facilities and programs, organized in consultation with ethno-cultural minorities, to help combat recidivism.[151]

4.1.3 Measures to Attain Objective of More Culturally Sensitive and Non-discriminatory Exercise of Discretion

The reports are fairly uniform in recommending measures to address concerns about discrimination and racism in the exercise of discretion within the justice system. Four types of measures are quite frequently repeated:[152] an increase of minorities as justice system actors at all levels; implementation of cross-cultural or anti-racism training for justice system actors; community liaison programs to improve relations between justice system actors and minority communities; and monitoring bodies or complaint agencies to provide access to remedies to minority community members for abuses of discretion.

4.1.3.1 Increased Presence of Minorities as Justice System Actors

Recommendations to increase the representation of racial and ethnic minorities as justice system actors at every level of the criminal justice system are numerous.[153] Such recommendations were first made for the police, with the hope of improving relationships between police and minority communities[154] to enable them to provide better police services. More recently, there has been greater recognition of the importance of improving the access of members of minority groups to other positions in the justice system, including probation, parole and corrections positions, and especially to the legal profession and the judiciary.[155]

There is growing recognition that equitable representation of minorities as

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[151] C.D. 2.21, pp. 12-13, points to some precedents that have developed at a local level without a national policy. In 1990, the province of Ontario, at a Toronto probation and parole office, set up a two-year program to treat Portuguese speaking wife batterers. The program makes use of Portuguese speaking resource people from the community. Also, the Ontario Ministry of Correctional Services set up a trial counselling service for Southeast Asians on probation or parole.

[152] See Brodeur, C.D. 2.2, pp. 60-64 for references to more than ten reports on the justice system and racial and ethnic minorities that make similar recommendations.

[153] LRCC, *Cross-Cultural Training, Increased Hiring of Minorities, and Community Liaison* (1991) (C.D. 2.13); Brodeur, C.D. 2.2, p. 61; C.D. 2.3; and Etherington, et al., C.D. 2.34, pp. 41-42.

[154] Brodeur, C.D. 2.2, pp. 67-69, points to several studies in the United States that show inconclusive results on the extent to which increased presence of minority officers results in better police-minority community relations.

[155] It is generally acknowledged that members of racial and ethnic minorities are under-represented as actors in the criminal justice system. See Etherington, et al., C.D. 2.34, pp. 41-42; and C.D. 2.13, p. 9. Both reports refer to the study by Mazer and Peeris, *Access to Legal Education in Canada* (1990), which reported that in 1986, visible minorities made up 5.9 percent of the population but only 2.8 percent of all lawyers. The Etherington report, at footnote 22, also cites references to several reports that found visible minorities were significantly under-represented on police services.

significant actors in the justice system is important for access to justice for several reasons. It should help to reduce actual bias and the perception of bias as characteristics of the justice system. It can do this, in part, by sending a clear message to members of minority groups that it is their justice system too. It can also serve as a very important part of effective cross-cultural training by increasing the likelihood that majority actors who may have had little contact with minorities will be more aware and understanding of racial and cultural differences where they exist and less likely to assume differences where they do not exist. It may also make them more receptive to more formal forms of cross-cultural or anti-racism training. Increased representation of minorities should also increase the likelihood that instances of racism and discrimination will be detected, identified and addressed in a meaningful fashion. Finally, it can be very important to provide role models for members of minority groups, thereby making it easier to recruit minorities to such positions in the future and, as a result, break the self-sustaining cycle of under-representation.[156]

For the past 20 years, attention has focussed on measures to ensure that police service agencies are more representative of the racial and ethnic make-up of the community they serve.[157] This has meant that measures such as recruitment outreach programs and reform of policing regulations affecting dress and physical stature have been accepted by many police organizations.[158] But several reports suggest that the achievement of employment equity objectives in policing may depend on the adoption of legislation such as the new *Police Services Act*, 1990,[159] in Ontario.[160] And, most are in agreement that it is especially important that employment equity policies are applicable to promotion decisions as well as hiring.

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[156] C.D. 2.13, p. 10, notes that because there are very few members of minority groups on police forces, it can make it more difficult to recruit them.

[157] *Report of Task Force on Policing in Ontario* (1974), referred to as recommendation 7 in the *Report of the Task Force on Policing and Race Relations in Ontario* (1989), p. 237.

[158] See Etherington, et al., C.D. 2.34, p. 27, citing Jain, "The Recruitment and Selection of Visible Minorities in Canadian Police Organizations, 1985-87" (1988) 31 Can. Pub. Admin., p. 463. Jain concluded that there had been some improvement in removing systemic barriers to hiring minorities since 1985, but still found that police regulations and practices concerning recruitment required further review to eliminate all practices which might possibly have an adverse impact on the recruitment of minorities, i.e., policies concerning job interviews, psychological tests and other criteria. Also Brodeur, C.D. 2.2, pp. 65-66, finds reason for "cautious optimism" in the present direction of employment equity developments, at least for large urban police forces which he finds are evolving towards greater representation of racial and ethnic minorities.

[159] S.O. 1990, c. 10, proclaimed in force on January 1, 1991. Section 48 provides that every police force "shall" have an employment equity plan prepared in accordance with the Act and the regulations. The plan must provide:

- for the elimination of systemic barriers to recruitment and promotion for members of the prescribed groups [s. 48 (2)(a)];
- the implementation of positive measures regarding recruitment and promotion of such persons to make the force more "representative of the community or communities it serves" [s. 48 (2)(a)]; and
- specific goals and timetables concerning the implementation of the above mentioned measures and the "composition of the police force" [s. 48 (2)(a)].

In regulations made under the Act and released on April 11, 1991, all police chiefs in the province must draw up long-term goals and timetables to make their forces reflect the make-up of society at large in terms of women, visible minorities, natives and the disabled. The new policy does not prescribe legislated deadlines or quotas, but requires the Solicitor-General to monitor the progress of police services in attaining their goals. If targets are not met, serious sanctions ranging from the appointment of a local administrator to the firing of the police chief or members of the local police board could be imposed. The necessity for such measures may be indicated by Toronto's recent attempts to employ outreach recruitment practices to increase visible minorities on the force since 1986. Despite these efforts it still is staffed only 5.3 percent by visible minorities although the present population is approximately 17 percent visible minorities. Appleby, "Policing the Ranks to Find the Right Balance", *The Globe and Mail*, [Toronto] April 13, 1991, p. A8.

[160] Etherington, et al., C.D. 2.34, pp. 28-29; and C.D. 2.13, pp. 11-12.

All reports addressing the issue recognize the importance of increased representation of racial and ethnic minorities as judges, prosecutors and defence counsel.[161] The exploration of initiatives to increase their representation in the profession and on the bench has just begun in the last few years.[162] The *Report of the Royal Commission into the Prosecution of Donald Marshall Jr.* urged governments to appoint qualified visible minority and aboriginal persons as judges and administrative decision makers at every opportunity.[163] The appointment process for provincial division judges in Ontario has been directed to recruit women, aboriginal persons and members of visible minorities to improve their representativeness in that division of the Ontario court system.[164] It is hoped that the federal judicial appointment process will institute similar objectives. Such initiatives for the recruitment of Crown prosecutors also needs to be undertaken.

But, attempts to apply some type of employment equity measures to positions in the justice system are all dependent on members of minorities gaining access to the profession through access to legal education. Although there is much to be done, there are several promising initiatives in the area of education equity.[165] Several law schools in Canada already have admission policies designed to increase the number of places offered to aboriginal or visible minority candidates[166] and several schools have recently

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[161] C.D. 2.13, p. 12; Etherington, et al., C.D. 2.34, p. 42; Brodeur, C.D. 2.2, p. 71; and Kaiser, C.D. 2.3.

[162] For discussion of arguments for and against setting goals for increased representativeness within the judiciary in relation to gender, see Grant and Smith, "Gender Representation in the Canadian Judiciary", in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (1991), pp. 57-90. For a discussion of similar arguments on increasing the representativeness of the judiciary in relation to racial and cultural minorities, see Mendes, "Promoting Heterogeneity of the Judicial Mind: Minority and Gender Representation in the Canadian Judiciary", in *Appointing Judges: Philosophy, Politics and Practice*, pp. 91-108. Mendes concludes that increasing representativeness will not be enough to ensure access to justice for aboriginal people and minority groups, and should be complemented by establishing task forces on native, minority and gender awareness in the judicial process and the creation of gender, native and minority awareness committees available for consultation on particular cases to every level of court in the country (pp. 106-107).

[163] *Supra*, note 98.

[164] See the *Ontario Judicial Appointments Advisory Committee: INTERIM REPORT* (September, 1990), pp. 17-18. The Committee, chaired by Prof. Peter Russell, listed as part of its "criteria for evaluating candidates":

> Demographic -- The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation of women and several ethnic and racial minorities.

[165] In 1990, the Canadian Council of Law Deans held a conference on Minority Access to Legal Education, in Ottawa. Members of the faculties of Canadian law schools met with representatives of visible minorities and aboriginal peoples, minority law students, faculty from American law schools with affirmative action programs and Justice Department personnel, to discuss admission policy reforms and other measures to be undertaken to increase the admission of minority students and improve their chances of completing programs. Conference on Minority Access to Legal Education, November 8, 1990, Faculty of Law, University of Ottawa.

The Canadian Association of Law Teachers has an ongoing Project on Equity in Legal Education which began in 1988, to develop methods to make legal training more accessible to members of minority, ethno-cultural and native groups. "Access for All" (1990) 2 Together, pp. 12-13. The project will focus on such areas as admissions, curricula, financial support, placement and community legal information. The project committee issued its first report in 1991, calling for significant reform of admission policies, implementation of support policies for minority students, and curriculum reform.

[166] Probably the oldest such admission policy is found at the University of Windsor, where the Faculty of Law has, since 1978, de-emphasized the importance of marks and LSAT scores and looked at five other criteria indicating factors such as the candidate's social activism and community involvement and any disadvantage the applicant faced that might have interfered with their education or scholastic performance. The policy has tended to result in a far more diverse student population than at other Ontario law schools, at least until recent changes to admission policies at other schools.

McGill University law school has employed a similar approach for a number of years. Osgoode Hall Law School and the Faculty of Law at Queen's University have also recently instituted admissions equity policies to increase their minority populations.

The University of Saskatchewan has operated a Native Law Centre at Saskatoon for over ten years. The program is designed to provide native students with an orientation to the study of law and to provide them with skills that will assist them at law school. The instructors also provide the native students with an assessment of their aptitude for the study of law.

implemented broader education equity programs to provide support for minority students in their programs and bring changes to the curricula to deal with minority concerns.[167] And more recently, the Law Society of Upper Canada introduced a number of measures to help bring visible minorities and aboriginals into the legal profession.[168]

There is also a need to explore employment equity within the law school professorate. Although a recent study concluded that visible minorities and aboriginal persons are under-represented among the general university professorate, there do not appear to be any studies revealing the degree of under-representation in law schools in Canada.[169] Those who work within the law professorate in Canada know that, with one or two exceptions,[170] there is serious under-representation of minorities in their profession. Methods of encouraging members of cultural minorities to do graduate work and apply for faculty positions must be developed and implemented.[171]

4.1.3.2 Cross-cultural (Anti-racism) Training of Justice System Actors

The need for more, and more effective, cross-cultural or race-relations training[172]

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[167] For several years, Dalhousie Law School has operated the Law Program for Indigenous Blacks and Micmacs. The *Marshall Commission Report* urged that this program be supported financially by the governments of Canada and Nova Scotia and the Nova Scotia Bar. Recently, it has received assurances of sufficient funding from these three bodies to continue operating for at least another three years. See R. Devlin and W.A. MacKay, "An Essay in Institutional Responsibility: The I.B.M. Program at Dalhousie" (1992) 14 Dal. L.J.; and McKay, "The Law Programme for Indigenous Blacks and Micmacs" (*Final Report to the Law Foundation of Nova Scotia for 1990-91 Term*, August, 1991).

More recently, the University of Ottawa's Faculty of Common Law instituted an Education Equity Program to improve access to legal education for visible minorities, aboriginal peoples, the disabled and women and to ensure that these groups receive the necessary support once in the program. The Faculty of Law at Queen's University instituted an education equity program with a half-time coordinator in 1992.

Several black students expressed the need for such programs with their complaints about the unreceptive law school environment for black students, at the Second Annual Conference of the Black Law Students' Association of Canada. See "Law School Environment `Toxic' for Black Students", 4, 10, *Law Time*s (March 8-14, 1993), pp. 1-2.

[168] On February 15, 1991 the benchers unanimously passed a motion to:

- set up a standing committee on equity in legal education and practice to establish policies and programs;
- fund the committee up to $20,000; and
- raise $50,000 over the next five years for bursaries and scholarships for aboriginal and minority groups.

The motion was passed after study of a report by a special committee which revealed that although visible minorities represent eight percent of Ontario's population they comprise only 3.2 percent of its lawyers. The report also noted that although some law schools have special programs to provide access many minority persons cannot afford the expense of a legal education. See "Benchers Battle Over Minority Report," *Law Times* (March 4-10, 1991), p. 3.

More recently, the Society's Access to Legal Education Subcommittee is consulting with Ontario law firms on the idea of hiring quotas or goals for women and members of designated minorities. It is also studying ways to increase access to the Bar Admission course for immigrants who have legal training. In addition, the Society is working to complete a Law Society anti-discrimination policy which will be implemented through a rule of professional conduct. See "Law Firms being Asked for Views on Minority Quotas," *Law Times* (April 5-11, 1993), pp. 1-2.

[169] Mazer and Peeris, *Access to Legal Education*.

[170] The Faculty of Law at the University of Windsor, with three members of visible minorities on a full time faculty of approximately 20, would appear to have one of the highest levels of representation in the country. Several Canadian law schools have very recently taken initiatives to increase the complement of aboriginal and visible minority members in their faculties.

[171] The Faculty of Law at Queen's University has recently started a bursary program for aboriginal and minority graduate students in its LL.M program.

[172] These terms are often used interchangeably but educationists make a distinction between cross-cultural (also known as intercultural or multicultural) and race relations (also known as anti-racism or race awareness training). The former tends to emphasize information and understanding about other cultures, communication, interaction and the development of self-awareness. The latter seeks to increase understanding of the dynamics of racism and increase peoples ability to combat harassment based on race. It emphasizes behavioral outcomes and also addresses racism at the structural level. In contrast, intercultural training focuses on bridging cultural differences between individuals

has been identified as a priority by policing experts, members of minority communities and governments.[173] More recently, attention has focussed on the need for such training for other participants in the justice system.[174] In policing, the repetition of such recommendations since the 1970s has resulted in the fairly widespread introduction of cross-cultural or anti-racism training programs in police services across Canada, particularly in large urban services.[175] Yet, despite this attention and activity, there is little agreement or study on the types of training needed or the effectiveness of different types of training, trainers, and training techniques. In the most comprehensive review of the literature to date, only 14 studies were found on the effectiveness of such training in the United States, the United Kingdom and Canada.[176] Of those, only four were on police programs and only one was done in Canada.[177] The results of the Canadian study were inconclusive on the beneficial effect of such training.[178] The authors of a recent report which looked at existing research on cross-cultural or race-relations training and existing training programs in Canada, the United Kingdom and the United States found:

> An overall conclusion to be drawn from this evaluation of police race-relations training programs is that the effects of training are difficult to isolate and measure. Impact may be minimal in any case, when compared to the effects of learning by experience and absorbing the values of the police occupational culture.[179]

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from different cultural backgrounds. The most comprehensive survey of existing studies on the effectiveness of such training in police and military settings concluded that cross-cultural training appeared to have a greater positive effect on learners than race relations training. The authors speculate that police and military may be more receptive to programs that are positive in orientation rather than those which impugn their treatment of minorities. Ungerleider and McGregor, "Police and Race Relations Training Literature Review", Appendix 1 in *Race Relations Training Review* (1990), a report prepared by Equal Opportunity Consultants for the Race Relations and Policing Unit, Ontario Ministry of the Solicitor General, pp. 8-9.

[173] This was recognized as a priority by participants in the Roundtable on Multiculturalism and Justice Issues at Windsor in November 1990. This was also the case in the recommendations or proceedings of the following recent commissions or inquiries:

- Ontario Task Force on Race Relations and Policing (1989 Lewis Task Force);
- Québec Commission des Droits d'Investigation (the 1988 Bellemare Commission);
- Manitoba Justice Enquiry (1991);
- Royal Commission on the Donald Marshall Jr. Prosecution (1989); and
- Alberta Blood Enquiry (1991).

Federally it was recognized as a priority by the:

- 1989 RCMP "Policing for a Pluralistic Society" Conference; and
- 1990 Dept. of Solicitor General of Canada-Federal/Provincial/Territorial Meeting on Policy Development in the Field of Policing.

[174] See Etherington, et al., C.D. 2.34, p. 37-40 re lawyers and judges; Brodeur, C.D. 2.2, p. 73; C.D. 2.13,

pp. 8-9; and Kaiser, C.D. 2.3, pp. 146-147.

[175] See *Police Challenge 2000*, p. 112, and summaries of 12 different programs in Ontario forces found in Ungerleider and McGregor, *Race Relations Training Review*.

[176] Ungerleider and McGregor, *Race Relations Training Review*, p. 5.

[177] Ungerleider, "Police Intercultural Education: Promoting Understanding and Empathy Between Police and Ethnic Communities" (1985) 17 Can. Ethnic Studies, pp. 51-66.

[178] Ibid. While the training did not appear to produce any attitudinal or behavioral change, it did increase participants' knowledge of other groups and increased interaction with minority participants during the workshop.

[179] Ungerleider and McGregor, *Race Relations Training Review*, p. iv. Reasons for the inability to answer the specific question of what, if any, effect such training had on officers were given as:

- the criteria for measurement are elusive and interwoven with other aspects of policing;
- there is no clear agreement as to what the goals are except at the most general levels; and
- there is also confusion as to whether attitudes, knowledge or skills should be taught.

These findings should not lead to abandonment of cross-cultural or race relations training. Rather they indicate that much more empirical study of existing programs at the federal, provincial and municipal level is required to determine the most effective methodologies and techniques.[180] Second, present efforts should build on the tentative indications of conditions which may enhance effectiveness arising from existing literature.[181] For example, there is some support for the conclusion that training can be effective if it is fully integrated into policing and police organization, and if it ensures that training and experiences are closely associated, that training goals and operational objectives coincide, and that supervisors and senior management are visibly reinforcing the goals of the training.[182] Others have suggested that such training will only be effective if it is fully integrated into other "regular" police or professional training in a way for trainees to learn practical skills and see the benefits of their application.[183]

Although there have been some suggestions that lessons learned and recommendations made in relation to police may not be applicable or may be difficult to apply to the training of lawyers and judges, there is little detailed discussion of objectives, techniques and other training issues in the lawyer/judiciary context.[184] One report refers to several initiatives in recent years by both the Canadian Judicial Centre and the Western Judicial Education Centre to provide cross-cultural training.[185] However, there are concerns about the lack of evaluation and methods to ensure effectiveness. The problems of ensuring that cross-cultural education to eliminate possible bias and insensitivity reaches those most in need could be more difficult in the judicial context because of the

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[180] There have been some important measures taken recently. The Ontario Solicitor General's Department established a Race Relations and Policing Unit in response to the Lewis Report of 1989, and the unit has commissioned and received the *Race Relations Training Review*, to assist it in evaluating existing programs and formulating proposals for training strategy. The federal government has recently created a Canadian Police-Race Relations Centre, which will provide information and expert advice on cross-cultural training programs. See C.D. 2.13, pp. 3-4.

[181] Ungerleider and McGregor, *Race Relations Training Review*, p. 12, found the following factors to be statistically significant:

- programs using an intercultural approach were more effective than those using an interracial approach; and
- programs in which the participants were ethnically and racially heterogenous were more successful than programs offered to more homogenous groups. This latter point reinforces the beneficial effects of employment equity.

[182] Ungerleider and McGregor, *Race Relations Training Review*, p. iv.

[183] These were the sentiments of many at the Windsor Roundtable. It was a dominant theme throughout the discussions on training for all actors in the justice system, that cross-cultural training not be seen as somehow separate, and therefore perhaps of less mainstream significance. Etherington, et al., C.D. 2.34, p. 32.

[184] C.D 2.13, p. 8, points out that lawyers and judges are not recruited and trained in the same way as police and this presents difficulties in incorporating such training into the rest of their "curriculum." Etherington, et al., C.D. 2.34, at 37, advocates professional training programs for prosecutors and refers to the Marshall Commission recommendation 14 urging continuing professional education programs for prosecutors which provided:

- an exposure to materials explaining the nature of systemic discrimination toward black and native people in Nova Scotia in the criminal justice system; and
- a discussion of means by which prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the N.S. justice system.

[185] The Canadian Judicial Centre was formed in 1988 to provide this type of training and has begun to produce materials and seminars. A cross-cultural training program will be developed with the assistance of the Race Relations and Cross-cultural Understanding Program of Multiculturalism and Citizenship Canada. See "Continuing Education for Judges" (1990) 2 *Together*, p. 12 (*Together* is a newsletter published by Multiculturalism and Citizenship Canada.)

The Western Judicial Education Centre (WJEC) has made progress on this type of training for several years. For example, in May 1990, the WJEC held a workshop designed to improve judges' awareness of the social context of sentencing, particularly for aboriginal people. Eighty provincial court judges attended the workshop. This was the second in a series of three workshops. C.D. 2.13, p. 8.

long-observed independence of the judiciary.

4.1.3.3 Community Liaison

Several reports stress the importance of consultation and liaison with minority communities for all justice system actors, particularly for police and prosecutors. Liaison with the minority communities can provide important two-way communication but its primary significance would rest in its ability to make justice system actors more familiar with other cultures and more directly aware of justice system concerns of minority community members.[186]

4.1.3.4 Monitoring Bodies and Complaint Procedures

Police Accountability and Complaints Measures

Police are the justice system actors who have been the subject of the most study, recommendations and legislative action on questions of accountability, monitoring and complaint procedures. The essential elements of an effective and acceptable public complaints system, particularly for complaints from members of minority groups, are accountability, independence and accessability.[187] Accessability requires that the provision of procedures be accompanied by public education for members of racial and ethnic minorities to enhance their awareness of the procedures and their ability to use them. It also requires that the process be designed to ensure independence and impartiality in both the investigation and hearing of complaints and the protection for complainants from reprisals by police.[188]

After many years of study of these issues by public inquiries,[189] there has been considerable legislative activity recently in several jurisdictions, most notably Ontario and Quebec, to meet some of the objectives for police accountability.[190] The 1990 Ontario reforms attempt to enhance guarantees of impartiality in the investigation and hearing of complaints through the province-wide implementation of a process first instituted in 1981, for the Metropolitan Toronto Police Force.[191]

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[186] C.D. 2.13, p. 13. See also *Multicultural Criminal Justice Advisory Council* (1991) (C.D. 2.12).

[187] *Access to Remedies* (1991) (C.D. 2.22), pp. 3-4. These criteria have been repeated in several studies of policing but are most closely associated with the *Report of the Ontario Race Relations and Policing Task Force* (1989) (Chair Clare Lewis). The report notes that a "publicly credible, accountable and independent civilian mechanism for public complaints is basic to responding to allegations of racial intolerance or other misconduct by all police," (p. 184).

[188] Ibid; and Etherington, et al., C.D. 2.34, p. 33.

[189] Such as the Lewis Task Force on Race Relations and Policing in Ontario (1989) and the Bellemare Commission in Quebec (1988).

[190] In Ontario, in the comprehensive reform of most aspects of policing found in the *Police Services Act*, 1990, S.O. 1990, c. 10, there is an extensive and detailed citizens' complaint process. In Quebec, a new public complaint process was enacted in *Projet de Loi 86*, in 1988. See Brodeur, C.D. 2.2, p. 90. Brodeur also notes that in 1988 and 1990, the RCMP Commissioner's Standing Orders for practice and procedure before RCMP complaint boards were significantly amended (pp. 90-91).

[191] C.D. 2.22, pp. 3-4. This report also notes that the Ontario model has been recommended for use in Manitoba by the *Manitoba Justice Inquiry Report*, Vol. 1, p. 635.

The report, *Access to Remedies*, provides several specific suggestions on police complaint procedures to ensure they provide a meaningful avenue for redress for members of racial and ethnic minorities.[192] There should be provision for significant civilian involvement, such as that provided in the Ontario scheme through appointment of a police complaints commissioner. The process for making complaints should be simple[193] and well-publicized. There should be some allowance for the informal resolution of complaints through mediation, provided the procedure minimises the scope for complaints being withdrawn, or not laid, due to intimidation by the police.[194] Instances of intimidation should be treated as serious disciplinary offences for officers. There should also be provision for dealing with complaints that are system-wide or reflect on a police service policy. The complaint procedures should allow for the person adjudicating the complaint to go beyond the facts of the formal dispute to recommend changes to overall police practices or policies.[195]

Several reports suggest that because the police are already accountable to numerous bodies, and recently there has been significant reform in police complaint procedures in several of the largest police jurisdictions in Canada, it is not desirable to recommend new procedures or structures until the present ones have been evaluated. Instead, they call for close monitoring of these new mechanisms.[196] There is also significant agreement that such evaluation should focus not only on how well or poorly complainants are served by the technical operation of the procedures, but also how successful the new mechanisms are in reaching and being activated by potential users, especially by members of racial and ethnic minority groups.[197]

Professional Accountability: Complaint and Disciplinary Procedures for the Legal Profession

Procedures for making complaints or obtaining redress against lawyers have received little scrutiny in general and virtually no consideration in relation to minority

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[192] The recommendations are taken from C.D. 2.22, pp. 4-5.

[193] As in Ontario, where the new Act allows complaints to be made at any police station or Police Complaints Commissioner Office, orally or in writing. Clerical obligations concerning filling out and filing forms are placed on the person receiving the complaint.

[194] See for example, the *Ontario Police Services Act*, 1990 R.S.O. 1990, c. 10, s. 83-84, which allows for informal resolution but also allows the continued investigation of a complaint despite an informal resolution or withdrawal if the Commissioner believes that there was "a misunderstanding or a threat or other improper pressure."

[195] Lewis, Linden, and Keene, "Public Complaints Against Police in Metropolitan Toronto -- The History and Operation of the Office of the Public Complaints Commissioner" (1987) 29 Crim. L. Q. 115-144, p. 136; and *Police Services Act*, 1990 R.S.O. 1990, c. 10, s. 101.

[196] C.D. 2.22, p. 2; Brodeur, C.D. 2.2, pp. 90-91; and Etherington, et al., C.D. 2.34, pp. 34-35. Brodeur notes that a police officer in Quebec is accountable to 11 different agencies (pp. 89-90).

[197] Etherington, et al., C.D. 2.34, pp. 33-34, refers to the length and complexity of the new Ontario statutory provisions and the difficulties they may present to minority complainants unless there is an extensive and culturally sensitive public-education program to ensure that members of cultural minorities understand the process and also understand that there are projections from police reprisal built into the process to ensure their safety. This latter concern can be of great importance for some minorities who come from repressive regimes with extensive police powers and corruption. Etherington did note the plans of the Office of the Police Complaints Commissioner to engage in several outreach public education activities in minority communities to publicize the new process (p. 34, note 72). See also C.D. 2.22, pp. 6-7, which expresses similar concerns about the ability of the new processes to break down the "reluctance and diffidence of certain minority groups to seek redress through formal complaint mechanisms."

concerns.[198] This is despite the fact that the legal profession's status as a self-regulating profession may lead to a "perception by the public that complaints against lawyers are not satisfactorily dealt with by other lawyers."[199]

Several reports express concern about the extent to which lawyers are sufficiently educated or sensitized to the particular needs and skills required to properly represent minority clients.[200] Some indicate that complaints of incompetence, negligence, abuse or rude and unprofessional conduct by lawyers are common among members of minority groups, but that minority complainants often do not make appropriate disciplinary bodies aware of their concerns because of their lack of knowledge about complaint procedures or fears that they are too complicated and burdensome to pursue.[201] As a result, there have been recommendations for studies of minority group members' perceptions on how well they are treated by the practising bar and their knowledge and appreciation of the role, responsibilities and procedures of law societies in the investigation and hearing of complaints against lawyers.[202]

The answers to these questions will be heavily influenced by two factors: whether hearings of complaints are open to the public or held in camera; and appropriate public legal education measures. Although there has been a recent trend in most jurisdictions to make law society disciplinary proceedings public, there still are some jurisdictions where they are closed to the public. In those jurisdictions where there is a preference for openness, the decision on public or in-camera hearings is left to the discretion of the adjudicator.[203] The report, *Access to Remedies*, argues that the benefits of public hearings are sufficiently important to outweigh the potential hardship for subsequently vindicated lawyers who are embarrassed by allegations.[204] It stresses the important public education and confidence benefits that result from allowing the public to assess the fairness, honesty and legitimacy of law society procedures.[205] Consequently, the report expresses concern that the recent formal adoption of openness as a "preferred posture" in several jurisdictions not be significantly undermined by the exercise of discretion to close proceedings.[206] It recommends a study of whether formal policies of public hearings are

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[198] The only study which discusses this issue in any detail is C.D. 2.22, pp. 7-16. The study points to paucity of empirical research on the self-policing of complaints about lawyers by the legal profession and refers to only two very dated studies, the most recent being in 1978 (p. 7).

[199] Ibid, citing Mew, "Lawyers: The Agony and the Ecstasy of Self-Government" (1989) 9 Windsor Yearbook of Access to Justice 210, p. 238.

For further evidence of negative perceptions of lawyers in terms of competence, corruption and sensitivity to minority concerns, see *Focus Groups on Public Legal Information Needs and Barriers to Access* (1990) (C.D. 2.32).

[200] *Report of the Royal Commission on the Prosecution of Donald Marshall Jr.*, 1, p. 155; C.D. 2.22, pp. 9-10; Etherington, et al., C.D. 2.34, pp. 35-38; and Kaiser, C.D. 2.3, pp. 115-16.

[201] C.D. 2.22, p. 10; and Cawsey, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (1991) 1, pp. 10-11.

[202] C.D. 2.22, p. 11.

[203] See summary of regulations concerning disciplinary procedures in Hamid, *Provincial Law Society Disciplinary Proceedings* (1991) (C.D. 2.5). At the time Hamid wrote several jurisdictions, such as P.E.I and Manitoba were considering changes to give preference to open hearings.

[204] For further arguments in favour of open hearings, see *R.* v. *Pilzmaker and the Law Society of Upper Canada* (1989), 70 O.R. (2d) 126 (H.C.); and MacKenzie, "Lawyer Discipline and the Independence of the Bar: Can Lawyers Still Govern Themselves?" (1990) 24 Gazette 319, p. 320.

[205] C.D. 2.22, pp. 12-13.

[206] See discussion of policy of Law Society of Upper Canada, re open hearings and the exercise of discretion to make them in camera in footnote 39, ibid, p. 13.

being realized or being undermined by exceptions to the policies.[207] Finally, it recommends that law societies be extensively involved in culturally sensitive and appropriate public legal-education programs for minority communities to inform them about proper professional conduct by lawyers, their rights to lodge complaints, and the mechanisms to use to pursue them.[208]

A related issue is the development of some form of oversight mechanism to review cases in which complainants are not happy with the disposition of their complaint by the law society to help allay the public's concern about a self-regulating profession's ability to discipline its own members. Although noting that some law societies have recently instituted processes similar to the Law Society of Upper Canada's Complaints Review Committee (chaired by a lay bencher), the report, *Access to Remedies*, calls for a study of the effectiveness in non-Canadian jurisdictions of more independent review mechanisms.[209]

Policing the Courts: Complaint and Disciplinary Procedures for the Judiciary

There is concern that the formal mechanisms for pursuing complaints against judges, and provincial and federal judicial councils, are not well-known to the public and may be regarded as unresponsive and remote.[210] There are also concerns that the accessability and efficacy of judicial councils may be hampered by lack of sufficient remedial powers, lack of public lay representation in some councils, lack of public education concerning their operation, and the holding of hearings in camera. In terms of powers, the major difficulty lies with the Canadian Judicial Council which is limited to holding inquiries with a view to recommending removal from office.[211] Provincial councils appear to possess a wide range of disciplinary powers, including the power to reprimand, fine, suspend or order payment of costs by a judge. The LRCC recommends amendment of the *Judges Act* to provide for a full range of sanctions to improve the Council's investigatory and adjudicative roles.[212]

The Canadian Judicial Council does not allow for lay representation on council to hear and decide complaints. A council is usually staffed by judges, although there is allowance for lawyers to sit on an ad hoc basis. Provincial councils generally provide for at least one lawyer as a council member and all but Nova Scotia allow for some degree of lay representation.[213] The importance of public lay representation for public access, accountability, and provision of a different "non law professional" perspective has led one

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[207] Ibid, p. 14.

[208] Ibid, pp. 14-15.

[209] The study refers to the example of England and New Zealand where independent Ombudsmen or Lay Observers have been appointed. See C.D. 2.22, pp. 15-16; and Mew, "Lawyers: The Agony...," p. 240.

[210] C.D. 2.22, pp. 16-17. Judicial councils have only existed in Canada since 1968. The Canadian Judicial Council exercises authority over all federally appointed judges. Each province has its own judicial council for provincially appointed judges.

[211] Ss. 63 and 65 of *Judges Act*.

[212] C.D. 2.22, pp. 17-18.

[213] Ibid, pp. 18-19, citing McCormick, "Judicial Councils for Provincial Judges in Canada" (1986) 6 Windsor Year. Access Just., p. 160.

report to recommend that all judicial councils provide for lay representation.[214]

Further, while speculating that members of minority groups in Canada know little about judicial complaint rights and processes and have little faith in them as effective avenues for redress,[215] the LRCC report advocates empirical study of the public's knowledge of the role and functioning of judicial councils; and the inclusion in public legal-education programs of information on the rights and mechanisms for filing complaints against judges.[216] The issue of open versus in-camera hearings is perhaps even more significant and complex for judges than for lawyers. There would appear to be no consistently followed practice: some jurisdictions require public hearings if the complaints are found to be significant and serious; others give authority to judicial councils to hold a public hearing if the council decides it is in the public interest or that there are compelling reasons; others allow the judge subject to the complaint to elect; and others presume that the hearing should be public unless the council decides that all or part of it should be held in camera.[217] The hearings of the Canadian Judicial Council are usually closed, although there is no legislative restriction. The Council has the authority to order an open hearing, and the Minister of Justice can compel an open hearing. A rare example of an open hearing occurred in the Council's inquiry into the members of the Nova Scotia Court of Appeal panel that sat on the appeal of Donald Marshall Jr.[218] While recognizing the advantages and disadvantages of open hearings,[219] the LRCC report recommends that governing legislation in all jurisdictions should clearly establish that openness is discretionary in the Council and the criteria on which the decision is to be made should be structured by legislation.[220] However, it also recommends that proceedings should be presumptively open, particularly where they involve allegations of racist commentary or discrimination.[221]

Finally, only one jurisdiction has attempted to legislate a code of judicial conduct,[222] and some have argued that it is inappropriate to attempt to legislate such standards because they can only be decided by the judiciary themselves. The LRCC report recommends the development of codes of judicial conduct for all levels of the judiciary, to be published and widely disseminated through public legal education. It also recommends that judicial councils be involved in the development of codes of conduct,

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[214] Ibid, pp. 20-21, notes that this recommendation has broader impact than minority access concerns, but argues that the removal of barriers to the general public should benefit minorities significantly.

[215] Ibid, pp. 21-22, citing the *Report of the Royal Commission on the Prosecution of Donald Marshall Jr.*, 1, p. 157.

[216] Ibid, pp. 21-22.

[217] Ibid, pp. 23-24, for a breakdown of each council's procedure.

[218] Ibid, pp. 23-24, noting that this was the only case in which an open hearing was held on a disciplinary matter in the 20-year history of the Council.

[219] For discussion of the pros and cons of open and in-camera hearings on complaints against the judiciary, see McCormick, "Judicial Councils...," pp. 185-186; Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges*, Rep. 72, (1989), pp. 81-82; and the *Report of the Canadian Bar Association Committee on the Independence of the Judiciary* (1985), p. 42.

[220] C.D. 2.22, p. 23.

[221] Ibid, p. 25. In such cases the public interest in obtaining information about possible judicial misconduct outweighs the judicial interest in avoiding undeserved damage to reputation. On July 7, 1993 the Ontario government introduced the *Courts of Justice Statute Law Amendment Act*, with measures to increase the representativeness of the Ontario Council, make complaint hearings more open, and confirm the permanent establishment of the Judicial Appointments Advisory Council and its equity objectives.

[222] Quebec Order in Council, O.C. 643-82, March 17, 1982, *Judicial Code of Ethics*.

with the advice and involvement of representatives of minority communities.[223]

Multicultural Criminal Justice Advisory Council

The LRCC report recommends creating a multicultural criminal justice advisory council to promote a more comprehensive approach to ensure that the exercise of discretion by justice system actors provides equitable and respectful treatment for members of racial and ethnic minorities.[224] This new body would generally be responsible for attempting to change attitudes in society and promote tolerance, acceptance and understanding. It is suggested that it might be modeled on the Advisory Council on the Status of Women, with a mandate to heighten society's awareness of multicultural issues, study the impact of existing practices and policies on minorities, inform the public of progress or delay on multiculturalism concerns, identify areas of concern to various minority communities, gather information on such issues, and publish reports and studies on its work. Such a body could be particularly useful to identify general problem areas, in particular systemic problems, and identify system-wide solutions.[225]

For such a body to be effective it is proposed that it be independent of government, with full-time staff and the power to determine its own agenda and research programs.[226]

This advisory body would have an important general monitoring function. One of its major tasks would be to gather criminal justice data to assist in determining whether systemic discrimination exists and its location or causes. This would depend on the adoption of recommendations discussed above concerning the collection of accurate and reliable race and ethnicity data for those involved in the criminal justice system, both from justice system actor reports and independent studies mounted by the new advisory council. The underlying purpose of such studies would be to discover and explain both intra and extra-criminal justice system causes of anomalies found in the system. Studies could also be mounted concerning proposed solutions to problems.[227] One of the strengths of having such an independent body responsible for the collection and analysis of this information would be the increased perception and reality of accountability.

Finally, it is recommended that this council become directly involved in dispute resolution between members of minority communities and justice system actors, and

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[223] C.D. 2.22, p. 27.

[224] LRCC, *A Multicultural Criminal Justice Advisory Council* (1991) (C.D. 2.12).

[225] Ibid, pp. 1-2. The LRCC recognizes that a Canadian Multiculturalism Advisory Council already exists, with a mandate to provide advice to the Minister of Multiculturalism on the implementation of the *Multiculturalism Act*. However, they are recommending a more independent body with a broader mandate.

[226] C.D. 2.12, p. 3. To further promote the Council's autonomy, it is recommended that it have the power to report to Parliament or publish reports without Ministerial consent, and the authority to deal directly with police, prosecutors, corrections and others to solve problems.

[227] The LRCC also suggests that the Council could mount studies on objectives and techniques for cross-cultural training, the effectiveness of procedures for complaints against justice system actors, and the effectiveness of public legal education initiatives for members of minority communities.

particularly in cases involving instances of systemic discrimination. The LRCC suggests that the council might play such a role if it could work in association with a senior advisor on race relations, whose position could be established in all agencies in the criminal justice system. A senior advisor on race relations could act as a liaison between specific agencies and minority communities, gathering information concerning community concerns and investigating allegations of systemic discrimination within his or her agency. The senior advisor could also use Advisory Council resources and request its assistance to resolve problems within the agency and disputes between the agency and minority communities.[228]

4.1.3.5 Development of Non-discriminatory Risk Indicators for Discretionary Decisions

Several reports note the importance of gathering information and analysis on the development and use of risk indicators in the exercise of discretion at critical stages of the criminal justice process: the decision to charge an offender; the decision to allow or deny pre-trial release; sentencing; and parole or other forms of conditional release from prison.[229] The main issue raised is whether the criteria used as risk indicators by decision-makers at these junctures result in systemic discrimination by causing the unjustified detention of accused persons from racial or ethnic minorities.[230]

Although the LRCC report on pre-trial release[231] points out that there is too little statistical information available in Canada to answer this question, it reviews two Canadian studies with some relevance to the issue[232] and concludes that there is enough cause for concern to justify an attempt to determine on a national scale the criteria being

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[228] C.D. 2.12, pp. 9-11. In terms of resolving problems not solved through this mediative type of process, the LRCC recommended that the Advisory Council be given the power either to file a report to Parliament on the problem and possible solutions or that it be given standing under appropriate legislation to pursue a complaint in front of the appropriate Human Rights Commission. As this and several other reports point out, human rights commissions and tribunals have the power to order changes to agency policies or practices but they are generally limited in terms of the types of complaints they can receive, and discrimination in the exercise of legal discretion is not prohibited under the federal human rights act and most provincial human rights codes. However, it should be noted that the exercise of discretion by government actors is generally subject to scrutiny by the courts for violation of provisions of the *Charter of Rights and Freedoms*.

[229] Brodeur, C.D. 2.2, pp. 76-78; and LRCC, *Bail*, (1991) (C.D. 2.18).

[230] C.D. 2.18, p. 8.

[231] For grounds for detention by police after arrest, see s. 497 of the *Criminal Code*. For grounds for detention by a justice, see s. 515(10). For the latter the statutory grounds justifying detention are that it is necessary to ensure the accused's attendance in court or that it is necessary in the public interest or for the protection or safety of the public. The vague criteria of "public interest" was recently struck down by the Supreme Court of Canada as a violation of s. 7 of the *Charter* in *R.* v. *Morales* and *R.* v. *Pearson*, decided in November 19, 1992.

[232] The first study was done for the Bellemare Comité by Lescop, "Résultats d'analyse d'un échantillon de prévenus blancs et non-blancs arrêtes sur les territoire du SPCUM en 1987," in *Enquête sur les relations entre les corps policier et les minorités visibles et ethniques, Rapport Final*, Annexes (1988). The report found evidence of differential treatment with whites more frequently obtaining pre-trial release than non-whites, and found the most frequent reason for pre-trial custody was the absence of proof of permanent address or identity. This then raises questions about the relevancy of the criterion of a known address. An earlier study by Hagan and Morden of police detention of persons in Ontario in the 1970s found that there was a Crown attorney manual regarding bail decisions which gave quasi-legal authority to specific criteria such as the accused strengths and weaknesses, attitudes, associations, home life, employment status, residence, etc. Hagan and Morden found that the most significant factors in detention decisions were prior convictions, prior incarceration, employment status and behaviour toward the police. Obviously the job criteria would discriminate against the poor. But the *Bail* report makes the point that this factor and the criteria of behaviour of the suspect (i.e., not cooperating with police) could result in indirect discrimination towards members of racial and ethnic minorities. C.D. 2.18,

pp. 11-12, citing Hagan and Morden, "The Police Decision to Detain: A Study of Legal Labelling and Police Deviance," in *Organizational Deviance* (1981), pp. 9-12.

used by police and courts to decide whether or not to detain someone. Such criteria could then be evaluated to determine whether or not the police and courts are justified in terms of a rational link to the purposes of detention (ensuring attendance at trial and protecting public safety).[233] The report also recommends the development of guidelines for risk indicators for use by police, courts and corrections officials. These risk indicators would be empirically based and structured to avoid potential unintended discrimination.[234]

4.1.4 Issues Concerning Language of Accused, Victims, and Witnesses

In the main LRCC report on these issues, Pomerant acknowledges that the multiculturalism objectives of equitable treatment and respect would be best served if all accused, witnesses or suspects were entitled to communicate only with justice system officials who were able to communicate in their "best" language.[235] However, recognizing the administrative impossibility of such a scheme, he focuses on measures to ensure that minority persons are given full notice of, and meaningful enjoyment of, their *Charter* right to an interpreter[236] if they do not understand the language of the proceedings. He expresses concern that the *Charter* right, which only expressly refers to the right of a "party" or "witness," needs to be supplemented by legislative provisions to ensure that accused, witnesses and suspects have access to translator services during all pre-trial and trial stages of the process.

It can be especially important to provide translators for both the accused and the victim at trial to prevent any possibility of bias or distortion in the course of translation. In addition, measures should be taken to ensure that translators are not only linguistically competent but also culturally sensitive and sensitive to special needs such as those of minority women.

Pomerant recommends that legislation be enacted to ensure the costs of such services are borne by the government, that justice system actors be required to ascertain the need and advise persons of their rights to such services (in an appropriate manner) as early as possible, and that a training and certification process for justice system translators be implemented to ensure that equitable standards of competence, ethics and impartiality are observed. He also advocates significant research initiatives to determine the extent to which the *Charter* right to an interpreter is being observed or violated in courtrooms in Canada.[237]

Finally, there is concern expressed in several of the reports on consultations with ethnic and women's organizations that cultural and language barriers can be a serious impediment to access to justice for victims of criminal behaviour from racial and ethnic minorities. These barriers can take several forms. In the area of family violence, and

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[233] C.D. 2.18, p. 13.

[234] Ibid, p. 6.

[235] Pomerant, *Language of Accused and Multicultural Issues* (1991) (C.D. 2.14), p. 1.

[236] S. 14 of the *Canadian Charter of Rights and Freedoms*.

[237] Pomerant, C.D. 2.14, pp. 3-7.

particularly violence against women, two reports refer to the problem that women from some cultures are reluctant to contact police to report criminal behaviour and seek assistance for several reasons: their cultural background leads them to fear police and authority;[238] their inability to communicate in one of the official languages prevents them from learning of their legal rights or makes them reluctant or unable to talk to police;[239] their cultural background makes them think they must accept abuse from their spouse and it would be wrong to go to police;[240] or they lack access to, or are unaware of, culturally sensitive social and legal-support services.[241] The provision of better and more accessible official language training, and culturally sensitive public legal education, legal aid, police and social-support services are strongly recommended in several reports and is viewed as essential to the well-being of minority women.

4.1.5 Rules of Evidence and Multiculturalism

Although there is little discussion of problems or justification for concern, the LRCC draft report on evidence issues[242] suggests that the present options under evidence legislation to either have witnesses take an oath or allow them to make a solemn affirmation to tell the truth may not be sufficient to honour a commitment to equitable treatment and respect for all cultural minorities. Pomerant suggests that the *Evidence Act* be amended to provide that a witness who does not wish to testify under oath may promise to tell the truth in any manner which is respectful of his cultural or religious beliefs, ensure that presiding judges will ascertain from the witness the person or persons who should administer or receive the promise for it to be binding, and make arrangements for the required person or persons to administer or receive the promise.[243]

A far more widely discussed issue, and one on which there is little consensus, is whether or not Canadian law should recognize some form of privilege for communications with religious advisers.[244] At present, in Canada, there is no generally recognized religious adviser privilege, although two provinces have given such communications some protection.[245] In its recent decision in *R.* v. *Givenke*,[246] the Supreme Court of Canada ruled against arguments for a blanket or class privilege for religious adviser communications at common law, holding instead that they would be subject to a "case-by-case" privilege, for which there is a presumption of admissibility if relevant. This requires the court to apply the Dean Wigmore common law criteria and

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[238] C.D. 2.35, in reference to Latin American women. See also Jamieson, et al., *Survey of Selected National Non-governmental Organizations on Women and Justice Issues* (1991) (C.D. 2.36).

[239] Jamieson, et al., C.D. 2.36.

[240] Etherington, et al., C.D. 2.34, p. 60, note 128.

[241] Ibid; Jamieson, et al., C.D. 2.36; and C.D. 2.35.

[242] Pomerant, *Canada Evidence Act and Multicultural Issues* (1991) (C.D. 2.29).

[243] Ibid, p. 2.

[244] Ibid, pp. 2-29; *Criminal Law Issues Involving Religion and Conscience* (1991) (C.D. 2.29); Young and Gold, C.D. 2.4, pp. 132-138.

[245] Newfoundland protects priests or clergy persons from being compelled to give evidence concerning confessions received in a professional capacity (R.S.N. 1970, c. 115, s. 6); Quebec's *Charter of Human Rights and Freedoms* protects communications to clergy received in a professional capacity (R.S.Q. 1977, c. c-12, s.9).

[246] [1991] 3 S.C.R. 263.

weigh the policy considerations to decide if exclusion is warranted in each particular case.[247] This would appear to be consistent with Canadian precedent and the recommendations of previous commissions and task forces which have investigated this issue.[248]

After noting that 49 of 50 American states have enacted some form of religious adviser communications privilege, the Pomerant report summarizes arguments for and against the enactment of such a privilege in Canada.[249] He concludes the real purpose for enacting a class privilege for this type of communication would be to promote involvement in religion rather than to enhance religious freedom. He suggests it is inconsistent to promote the seeking of advice from religious professionals but not from other advice-giving professionals or parents. However, he also found that the present Canadian case-by-case approach is not satisfactory because it produces uncertainty with the use of criteria which make its acceptance almost impossible. Finally, he recommends there should be no privilege recognized to protect religious communications, but if there is a privilege it should be clearly legislated as a class privilege with many of the issues concerning its scope and application revealed by American experience clearly dealt with in the legislation.[250] Other LRCC reports take a more positive stand on the enactment of a legislated class privilege for religious adviser communications.[251]

4.2 Substantive Criminal Law Issues Involving Race/Ethnicity, Culture and Religion

[247] Wigmore, *Evidence*, Vol. 8 (McNaughton rev., 1961), p. 527: (1) the communication originated in a confidence that it would not be disclosed; (2) the asserted confidentiality is essential to the satisfactory maintenance of the relation between the parties; (3) the relationship is one that, in the opinion of the community, should be sedulously fostered; and (4) the damage to the relationship resulting from disclosure exceeds the benefit disclosure will provide for the correct disposal of the litigation.

[248] See Pomerant, *Canada Evidence Act*, pp. 5-15, referring to the following studies:

- Law Reform Commission of Canada, *Evidence, Report* 1 (1975) s. 41, pp. 30-31;
- *Report of the Federal-Provincial Task Force on Evidence*, (1983);
- English Criminal Law Revision Committee, Eleventh Report, *Evidence (General)* Cmnd. 4991 (1972), pp. 158-159; and
- Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), pp. 145-146.

[249] It could be viewed as furthering the *Charter* guarantee to freedom of religion and ensuring the treatment of religious minorities by the justice system is more equitable and respectful. It could encourage wrongdoers to approach religious advisers and hopefully thereby improve their morality. It would eliminate the potential conflict between religious duty and legal duty for clergy who are required not to reveal such communications. The case-by-case approach under Wigmore's criteria causes great uncertainty, and is worsened because the criteria are such that it will be almost impossible to justify exclusion in significant or serious cases.

On the other side, it appears that only the Catholic church requires its clergy to maintain confidentiality at all costs, even if opposed to legal obligations to disclose. To avoid notions of favouring one religion over others the privilege must apply to all religious adviser communications, and then it is difficult to justify privilege for these communications while leaving other communications with significant advice-givers such as doctors, psychologists, social workers and parents unprotected. There does not appear to be a significant body of complaint or opinion in Canada arguing that the law is disrespectful or inequitable to minorities because it does not now provide them with a privilege. There appear to have been virtually no cases in which the Court has ordered the breach of a "discipline enjoined" requirement of secrecy or in which a priest has been subpoenaed to testify as to a confession. It is also suggested that a privilege is not really necessary to encourage resort to confession or adviser communications if church doctrines actually require it. There is no evidence that absence of privilege has any effect on church membership, adherence or practice. Such a privilege may be seen as going beyond mere encouragement for freedom of religion to state encouragement of involvement in religion. It could also encourage clergy not to disclose information which could exonerate an accused. Pomerant, *Canada Evidence Act*, pp. 19-27.

[250] See Pomerant, *Canada Evidence Act*, pp. 28-29. Examples of some of the issues to be resolved involve who has the privilege and the power to waive it, to which clergy does it apply, whether or not the protection should be given to all religious adviser communications or limited to those required to be kept confidential by church doctrine, whether certain communications should be excluded from privilege (i.e., child abuse admissions), etc.

[251] See Young and Gold, C.D. 2.4, pp. 134-137; and *Criminal Law Issues Involving Religion and Conscience* (1991) (C.D. 2.29), p. 31.

There are two main types of issues in this area. Issues in the first group arise when minority religious or cultural practices conflict with the statutory criminal law of Canada. The second includes issues arising from attempts or failures in Canadian statutory criminal law to protect racial and ethnic minorities from discriminatory and violent racist behaviour by others.

4.2.1 Accommodating Minority Practices in Conflict with Statutory Criminal Offences: International Law and *Charter* Obligations and Principles

The general issue here is the extent to which Canadian criminal law should accommodate or make exemption for minority religious or cultural practices that are in conflict with statutory definitions of criminal conduct. In dealing with this issue, it is necessary to consider the extent to which *Charter* and international law obligations require such an accommodation and the extent to which such exemption can be made without sacrificing fundamental social values or policies embodied by our criminal law or constitution. It also requires consideration of the desirability of some form of accommodation and the form or mechanism that should be employed to deal with individual cases — i.e., a general legislative exemption or a case-by-case accommodation by our judiciary.[252]

Several reports point out that *Charter* rights and international obligations may require certain accommodations or exemptions for minority religious or cultural practices that conflict with definitions of criminal behaviour.[253] For some these constitutional and international principles require that the law attempt to accommodate the core practices of religious collectivities to the fullest extent which is consistent with competing values and rights.[254] This approach recognizes that the *Charter* also imposes an important limit on the principle of accommodation. A religion or culture-based practice in violation of another person's constitutional rights should not be accommodated.[255] And, it can be argued that an accommodative approach to minority religious and cultural practices is also consistent with the basic premise for our criminal law accepted by the Law Reform Commission early in its work — that restraint in terms of limiting criminal law to those serious crimes which seriously transgress essential values is vital to the health of our

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[252] Young and Gold, C.D. 2.4, pp. 1-5; C.D. 2.29; and *Statutory Criminal Law* (1992) (C.D. 2.23).

[253] Young and Gold, C.D. 2.4, p. 14. The *Charter* guarantees freedom of religion and conscience (under s. 2(a)) and prohibits discrimination on the basis of religion or national origin in s. 15. It also requires that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians in s. 27. These rights are subject to reasonable limits justified under s. 1 of the *Charter*.

C.D. 2.29, pp. 1-3, points to Art. 27 of the *International Covenant on Civil and Political Rights* (1976) which states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[254] Young and Gold, C.D. 2.4, p. 21, note that past and current jurisprudence has tended to reject claims of this nature advanced by religious collectivities in the criminal law realm.

[255] Young and Gold, C.D. 2.4, pp. 22-23, note that this limitation should make it easier for judges to recognize the accommodation in the first place, knowing that the "hypothetical horribles" of cases such as human sacrifice or scarring in the name of religion could never pass this limitation because of the threats they represent to the rights of others.

criminal law.[256]

In general, there appears to be little consensus in the reports dealing with this issue on the extent to which there is need for reform to bring about a more accommodative posture through legislative or judicial action. Although almost all reports agree that the Canadian tradition, both pre- and post-*Charter*, has been for courts to refuse to grant exemptions or accommodate minority religious practices, their views differ significantly on the need for a change in general, and desirable outcomes on specific issues raised by clashes between minority religious practices and drug laws, weapons laws, bigamy offences, and parental-care offences.[257]

4.2.2 Issues Arising from Conflicts between the Criminal Law and Minority Religious and Cultural Practices

4.2.2.1 Drug Laws

The issue of accommodation or exemption for sacramental drug use involving substances prohibited by criminal law has long been an issue for U.S. courts and legislatures. The most often discussed example is the use of peyote as a central and vital component of a religious ceremony for members of the Native American Church. Both the California Supreme Court and the Arizona Court of Appeal exempted members of the Church who ingested peyote as part of the ceremony due to the centrality of the practice and the absence of compelling state interest.[258] Legislation in several states and federal food and drug legislation has granted specific statutory exemption for the use of peyote by members of the Native American Church.[259] However, the United States Supreme Court recently denied constitutional exemption to a member of the Native American Church from state laws prohibiting peyote possession because of the state's compelling interest in preventing drug abuse.[260]

Although all reports that considered the issue recommend some type of reform to provide accommodation for religious drug use, they appear to be unaware of the need for such exemptions in Canada. The main LRCC report, *Statutory Criminal Law*, notes that with the possible exception of Rastafarians and their use of marijuana, the LRCC was unaware of any group in Canada that might seek such an exemption, or of any court actions by Rastafarians in that regard.[261] The report, therefore, recommends a study to

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[256] LRCC, *Our Criminal Law* (1976), cited in Young and Gold, C.D. 2.4, p. 24.

[257] Most notable is the divergence between, Young and Gold, C.D. 2.4, calling for significant reform in both general approach and on specific offence issues, and the LRCC report, *Statutory Criminal Law* (1992) The latter report finds that, "On the whole, we believe that relatively little reform is needed in this area", in part because "there are not a great number of conflicts between minority practices and criminal law in our society, and seeking exemptions from the criminal law does not seem to be a matter of high priority for most members of minorities" (p. 3).

[258] *State* v. *Whittingham*, 504 P. 2d 950 (1973); and *People* v. *Woody*, 394 P. 2d 813 (1964).

[259] See discussion in C.D. 2.29, p. 7.

[260] *Dept. of Human Resources of Oregon* v. *Smith*, 110 S. Ct. 1595 (1990). The Court also held that whether an exemption should be provided to a particular religious group was a matter of legislative policy, not a constitutional necessity.

[261] Young and Gold, C.D. 2.4, p. 13. The report does note that in *R.* v. *Kerr* (1986) 75 N.S.R. (2d) 305 (N.S.S.C.A.D.) the accused claimed religious purposes for his marijuana use, but it was unclear what religion he espoused.

determine whether or not any groups in Canada traditionally make use of controlled drugs in their religious practices. If a need for some mechanism is found in the study, the report recommends that a statutory mechanism for application by religious groups for exemption be adopted. Further, the LRCC report recommends that specific exemptions be granted to individual religions to avoid the uncertainty and litigation inherent in a general broadly worded exemption. It also suggests that an exemption from drug offence legislation only be granted when it is sought by a bona fide religion; the drug used is central to a ceremony or practice of the religion; and its use would not indirectly make the drug more widely available in the general community.[262]

4.2.2.2 Weapons Offences

There have been several cases in recent years where individuals who carry knives or daggers as part of their religious observances have come into conflict with the *Criminal Code* offences concerning the carrying of weapons. The most widely known example is the religious requirement for male Sikhs to carry a small dagger, a kirpan, to be worn under their outer garment. This religious practice can result in criminal convictions for carrying a concealed weapon,[263] and attending a public meeting while carrying a concealed weapon.[264] There may also be other religions with similar practices.[265] Although there have been very few decisions to date, the courts have refused to make any accommodation or exemption, on *Charter* or common law grounds, for the beliefs of individuals who carry weapons in observance of religious requirements.[266] In general, the courts appear to be basing their decisions on the traditional belief versus action or conduct distinction for defining constitutional protection for religious freedom.[267]

There is little consensus in the reports for the proper response to this conflict. The main LRCC report, *Statutory Criminal Law*, advocates accommodation or exemption for minority religious practices of this nature because it finds no fundamental clash of values between the purposes of the criminal law and the minority religious observances. The interest to be protected by the weapons offences is legitimate but is primarily aimed at

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[262] Ibid, p. 14. C.D. 2.29 and Young and Gold, C.D. 2.4, are conscious of the concerns raised by the recognition of any form of exemption and the litigation and uncertainty that has to be dealt with in the aftermath of recognizing some form of accommodation for sacramental drug use. C.D. 2.29, pp. 5-6 recommends adoption of a general test but with several restrictive criteria to limit the exemption to drug use which is a core aspect of an "established religion" and which does not cause serious physical or psychological damage. Young and Gold's report contains a lengthy discussion of the complex issues of restricting an exemption to bona fide religious use and the conceptual and practical problems with various gatekeeping devices to distinguish between "legitimate" claims for religious accommodation and phony claims asserted to get around drug laws (pp. 39-46 and pp. 109-119).

[263] S. 89, *Criminal Code*.

[264] S. 88, *Criminal Code*. See discussion of these offences in *Statutory Criminal Law* (1992), pp. 9-11. This report also points out that other forms of criminal behaviour can become more serious if committed by Sikhs because of the presence of the weapon. For example, the hybrid offence of assault under s. 265 (maximum five years imprisonment) would become the indictable offence of assault with a weapon under s. 267 (maximum ten years imprisonment).

[265] See *R.* v. *Appleby* (1990) 109 A.R. 40 (Prov. Ct.) in which a follower of "Wicca" religion claimed the right to carry a concealed knife.

[266] See *Hohti* v. *the Queen* (1985) 35 Man. R. (2d) 159 (C.A.) and *Re Singh and the Queen* (1985) 18 C.C.C. (3d) 31 (Man. Q.B.) rejecting accommodation for carrying of a ceremonial dagger by members of the Sikh faith and *R.* v. *Appleby* (1990).

[267] See Young and Gold, C.D. 2.4, pp. 48-49.

preventing the use of weapons and the promotion of public security. Those who carry a ceremonial dagger are interested in its symbolic value and not its value as a weapon. The report suggests the accommodation could be best accomplished by simply enacting the LRCC proposed changes to the weapons offences recommended in *Recodifying Criminal Law*, Report 31 (1987).[268]

The other report, *Religion and Conscience*, which discusses this issue in detail, takes a contrary position. It recommends against recognizing an exemption to existing *Code* provisions to allow a religious group to carry any open or concealed weapon.[269] It argues that religious values that may put the security of others at risk must be compromised in the face of the state's primary duty to protect its citizens and reduce the risk of crimes of violence. It also suggests that the intrusion on freedom of religion interests is minimal.[270]

4.2.2.3 Crimes of Bigamy and Polygamy

There is a sharp division of opinion on the extent to which accommodation or exemption is required for religious marriage practices that violate criminal prohibitions against bigamy or polygamy. Young and Gold, pointing to the 1985 recommendation of the LRCC to remove polygamy from the *Criminal Code*, argue that this offence is a prime example of one which should permit religious accommodation and exemption. They argue that victimless or consensual crimes offer a more persuasive case for accommodation, provided the level of perceived harm to society is not sufficient to override religious liberty concerns. While recognizing that in the case of a consensual crime like polygamy justification is possible in terms of harm to the participants themselves, they argue there is no place for this paternalistic justification when we are concerned with the regulation of religious conduct.[271]

However the *Religion and Conscience* report recommends against accommodation or exemption for religiously mandated bigamy or polygamy. The primary argument of this report appears to be that such accommodation supports patriarchal religious practices which are denigrating to the status of women in society, and thus do present a significant harm to participants and to others in society.[272]

4.2.2.4 Parental Duty of Care Offences

There is little, if any, support for accommodation or exemption in cases where the

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[268] Report 31 would abolish the existing weapons offences and make it an offence to have a weapon in circumstances where there is reasonable inference that it will be used to commit a crime against personal safety and/or liberty.

[269] C.D. 2.29, pp. 13-17.

[270] Ibid, pp. 16-17.

[271] Young and Gold, C.D. 2.4, pp. 73-75. It would appear that the LRCC may have agreed with this position because there is no mention of bigamy or polygamy offences in the *Recodifying Criminal Law*, Report 31, proposals.

[272] Young and Gold, C.D. 2.4, pp. 23-24.

religious beliefs of parents concerning faith healing or prohibition of medical care bring them into conflict with criminal prohibitions designed to protect minors from death or harm caused by a failure of their parents to provide the necessaries of life.[273] The reports recognize the difficulty of the issue in terms of the significance of the religious beliefs of the parents, but recommend against accommodation because it can pose a direct threat to other persons.[274] The competing interests of the state in protecting the right to life and safety of others simply outweigh the parents' interests in religious freedom.[275] This generally reflects the present state of the law, where courts have refused to recognize religious belief as a "lawful excuse" for parental conduct which violates these criminal prohibitions.[276] The main LRCC report concludes that "the protection of life is one of the fundamental goals of the criminal justice system, that it is an important enough principle that criminal sanctions are appropriate, and therefore that no exemption should be created."[277]

4.2.3 The Relevance of Cultural and Religious Differences to the Criminal Fault Requirement, Defences, Justifications or Excuses

It has been suggested that accommodation may be achieved on an individualized basis by judicial determination that one's religious beliefs or cultural background may operate to negate the mens rea or mental state required for the criminal offence or to provide an affirmative defence.[278] Although these arguments are not significantly favoured in Canadian courts, the extent to which fundamental principles of criminal responsibility should accommodate minority religious and cultural differences deserves some consideration.

4.2.3.1 Negating Mens Rea

Evidence of cultural difference or religious belief may affect criminal responsibility if it is relevant to the determination of whether or not the Crown is able to prove the requisite mens rea or fault requirement for the offence.[279] This issue has arisen

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[273] Most often the relevant *Criminal Code* offences will be s. 215 (failure to provide the necessaries of life), s. 220 or 221 (criminal negligence causing death or bodily harm) and s.234 and 222 (manslaughter by criminal negligence).

[274] *Statutory Criminal Law* (1992), p. 16. See also Young and Gold, C.D. 2.4, pp. 94-105. However, Young and Gold, p. 139, do recommend that Parliament consider a legislative exemption to the parental duty of care provisions of the *Code* to accommodate those whose religious beliefs lead them to treat the illness of a child by spiritual means only, except in cases where the failure to treat by medical means results in serious physical harm to the child.

[275] C.D. 2.29, pp. 26-27.

[276] See discussion of cases in *Statutory Criminal Law* (1992), p. 16, note 35; and Young and Gold, C.D. 2.4, pp. 93-103. Young and Gold also discuss the attempt to provide legislative exemptions from child welfare or misdemeanour offences for parents who refuse treatment on religious grounds in 40 states in the United States (pp. 102-110). They note that even these provisions have been ineffective to protect parents from criminal responsibility in cases of serious harm or death of their children.

[277] *Statutory Criminal Law* (1992), p. 17.

[278] See Young and Gold, C.D. 2.4, p. 77; and Kaiser, C.D. 2.3.

[279] In terms of those offences for which the Crown must prove mens rea in a subjective sense (that the accused had an aware state of mind with respect to the circumstances and/or consequences that form the elements of the offence) evidence of cultural background may be relevant to the determination of the accused's state of awareness.

most often in cases involving charges of manslaughter or criminal negligence against parents who preferred spiritual treatment over conventional medical treatment for sick children. Most early cases rejected the claims of absence of mens rea on the ground that their decision to rely on faith healing went to motive and was irrelevant to considerations of mens rea because in all these cases it could be shown that the parents knew their children were dangerously ill.[280]

But the issue of the relevance of religious belief to mens rea was confronted directly in the recent decision of *R.* v. *Tutton and Tutton*,[281] where the parents presented a credible case that because of their religious beliefs they were no longer aware of the risk to their child presented by their failure to get medical treatment. In the decision, the Supreme Court of Canada split three to three on the issue of whether the test for mens rea should be subjective, to be decided on the basis of the subjective awareness of the accused themselves, or objective, to be decided on the basis of what reasonable persons would have foreseen and done in the circumstances. If subjective, then the religious beliefs of the accused could be a significant factor which resulted in the accused lacking the necessary mens rea for responsibility. If objective, then the absence of subjective awareness due to religious belief or a religious vision would probably not negate fault.[282]

4.2.3.2 Defences or Excuses

There has been recent discussion of the recognition of a "cultural defence" as an independent substantive defence or, as an alternative, the manner in which evidence of cultural differences could be allowed to buttress the assertion of one of our traditionally accepted defences, excuses or justifications.[283] English, Canadian and American courts have traditionally been reluctant to allow differences between an accused's culture and society's dominant culture to form an independent substantive defence or excuse to criminal charges. Further, several U.S. cases have raised concerns about the implications of recognizing a cultural defence in one form or another.[284]

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[280] See Young and Gold, C.D. 2.4, pp. 93-94.

[281] See note 282.

[282] For offences where there is an objective mens rea or fault requirement, some judges apply the "reasonableness" or ordinary person standard only after taking into account "factors which are particular to the accused, such as youth, mental development and education" [per J. Lamer in *R.* v. *Tutton and Tutton* (1989) 1 S.C.R. 1392, citing Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (1987)]. Although Lamer makes no reference to religious or cultural background, one can argue that his inclusive list should include such factors after indicating that the notional reasonable person is to be fixed with the educational background of the accused. However, J. Lamer wrote only for himself and J. McIntyre, who wrote for the other two justices to support an objective standard, would not appear to contemplate fixing the reasonable person with minority religious beliefs or cultural background.

[283] See "The Cultural Defence in the Criminal Law" (1986) 99 Harvard L. Rev., p. 1293; Sams, "The Availability of the `Cultural Defense' as an Excuse for Criminal Behaviour" (1986) 16 Georgia J. of Int.; and Comp. Law, p. 335. See also Kaiser, C.D. 2.3, pp. 81-83; and *Statutory Criminal Law* (1992), pp. 17-18.

Young and Gold, C.D. 2.4, pp. 87-93, suggest that the common law of excuses may be ideally suited for accommodation of religious or cultural claims by courts on a case-by-case basis, but note that courts have thus far been unreceptive to such claims. They also note possible problems with use of this common law device to recognize such claims.

[284] In one California case, a Hmong tribesman from Laos was charged with kidnapping and rape after practising a Laotian tribal marriage ritual known as "zij poj niam." This is a form of marriage by abduction and sexual intercourse in which the bride is expected to object, weep and moan, and the suitor is expected to consummate the sex act in the face of such protest. *People* v. *Moua*, No. 315972-0 (Fresno Cty Superior Ct., February 7, 1985), cited in Sams, "The Availability of the `Cultural Defense...," p. 336. After hearing the testimony and reading a doctoral dissertation on Hmong marriage ritual the judge reduced the accused's sentence from 180 days to 90 days in jail. After the sentence was given the prosecutor suggested that the trial judge had implicitly recognized the cultural defence in mitigation of sentence (pp. 336-337). In another

Although current Canadian criminal law does not recognize a cultural defence or excuse,[285] it is possible, following the ground-breaking decision of the Supreme Court in *R.* v. *Lavallee*[286] (where expert evidence on the battered-wife syndrome was considered relevant to the self-defence issues of the reasonableness of the accused's perceptions of the threat faced and her belief in the force required in response), that evidence of cultural difference will be considered in the future, when relevant, in the application of objective assessments of the reasonableness of an accused's conduct necessary for several criminal law defences or excuses.[287] *R.* v. *Lavallee* shows that when we consider how the reasonable person would have responded in the circumstances, that reasonable person has to be fixed with the personal history and experiences of the accused.

Several reports suggest that if some form of cultural defence is recognized, limitations must be placed on it, so that cultural differences are not allowed to displace or overshadow fundamental norms of our criminal law such as prohibitions against the infliction of violence or abuse on others, particularly women and children.[288] What is most perplexing about the American cases cited above is that a "cultural defence" is argued in the context of brutal violence against women and children. Examples of wife assault with a culture-based excuse are not unknown in the Canadian context.[289] At a time

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case involving a Hmong tribesman, the accused exercised his "right" under Hmong custom to kill his adulterous wife. Case referred to but not cited in "The Cultural Defense," (1986), p. 1293. And in a third case, a Japanese-American woman argued a cultural defence when she was charged with killing her children after she attempted to commit oyaku-shinju (parent-child suicide) when she learned of her husband's adultery. Members of the Japanese community testified that the death ritual was an accepted means for a woman to rid herself of the shame of her husband's infidelity in traditional Japanese culture. *People* v. *Kimura*, No. A-091133 (Los Angeles Cty Super. Ct. filed April 24, 1985), cited in "The Cultural Defense," (1986), p. 1293. The prosecutor eventually allowed the accused to plead guilty to voluntary manslaughter even though he believed the pre-meditated killing satisfied the definition of first degree murder. The judge ordered her to undergo psychiatric treatment and sentenced her to one year in jail (p. 1295). Although the "cultural defence" was not acknowledged as a separate substantive defence or excuse in any of the cases, in two cases the evidence of cultural difference appears to have been a critical factor in allowing the accused to plea bargain to a much less serious offence or agreeing to a much lighter sentence than would otherwise have been given.

[285] Ignorance of the law based on cultural differences is not accepted as an excuse. For an example of a cultural defence pleaded unsuccessfully, see *R.* v. *Baptiste* (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.). The accused parents, immigrants from Trinidad, had beaten their 15-year-old daughter with a belt and extension cord, to discipline her, and thereby caused abrasions, bruises and disfigurement. The issue was whether the parents had committed an assault or were excused by s. 43 of the *Criminal Code*, R.S.C. 1985, Bill C-46, as parents who used force that was reasonable in the circumstances for correction. Defence counsel argued that his clients should be excused because this type of corporal discipline is part of the culture of the accused. The court held that it could not consider the customs of the accused's former country where corporal punishment may have greater acceptance, but must consider the customs of the contemporary Canadian community to determine whether the force used was reasonable under the circumstances. The Court also doubted whether any form of corporal punishment was still acceptable in modern Canadian society.

The B.C. Court of Appeal has also rejected an assertion of the qualified excuse of provocation by an accused who claimed that his ethnic and cultural background explained his violent reaction to discovery of his wife's adulterous conduct. *R.* v. *Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A.).

[286] (1990), 76 C.R. 329 (S.C.C.).

[287] As is the case for self defence, defence of property, necessity and provocation. The notion of the fictional "reasonable man" operating in a surreal state devoid of any of the characteristics or background of the accused appears to no longer be a part of our criminal law. It reached its zenith perhaps in the case of *R.* v. *Parnekar* (1973, 21 C.R.N.S. 129 (S.C.C.)) where, in relation to the defence of provocation, the court held that the test was one of "the ordinary person not confronted with all the same circumstances as the accused", so that no account could be taken of the fact that the accused was Black despite the fact that the provocation alleged was a racist insult (p. 134). This case is overruled in the specific provocation context by *R.* v. *Hill* (1986) 51 C.R. (3d) 97 (S.C.C.) and in the broader sense by decisions like *Lavallee* and *Tutton* showing that objective standards related to fault requirements or defences must take into account the background and experiences of the accused.

[288] Etherington, et al., C.D. 2.34, pp. 50-51; and *Statutory Criminal Law* (1992), pp. 17-18.

[289] See for example, "Wife assault called `epidemic' among S. Asians", *The Globe and Mail*, [Toronto] November 19, 1990, p. A8. A spokeswoman for the South Asian Family Support Services said the problem was contributed to by cultural factors:

> The patriarchal structure makes women believe it's their duty to take the abuse. Many are afraid to leave their husbands

when we have only begun to recognize and take measures to eliminate sexist elements of our criminal law and methods of enforcement, we must guard against attempts to argue that cultural difference can excuse such violence.

4.2.4 Creation of Statutory Exemption to Provide Accommodation for Religious Belief

The Young and Gold report argues that to the extent it is decided to implement measures for accommodation or exemption of religious practices which conflict with criminal law offences this should be done through legislative enactment rather than judicially created exemptions based on the *Charter* or the common law. They point to the courts' past reluctance to recognize such claims and the institutional limitations on the ability of courts and judges to make sensitive and appropriate decisions in these areas. They are particularly concerned about the shortcomings of litigation in terms of policy information gathering ability and awareness of the full range of issues and implications for other groups of religious-based claims.[290] They discuss several options to legislatively create a general religious practice defence/excuse or more specific exemptions in particular cases.[291]

4.2.5 Issues Concerning Creation of Criminal Offences to Punish Racist Behaviour**Error! Bookmark not defined.**

4.2.5.1 Existing Offences: Hate Propaganda

Sections 318 and 319 of the *Criminal Code* make it an offence to advocate or promote genocide, incite hatred against an identifiable group in circumstances likely to lead to a breach of the peace, or to wilfully promote hatred against identifiable groups.[292] While these provisions attempt to render criminal the major visible manifestations of racism, they were adopted as a compromise between the need to protect identifiable groups and the broader community from words that maim and the recognition of freedom of expression as a fundamental freedom.[293]

These offences were criticized by Parliament's Special Committee on Visible Minorities in 1984[294] and the Law Reform Commission of Canada in 1986[295] and

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because it brings shame to the family.

[290] Young and Gold, C.D. 2.4, pp. 139-142.

[291] Ibid, pp. 141-143.

[292] R.S.C. 1985, c. Bill C-46. The offences were enacted by Parliament following their recommended adoption by the *Report of the Special Committee on Hate Propaganda in Canada* (1966) to the Minister of Justice. The report is often referred to as the Cohen Committee report. It concluded that although in the general *Code* offences concerning the infliction of violence and intimidation were sufficient to protect individuals from racially motivated violence or intimidation, Canadian law was:

> ... clearly... inadequate with respect to the intimidation of and threatened violence against groups, and almost wholly lacking in any control of group defamation (p. 59).

[293] Ibid.

[294] In the *Report of the Special Committee on Visible Minorities in Canadian Society: Equality Now!* (1984), the Special Committee reported

1990.[296] The main LRCC report to discuss this issue on the Minister's reference, *Statutory Criminal Law*, renews these criticisms and calls for removal of the requirement for the consent of the Attorney General for a prosecution for wilfully promoting hatred.[297]

Although the existing *Criminal Code* provisions have now been upheld as reasonable limits on freedom of expression under section 1 of the *Charter* by the Supreme Court of Canada,[298] this does not obviate the need to look at issues related to hate propaganda and the best way for our society to deal with it. However, the slim nature of the majority upholding the constitutionality of the offence and the specific reliance on the strict requirements of the existing law as the basis for holding that it was a reasonable limit which did not unduly impair the freedom of expression, may render amendments along the lines suggested by the report, *Equality Now*, to be of dubious constitutional validity.[299]

4.2.5.2 Possible New Offences Such as Racial Assault

Several reports discuss the desirability of creating new "racism" offences or at least offences that punish certain forms of intentional racist behaviour.[300] The arguments most commonly offered against the criminalization of racism are the philosophy of human rights legislation accepted in most Canadian jurisdictions of seeking the cooperation and compliance of violators of human rights laws through investigation, conciliation, and education wherever possible and resorting to adjudication and

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an increase in the presence of hate propaganda and made several recommendations with the purpose of making prosecutions and convictions under the *Criminal Code* provisions easier and providing other legal avenues for victims of hate propaganda to gain redress and stop publication of such material (pp. 69-79). Recommendations 35-37 deal specifically with *Criminal Code* section 319, R.S.C. 1985, c. Bill C-46 (in 1984 it was s. 281.2), which prohibits the incitement or promotion of hatred against an identifiable group. The report recommended the simplification or easing of the intent requirement (that the promotion of hatred must be `wilful'), the elimination of the need for the provincial Attorney-General's consent for prosecution, and clearer placement of the onus of proving one of the defences listed in the section on the accused.

[295] In Report No. 31, *Recodifying Criminal Law* (1987), the Law Reform Commission of Canada recommends eliminating the precondition of the Attorney General's consent for prosecution and eliminating the listing of the defences of truth, good faith or public interest in the *Criminal Code* section. However, the basis of the latter recommendation is that the intent requirement of "purpose" -- to stir up hatred -- will not usually be capable of proof beyond a reasonable doubt if there is evidence to support one of the formerly listed defences.

[296] LRCC, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (1990), pp. 76-79. The LRCC argues against the requirement for the consent of the Attorney General, with the objective of making access by private citizens easier.

[297] Young and Gold, C.D. 2.4, pp. 19-20.

[298] *R.* v. *Keegstra* (1991), 61 C.C.C. (3d) 1 (S.C.C.). C.J. Dickson , writing for the majority in *Keegstra*, refused to consider s. 27 of the *Charter* (multiculturalism) or s. 15 (equality) or Canada's international obligations to prohibit hate propaganda on the issue of the interpretation of s. 2(b) of the *Charter*. In short, the court would not interpret s. 2(b) to exclude protection for hate propaganda as expression because of Canada's constitutional commitment to multiculturalism embodied in s. 27 and its international agreements. However, the Court considered ss. 27 and 15 of the *Charter* and Canada's international obligations to be of great significance on the issue of the validity of s. 319 of the *Code* under s. 1 of the *Charter*:

> The value expressed in s. 27 cannot be casually dismissed in assessing the validity of s. 319(2) under s. 1, and I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bears notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society (p. 44).

Canada's constitutional commitment to multiculturalism was also cited by the majority as a reason for not allowing their analysis to be influenced too greatly by American jurisprudence on hate propaganda (p. 35).

In terms of international covenants, specific reference was made to Art. 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970, No. 28 (in force since 1969).

[299] *Keegstra*, pp. 76-87, per C.J. Dickson. For example, the *Equality Now* recommendation that the existing stringent requirement that the accused must be proven to have wilfully promoted hatred should be reduced to some lesser mens rea requirement that would be easier to establish (perhaps recklessness requiring only that the accused was aware of a risk that his actions might promote hatred).

[300] Etherington, et al., C.D. 2.34, pp. 55-58; *Statutory Criminal Law* (1992), pp. 20-22; and Kaiser, C.D. 2.3, pp. 138-139.

punishment through regulatory offences only where all else fails; the philosophy of restraint in the scope and application of the criminal law as embodied in several position statements of the Law Reform Commission of Canada;[301] the difficulty of drafting a general racism offence and the difficulty of enforcement; and the fear that a general offence of racism will begin to criminalize mere belief.[302]

Despite the validity of these arguments, it is difficult to push aside the concern of members of racial and ethnic minorities that a failure to create a criminal offence against overt racism may represent a failure to recognize it as behaviour our society regards as very serious wrongdoing. This is particularly the case when the existing *Criminal Code* contains extensive provisions to criminalize cruelty to animals[303] and the LRCC's recent proposals for a new criminal code contain several similar cruelty offences, despite the Commission's recognition that this is regulated extensively by regulatory (non-criminal) offences at the federal and provincial level.[304] As well, the LRCC's proposals for a new code recommend the creation of extensive new criminal offences for crimes against the environment, an area previously dealt with only by regulatory offences.[305] In both cases, despite its philosophy of restraint and recognition of complementary regulatory regimes, the Commission felt that the values embodied in the offences required the recognition as fundamental social and moral values that results from criminalization. Why not then, one must ask, criminal offences for overtly racist behaviour?[306]

In terms of the problems of definition and the philosophy of restraint, there are possible alternatives to a general offence of racism. One is the creation of several specific offences to deal with particularly abhorrent racist behaviour. Several reports discuss the possible creation of an offence of racial assault, either offering a precise definition of the mental and physical elements that would render an assault racist or letting the courts define it as was done with the recently created offence of sexual assault.[307] Another possible offence could be intentional racial discrimination by an official in the criminal justice system in the exercise of authority.

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[301] Law Reform Commission of Canada, *Report No. 3: Our Criminal Law* (1976), pp. 27-28.

[302] *Statutory Criminal Law* (1992), p. 20.

[303] Sections 400-403, R.S.C. 1985, c. Bill C-46. To deal with difficulties of enforcement, the sections also contain provisions which require the trier of fact to make presumptions concerning the wilful infliction of cruel treatment or wilful neglect once the Crown has proven evidence of neglect or suffering.

[304] Law Reform Commission of Canada, *Report 31, Recodifying Criminal Law* (1987), pp. 97-99, ss. 20(1), 20(2), 20(3), 20(4), creating four offences.

[305] Ibid, pp. 92-97, s. 19 (Crimes against the Environment). The LRCC commentary recognizes that traditionally the criminal law has viewed the environment as better left to protection under regulatory offences.

[306] Etherington, et al., C.D. 2.34, p. 57, asks whether the failure to include offences against overt racist behaviour might "bespeak of the fundamental values concerning racism -- or lack thereof -- of the dominant group." See also, Kaiser, C.D. 2.3, pp.138-139.

[307] S. 271, R.S.C. 1985, c. Bill C-46. See *R.* v. *Chase* [1987] 2 S.C.R. 293 where the S.C.C. defines the elements which turn an assault into a sexual assault. It is not based solely on the accused's purposes or the victim's perceptions but involves an objective (reasonable person) assessment of whether the assault is of a sexual character. A similar approach could be taken to racial assault, although the Crown could also be required to prove a racist purpose for the assault.

This approach is advocated by Etherington, et al., C.D. 2.34, p. 57. It is also suggested as an alternative recommendation by the main LRCC report, *Statutory Criminal Law* (1992), pp. 21-22. The first position taken in the latter report is to not create any new offences but to specify racist motivation as an aggravating factor in sentencing as discussed below. However they justify their alternate recommendation by noting that just as sexual assault has been singled out for special condemnation, racial assault should be treated similarly to demonstrate that racist motivation is strongly condemned by our society. They also recommend that it have a higher penalty than common assault.

4.2.5.3 Racism as an Aggravating Factor in Sentencing

Some reports recommend the alternative of not creating any new offences of racism but to provide a special sentencing provision clearly specifying that racist motivation was to be considered an aggravating factor in sentencing for offences other than the promotion of hatred provisions.[308]

[308] *Statutory Criminal Law* (1992), pp. 20-21. See also Etherington, et al., C.D. 2.34, p. 58, where this is offered as an alternate suggestion.

5.0 CIVIL JUSTICE SYSTEM ISSUES

5.1 Introduction

The importance of addressing multiculturalism and justice issues in the non-criminal justice system context must be emphasized, despite the fact that these issues are addressed in only six or seven contract documents. As Anand points out, the criminal justice system does not exist in isolation and many of the barriers to access to justice faced by racial and cultural minorities originate in institutions which are generally perceived to be extrinsic to the system. Where individuals are rejected by or perceive rejection by dominant groups in society, the potential for conflict between them and the values of the majority may increase.[309] In short, it is critically important to ask whether the broader non-criminal justice system provides access to justice to members of racial and ethnic minorities in their pursuit of economic and social justice or their attempts to gain redress for wrongs suffered in those areas of activity.

While the focus in Chapters 5.0 to 8.0 shifts to the civil justice system, the main issues discussed in Chapters 2.0 to 4.0 will continue to be addressed. The concern for problems of discrimination, both intentional and systemic, remains, and substantive and procedural devices which would allow such discrimination to be addressed, remedied, and avoided are sought. Also examined are recurring difficulties associated with "two-way ignorance": the ignorance of different cultural contexts and values by actors within the justice system and regulatory regimes; and the lack of knowledge of the law, legal rights and responsibilities, and avenues of redress by members of cultural minorities. This report recognizes the need to adopt measures to overcome both types of ignorance and to adapt our substantive law and procedures to better recognize and accommodate cultural differences if we are to enhance access to justice for racial and ethnic minorities in the civil justice context. Many of the measures proposed to combat racism, discrimination and ignorance in the exercise of discretion in the criminal justice system — education and employment equity for justice system actors, cross-cultural training, complaint mechanisms, and monitoring and advisory bodies — can be applied to civil justice system concerns.

At least one report, while urging greater recognition of the impact of cultural difference in civil justice system issues, suggests several cautionary notes, particularly in the family law context. It maintains that while judges must be better informed as to cultural differences relevant to cases before them and might be assisted by some mechanism for cultural consultation, some minority cultural values have to be regarded as simply not acceptable in Canadian society.[310] The Windsor Roundtable report argues for caution in recognizing minority values because of the risk of ghettoization and

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[309] Anand, C.D. 2.1, pp. 1-3.

[310] Etherington, et al., C.D. 2.34, pp. 62-63. For example, attitudes of discrimination and gender inequality should be regarded as distinct from mere cultural differences. The report also warns against the assumption that immigrant groups have brought patriarchal value systems into Canada. The concern expressed at the Windsor Roundtable was that such assumptions might conceal the pre-existence of patriarchal attitudes within the Canadian value system and legal structures.

stereotyping of the minority community on the one hand and the inappropriate use of cultural context on the other to conceal discriminatory attitudes (such as gender bias) which are severely detrimental to a large segment of the cultural group. It is important that policy makers and legal system actors learn to respond to demonstrated differences and recognize the dangers of assumed difference.

5.2 Family and Custody Law Issues

It is only in the past decade that practitioners and academics began to address the significance cultural differences may have, or should be given, in resolving family law issues. It is being recognized that differences in cultural or religious values concerning the family and community can seriously impact such issues as separation, divorce, custody and access, state intervention for child protection, adoption, division of property, and support and maintenance. Cultural differences may raise issues in dealing with these decisions in several ways.

There is the question of what significance cultural or religious difference should be given in applying vague or open-ended legal standards such as the "best interests of the child" or "child in need of protection" in custody and access and child welfare determinations. For some time, there has been strong criticism on the way provincial authorities and judges in aboriginal communities apply child welfare laws without sensitivity to the importance of cultural difference. This has resulted in legislative and administrative reform in several jurisdictions.[311] More recently, criticisms on the analysis of problems arising from the application of family law concepts to other minority communities is increasing,[312] but more research on the impact of cultural differences on

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[311] The problems created by the application of general provincial child welfare and adoption laws to aboriginal children without sufficient attention being paid to cultural difference and the importance of culture for both the well-being of native children and the continued survival of aboriginal tribal cultures have been reported in several articles during the past few years. See for example, Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986), 5 Can J. of Fam. Law, p. 111; MacDonald, "Child Welfare and the Native Indian Peoples of Canada" (1985), 5 Windsor Year. of Access to Just., p. 284; MacDonald, "The Spallumcheen Indian Band By-law and its Potential Impact on Native Indian Child Welfare Policy in British Columbia" (1984), 4 Can. J. of Fam. Law, p. 75; Zylberberg, "Who Should Make Child protection Decisions for the Native Community?" (1991), 11 Windsor Yearbook of Access to Justice, p. 74; Carasco and MacDonald note positive developments in B.C., Manitoba, and Ontario to adopt different models of child welfare which either give control and funding to Band Council operated child welfare societies or adopt other methods to ensure that tribal cultural factors will be of great significance in dealing with a child and the child's community will be thoroughly involved in the resolution of such cases.

See also ss. 37(4), 39(1), and 57(4) and (5) of the *Child and Family Service Act*, R.S.O. 1990, c. C. 11, which direct the court to consider the importance of aboriginal culture and heritage in determining the best interests of an aboriginal child, give Indian bands standing in child welfare proceedings, and direct a preference for an order to keep a child in his aboriginal community where it is determined that a child is in need of protection. For a discussion of similar enactments in other provinces (B.C., Manitoba and Alberta), see Syrtash, *Religion and Culture in Canadian Family Law*, Butterworths (1992), pp. 55-57.

[312] Two early pieces calling for greater attention to be paid to issues of cultural difference in child custody and child protection proceedings are Zemans, "The Issue of Cultural Diversity in Custody Disputes" (1983), 32 R.F.L., pp. 50-75; and Pask and Jayne, "Child Protection Issues Among the Indo-Chinese Refugees" in eds., Connell-Thonez and Knoppers, *Contemporary Trends in Family Law: A National Perspective* (1984), pp. 167-188. Both articles call for greater recognition of the importance of cultural continuity and greater awareness of cultural differences by judges, proper identification of cultural backgrounds of the parties using the necessary evidence to do so and turning to experts from other disciplines (anthropology and social anthropology) where necessary, and the need to show greater deference to non-majority cultural values in terms of parental care and child-rearing. However, Pask and Jayne emphasize the importance of balancing minority cultural standards of care and upbringing against the possible harm to the child resulting from such choices.

More recent work on these issues includes Syrtash, *Religion and Culture*; and Toselli, "Religion in Custody Disputes" (1990), 25 R.F.L. (3d) p. 261. Syrtash's book provides a fairly comprehensive summary of recent developments in legislation and case law affecting the significance of race and culture in custody, access and child protection proceedings (see especially Ch. 1 and pages 85-89). In religion, Syrtash notes that the

domestic law issues and the potential barriers to access to family law justice they present to minority community members, especially women and children, is still required.[313] All the concerns expressed in the criminal justice section about the exercise of discretion by justice system officials, including judges, would appear to apply to justice system officials dealing with family law issues.[314]

Further, what significance should minority cultural or religious values be given when they clearly clash with constitutional or majority values that have become embedded in our substantive law?[315] Should our legal system make greater allowance and accommodation for private religious or cultural community mechanisms for family law dispute resolution, even where such mechanisms are likely to lead to results not in accord with legislative preferences on issues such as property division?[316]

Finally, several reports express concern that cultural differences can impede access to justice by preventing minority group members, particularly women and children, from learning of their legal rights and entitlements, or from approaching system actors (including lawyers) to seek to enforce their rights.[317] Such problems can be worse for minorities who are under-represented among justice and social service system personnel who, in turn, are unfamiliar with the customs and values of the minority cultural communities.[318]

Charter freedom of religion has become a factor used by the access parent to ensure a right to introduce his religious beliefs to his child, but concludes that when different religions become a factor in custody and access disputes the courts continue to show a preference for mainstream religions at the expense of minority or "fundamentalist" religions (pp. 85 and 87).

[313] Etherington, et al., C. D. 2.35, p. 62.

[314] See discussion of these issues in Syrtash, *Religion and Culture*, pp. 2-3:

> Is the protean nature of the "best interests of the child" test an invitation for racism or is its vagueness a good thing, a means to invite creative responses to intractable cultural conflicts?... Most importantly, to what extent does a judge impose his own cultural values when assessing the best interests of a child in any custody or child protection proceeding that appears before him?

[315] The example given in several reports of such a clash in values concern culture or religion based practices of property division which fail to recognize the disadvantages of women and clash with a statutory presumptions of a 50/50 division of property. See also, Law Courts Education Society of B.C., *Comparative Justice Systems Project -- Issues Concerning Immigrants Adjusting to the Canadian Legal System* (1991) (C.D. 2.31), p. 9 of the summary, which reports that men and women of the Indo-Canadian community felt that Canadian divorce law favoured women, divorces were too easy to obtain and ruined families, and that judges do not understand their traditions, culture, the extended family, or the role of women.

[316] See discussion in Syrtash, *Religion and Culture*, pp. 98-103, on the strengths and weaknesses of religious courts and aboriginal tribunals as family law dispute resolution processes. He notes that many religious codes -- for example jewish law -- provide a much less generous property division for women spouses than most provincial legislation.

[317] C.D. 2.31, summary; *Focus Groups on Public Legal Information Needs and Barriers to Access* (C.D. 2.32); C.D. 2.35; and Jamieson, et al., *Survey*. Note that these problems are not uniform for different multicultural communities. Note also that within a particular cultural community there can be very different perceptions of problems with family law and its enforcement mechanisms along gender lines. The summary for the first document listed above refers to concerns about women in the Indo-Canadian community accessing necessary information to protect their rights under family law as a result of traditional male-female values, but it later refers to a perception among Indo-Canadian men that they feel very threatened by Canadian family law.

[318] See for example, "Wife assault called `epidemic' among S. Asians", *The Globe and Mail*, [Toronto] November 19, 1990, p. A8. In the article Aruna Papp tells her motivations for founding the South Asian Family Support Services to counsel immigrant women from India, Pakistan and Sri Lanka. On the basis of 100 interviews with these women, she noted that they would not report abuse or seek social or legal counsel because they were "afraid of deportation and divorce in a strange country and were unaware of social services that could help them." The patriarchal structure of the family made them believe it was their duty to take abuse and in their culture leaving the husband would shame the family. She also stated that "discussing family problems with a stranger [was] a Western concept.. The article went on:

> Many women are unaware of support services because they do not speak English. Others who have tried such services have had bad experiences. Catherine Fox works at...a woman's shelter. For five years she was a front line worker at a woman's shelter in Orangeville. She found herself unable to counsel immigrant women because of the language and

5.3 Employment Discrimination Issues

5.3.1 Matters of Substance

Over the past decade, there have been relatively rapid and significant developments in the substantive law to further the ideals of equality, equity and accommodation inherent in multiculturalism in the workplace. There are numerous substantive issues — from the differential impact of legislated occupational health and safety requirements on some minority groups due to cultural and religious differences,[319] to direct and adverse effect employment discrimination in hiring, conditions of employment, promotion, and dismissal — which continue to arise all too frequently. These issues will be dealt with first. However, much of the recent concern and criticism on employment discrimination focuses on the inadequacy of present procedures and mechanisms to deal with complaints of past wrongdoing. Such concerns ranges from advocacy for a more proactive systemic approach to promoting equality and equity in employment.[320] These issues will be discussed later.

There have been numerous recent developments concerning the evolution of new norms for equality in the workplace. But, the most significant development was the judicial[321] and legislative[322] recognition of adverse effect discrimination[323] and the duty of reasonable accommodation on employers as general concepts applicable to all prohibited grounds of discrimination in employment. The Supreme Court of Canada's recognition in *O'Malley* that equal treatment does not always mean equality and that often differential treatment is required to ensure equality, is now widely accepted by Canadian courts[324] and legislatures,[325] and it was essential to facilitate major advances in reducing

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cultural barriers.

[319] *Bhinder* v. *C.N.* [1985] 2 S.C.R. 561, involved systemic discrimination against a Sikh worker in the form of a hard hat occupational health and safety requirement. Note that the majority held the hard hat requirement was a bona fide occupational requirement (BFOR) for which an exemption is provided in the *Canadian Human Rights Act*.

Another concern related to occupational health and safety is the extent to which minority group workers may be at greater risk of being subjected to unsafe work conditions due to language barriers, lack of knowledge of their legal rights, perceptions of increased vulnerability to illegal employer retaliation, and, perhaps, their over-representation in unorganized segments of the workforce.

[320] See Ontario Human Rights Code Task Force, *Achieving Equality: A Report on Human Rights Reform* (1992) (Chair, M. Cornish); and Canadian Human Rights Commission, *Annual Report* (1991).

[321] *O'Malley and Ontario Human Rights Comm.* v. *Simpson-Sears Ltd.* [1985] 2 S.C.R. 536.

[322] Federal, Quebec, Ontario and Yukon human rights statutes bar adverse effects discrimination (practices which have the effect of discriminating against certain individuals or groups on a prohibited ground, although the practices themselves are not based on a prohibited ground). Manitoba also includes a specific prohibition against discrimination on the basis of "gender determined characteristics or circumstances." Barnacle, *The Current Industrial Relations Scene in Canada, 1989: Labour Legislation and Public Policy Reference Tables*, Queen's Industrial Relations Centre (1989), p. 192.

[323] In *O'Malley*, p. 551 S.C.R., J. McIntyre for the Court, stated the following concerning the concept of adverse effect discrimination:

> ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

[324] See *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool* (1990) 72 D.L.R. (4th) 417 (S.C.C.); and *Central Okanagan School District No 23* v. *Renaud* (1992) 92 C.L.L.C. 17,032 (S.C.C.).

[325] See for example, the Ontario *Human Rights Code*, S.O. 1981, c. 53, s. 10; and *Canadian Human Rights Act* R.S.C. 1985 c. H-6, s. 10.

employment discrimination on the grounds of race, origin, culture, creed, gender and disability. Recognition of adverse effects discrimination and a duty to accommodate difference is also critical to meeting the objectives of multiculturalism to protect and promote diversity, culture retention, accommodation, and tolerance.

Despite recognition of adverse effects discrimination, critical issues remain on its ultimate impact on access to justice in the workplace for members of racial and cultural minorities. One that has proved very difficult for the courts is the relationship between the duty of reasonable accommodation — with which employers must comply when a neutral employer rule is found to discriminate in an adverse effects manner — and a statutory bona fide occupational requirement (BFOR) exemption which excuses employers from findings of discrimination where a requirement is found to be reasonably necessary for business or health and safety reasons.[326] The Supreme Court of Canada initially found that once an employer established a BFOR defence on the basis that the rule was reasonably necessary on an occupation-wide basis, no duty to accommodate individual employees could be imposed on the employer.[327] That decision was highly criticized by academics, practitioners and members of human rights themselves as seriously undermining the ability of human rights bodies to confront problems of adverse effects discrimination and guarantee minority member individuals access to justice.[328] Although some legislatures moved quickly to incorporate a duty of reasonable accommodation of individual employees as a component of a BFOR defence, in 1990, the Supreme Court finally held that a statutory BFOR defence would not remove the employer's duty of reasonable accommodation in cases of adverse effect discrimination.[329]

The Windsor Roundtable report notes that a critical issue for access to reasonable accommodation of difference for minority individuals is the content to be given to the concept of undue hardship. A successful claim of adverse effects discrimination in employment will not normally result in the "neutral" employer rule or policy being struck out unless it has no rational connection to the employer's business or was used in bad faith. Instead, the employer can maintain the rule but must accommodate the individual employee's differences to the point of undue hardship. The extent to which the recent gains in case law will provide meaningful protection for the religious or cultural practices of employees from employer rules concerning hours of work, dress and appearance codes,

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[326] See general principles concerning the requirements for establishment of a BFOR or BFOQ in the leading case of *Ont. Human Rights Comm*. v. *Etobicoke* [1982] 1 S.C.R. 202. See also Ivankovitch, "Religious Employee and Reasonable Accommodation Requirements," (1987) 13 Can. Bus. Law J., p. 313.

[327] *Bhinder* v. *C.N.R.*, [1985] 2 S.C.R. 561. The failure to require the employer to establish that it could not accommodate the different needs of the individual employee in the case in question would be of critical significance in the vast majority of cases. In *Bhinder*, it was simple to accept that the wearing of hard hats was reasonably necessary for all CNR electricians to protect their health and safety. At the same time, it would have been quite difficult to establish that it was reasonably necessary for Mr. Bhinder to wear a hard hat to protect his health and safety in the circumstances of his regular job duties, or that it would cause the employer undue hardship if Mr. Bhinder were allowed to not wear his hard hat while all other electricians continued to do so.

[328] See Baker, "The Changing Norms of Equality in the Supreme Court of Canada," (1987), 9 Sup. Ct. Law Rev., p. 497; Woodward, "A Qualification on the Duty of Employers to Accommodate Religious Practices: *Bhinder* v. *C.N.R.*" (1987), 21 U.B.C. Law Rev., p. 471; and Canadian Human Rights Commission., *Special Report to Parliament on the Effects of the Bhinder Decision* (1986), p. 2.

[329] *Central Alberta Dairy Pool*. See also discussion in Etherington, "Religion and the Duty of Accommodation" (1991) 1 Can. Lab. Law J., p. 311.

and safety requirements will depend heavily on the content given to the concept of undue hardship. But, judges and adjudicators have been reluctant to attempt an exhaustive or exclusive definition of the considerations that may bear on determinations of undue hardship.[330]

In recent years, there have been significant adjudicative and legislative attempts to explain the meaning of undue hardship.[331] Although courts and boards in Canada and the United States initially appeared to interpret undue hardship as a fairly minimal threshold which could be easily met by the employer,[332] recent decisions in Canada are rendering the duty to accommodate more significant by elevating the threshold for the demonstration of undue hardship. The Supreme Court of Canada expressly rejected the lax de minimis approach to undue hardship of American courts in its recent *Renaud* decision.[333] It held that the use of the term "undue" infers that some degree of hardship must be acceptable and more than a mere negligible effort at accommodation is required.[334] The concept of undue hardship is an important limitation on the duty to accommodate which will largely determine the extent to which values of multiculturalism inherent in employment discrimination legislation will be honoured when they conflict with the values of the market.

5.3.2 Employment Equity

On matters of substance, several jurisdictions have recognized the inadequacy of a complaint-driven mechanism to redress wrongs on an individual basis (like human rights processes) to address the issues of structural racism or systemic discrimination. They

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[330] For instance, in *O'Malley*, p. 555, J. McIntyre, in reference to the concept of undue hardship merely referred to the factors of "undue interference in the operation of the employer's business" and "undue expense."

[331] In addition to incorporating a duty to accommodate as an essential element of a BFOR for both direct and adverse effect discrimination, the 1986 Ontario amendments stated that a defence of reasonable accommodation required proof that the needs of the complainant could not be accommodated "without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

Ontario Human Rights Code, sections 10(2), 23(2) and 16(1a), enacted by S.O. 1986, c. 64, s. 18.

In *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities under the Ontario Human Rights Code* (1981), as amended, the Ontario Human Rights Commission takes the position that the *Code* definition of undue hardship excludes other factors from consideration. The guidelines indicate the Commission is taking a restrictive approach to what will constitute undue hardship, requiring proof of significant and substantial impacts on the factors of cost or health and safety to make out a defence of reasonable accommodation. These guidelines are specifically drafted for disability claims, but they may be indicative of the approach the Commission is likely to take to definition of undue hardship in cases of discrimination on other prohibited grounds. See also discussion in Etherington, "Religion and the Duty...."

[332] The leading decision in the United States was *TWA* v. *Hardison*, 432 U.S. 63, 97 S.Ct. 2264 (1977). The United States Supreme Court held the employer had proven that accommodation would result in undue hardship. Reasonable accommodation could not require the employer and union to disregard the seniority system in the collective agreement. It held that to "require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship" (p. 2277, S. Ct.).

[333] *Central Okanagan School District No 23* v. *Renaud*.

[334] Ibid. This is also the first case where the Court held that both the employer and the union are under a duty of reasonable accommodation in the organized workplace and that although deviation from a collective agreement provision is a factor to be considered in determining undue hardship, such deviation can -- and was in that case -- be required as part of a reasonable accommodation. Similarly the court noted that the effect of accommodating measures on employee morale was a factor to be considered but must be looked at closely to ensure that objections based on attitudes contrary to human rights objectives not be given relevance. However, it did note that measures which would impose a "significant interference" with the rights of other employees would amount to undue hardship.

See also, *Gohm and the Ont. Human Rights Comm.* v. *Domtar Inc. and OPEIU, Local 26*7 (Bd. of Inquiry under *Ontario Human Rights Code*, Dec. released May 18, 1990, Ch. Pentney).

have recently enacted or introduced employment equity legislation to impose positive obligations on employers to identify and eliminate barriers to the hiring, retention and promotion of designated groups and to create plans to increase the representation of such groups in the workplace to levels commensurate with their representation in the community. This shift from a traditional "reactive" approach to a more "proactive" role for government regulators is viewed as necessary to overcome the deep-seated and historically entrenched barriers of systemic discrimination in employment for members of the designated groups — racial minorities, aboriginal peoples, people with disabilities, and women.[335]

On the recommendation of the Royal Commission on Equality in Employment,[336] the federal government enacted the *Employment Equity Act*[337] in 1986. The Act requires all employers under federal jurisdiction with more than 100 employees to "implement employment equity."[338] The Act requires the setting of equity goals for the designated groups[339] and the annual filing of equity plans[340] and extensive reports[341] concerning the employer's progress on achieving employment equity. The Minister of Employment and Immigration is then responsible for publishing employer reports and making them available to the public,[342] sending copies to the Canadian Human Rights Commission,[343] and placing before Parliament an annual report consolidating all employer reports and

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[335] See Office of the Ontario Employment Equity Commissioner, *Opening Doors: A Report on the Employment Equity Consultations* (1992); and Canadian Human Rights Commission, *Annual Report*, 1991 (1992), p. 49.

[336] Abella, *Equality in Employment, A Royal Commission Report* (1984) (known as the Abella Commission Report).

[337] R.S.C. 1985, (2d Supp), c. 23.

[338] Section 4 of the Act does not define employment equity but requires employers to implement it by:

- identifying and eliminating employment practices not authorized by law which result in employment barriers against persons in designated groups; and
- instituting positive policies and making such reasonable accommodation as will ensure that members of the designated groups achieve a degree of representation in the various positions of the employer that is at least proportionate to their representation in: 1) the workforce; or 2) in those segments of the workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw or promote employees.

[339] Section 3 of the Act defines "designated groups" as women; aboriginal peoples; persons with disabilities; and persons who are, because of their race or colour, in a visible minority in Canada. Further, fairly open-ended definitions of who falls within the latter three groups for the purposes of the Act are found in the *Employment Equity Regulations*, S.O.R./86-847.

[340] See s. 5 of the Act for plan filing requirements.

[341] Under s. 6 of the Act, the employer is required to report annually on:

- the industrial sector in which its employees are employed, the location of the employer and its employees;
- the number of total employees and the number of employees in the designated groups;
- the occupational groups of the employer and the degree of designated group representation in each occupation;
- the salary ranges of employees and the degree of representation of designated group persons in each salary range and subdivision thereof; and
- the number of employees hired, promoted and terminated and the degree of representation in those numbers of persons from designated groups.

Employers who fail to comply with reporting requirements are guilty of a summary conviction offence and can be fined up to $50,000, (s. 7).

[342] Section 10 of the Act.

[343] Section 8 of Act. The intention was to create a complementary relationship between the *Employment Equity Act* and the *Canadian Human Rights Act*. The employers' reports would provide the Commission with data on the status of designated groups within particular companies and the Commission has the authority to initiate an investigation when there are reasonable grounds to believe that systemic discrimination exists. In addition, the data from the reports may form the basis of a complaint to the CHRC against the employer by an employee. In fact, the CHRC received 11 complaints in 1988 based on the information in the 1987 reports. The Commission also requested that 19 employers cooperate in a joint review of their equity situation and 17 of the 19 complied while the other two faced a complaint investigation when they refused. Minister of Employment and Immigration Canada, *Employment Equity Act: Annual Report* (1989).

providing analysis of the progress made towards employment equity.[344] The emphasis is on education, publicity and monitoring rather than the establishment of mandatory quotas and time limits.

There has been much criticism, however, on the slow progress made by federal employers under the *Employment Equity Act*[345] and the progress made by the federal government itself as employer under its Treasury Board Employment Equity Guidelines,[346] and some critics have called for mandatory goals (or quotas) and deadlines,[347] and for better enforcement mechanisms and procedures. The Canadian Human Rights Commission has given the Act mixed reviews after the first five years[348] and has complained of deficiencies in the legislation concerning its role as the only monitoring and enforcement mechanism referred to in the legislation.[349]

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[344] Section 9 of the Act.

[345] Annual Reports filed for 1988, 1989 and 1990 show a very slow improvement in the employment equity picture for all of the targeted groups but show that some have fared worse than others. The 1989 report showed women increasing their percentage to 42.12 percent from 40.90 percent, aboriginal peoples from .66 percent to .73 percent, persons with disabilities from 1.59 percent to 1.71 percent, and visible minorities from 4.99 percent to 5.69 percent. However, the representation of these groups in the Canadian population in 1986 (the last year for which statistics are available) was women 50.6 percent, aboriginal people 2.8 percent (at least), persons with disabilities 7.3 percent, and visible minorities 6.3 percent. See *Employment Equity Act Report: Annual Report* (1989), p. 5 and Appendix B-1.

Progress remained slow for all groups in 1990 with natives faring the worst, increasing to only .79 percent of the federal workforce. See "Natives lag in job equity," *The Globe and Mail*, [Toronto] December 6, 1990, p. A8.

[346] See "Minority Hiring Progresses Slowly," *The Globe and Mail*, [Toronto] October 31, 1990, p. A4. Persons who were disabled made up 2.8 percent of the federal public service in 1989, up from 2.6 percent in 1987, aboriginal people remained at 1.8 percent (unchanged since 1987) despite a goal of 2.6 percent for 1991, visible minorities rose from 2.7 percent in 1987 to 3.1 percent in 1989, with a goal of 3.8 percent, and women made up 43.6 percent but only rose to 14.1 percent of management from 10.7 percent in 1987 (the goal for women in management for 1991 is 15.2 percent). However, the article points out that critics from both the target groups and the CHRC say the government has made little progress and has set goals that are too modest given 1986 census statistics concerning the representation of these groups in the population the government serves.

[347] See for example, "Chinese Canadians fight racism: `Glass ceiling' blamed for stopping workers' advancement to management ranks," *The Globe and Mail*, [Toronto] April 26, 1991, p. A7. The article reports a recent survey for the Chinese Canadian National Council with funding from the federal government. The results showed that a clear majority of Chinese Canadians (63 percent) believe they are disadvantaged when it comes to getting jobs and being promoted, that a `glass ceiling' keeps them from advancing to management ranks. But the report found that the vast majority of business and manufacturing organizations (75 percent) and professional organizations (68 percent) do not believe that Chinese-Canadians are being discriminated against.

Spokespersons for the Council pointed out the difficulty of addressing a problem that is not even acknowledged by the dominant group. The Council is urging all levels of government to "implement effective, mandatory employment equity programs that will set targets for the hiring and promotion of members of minority groups in the workplace."

[348] The Commission's 1991 *Annual Report* notes that the while visible minorities have made significant gains during the first four years of the Act's operation, in the private sector their gains are still very much dependent on the sector and job level being examined. While they made up a high of 12.8 percent in banking, the numbers were much worse for communications (5.5 percent), transportation (4.0 percent) and other sectors (4.7 percent) when compared to their 6.3 percent availability in the labour force. They remained quite under-represented in upper management. It notes that results for federal public servants under the Treasury Board program have been much worse with only 3.5 percent representation for visible minorities by 1990, and only 2.1 percent representation in the "executive group.".

[349] The initial legislation was quite vague about enforcement powers of the Commission. It was decided that no new mechanism or body was required. It was assumed that the combination of information generated under the *Employment Equity Act* and existing powers of the Human Rights Commission under its own act would be sufficient to make employment equity work. The Commission has been active in dealing with third party complaints, initiating its own complaints, joining with employers in cooperative reviews of their employment systems and providing other employers with their analyses of how well they were meeting the Act's requirements. But the Commission has concluded that there remain significant problems with enforceability of the Act and the powers of the Commission under it. It recommends the following measures to rectify these problems:

- that the law expressly provide that the Commission or another independent agency have all necessary authority to monitor employment equity performance;
- that the law stipulate clearly the enforcement procedures and recourse available where evidence of discrimination is discovered;
- that there be no ambiguity about definitions of designated groups or what constitutes discrimination under the law; and
- that the law stipulate what constitutes an infringement of the Act and what evidence is sufficient for a complaint of discrimination or

The Special Committee of the House of Commons completed its report on the mandatory comprehensive review of the provisions of the Act and its operation and effect in May 1992, as required by the Act.[350] The report recommends a significant broadening of the Act's application to encompass the federal civil service, and significant reforms to monitoring and enforcement provisions to make the legislation more effective in promoting compliance with employment equity goals. Most notably, it calls for removal of the current jurisdictional ambiguity from the Act by including provisions which clearly indicate the agency responsible for the implementation, monitoring and enforcement of the Act.[351] Finally, it recommends an expansion of offences and fines so that all violations of the Act would be punishable by a fine of $50,000.00. Thus, employers who failed to develop and implement an equity program pursuant to the standards set out in the Regulations to the Act, consult with employee representatives, comply with their employment equity plans, goals or timetables, or file an annual report would be guilty of an offence.[352] At present, the only offence in the Act is for failing to file an annual report.

The Ontario government has introduced legislation to bring employment equity to the province.[353] The application of the *Employment Equity Act* will be broad, encompassing provincial public servants and private-sector employers with 50 or more employees. Its objective is to achieve employment equity for the same four designated groups named under the federal scheme. The issue of whether or not Ontario should adopt legislatively mandated quotas and deadlines with punishment for failure to comply was prominent in consultation prior to the bill's introduction. The Act appears to be an attempt to compromise on mandatory quotas. It is mandatory in that all covered employers must submit, within a legislatively specified time period after enactment, an employment equity plan with provisions for the removal of barriers and the implementation of positive measures for hiring, and the retention and promotion of members of designated groups; the implementation of accommodation measures;specific goals and timetables for the implementation of the measures; and specific goals and timetables on the composition of the workforce. The Act is very vague on the requirements of specific goals and timetables concerning a more representative workforce, apparently leaving it to Cabinet to make regulations concerning these issues.[354] The Ontario Act creates two new bodies, the Employment Equity Commission to monitor employers' performance under the Act and assist employers, unions and

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other forms of non-compliance. CHRC, *Annual Report* (1991), pp. 55-57.

[350] *A Matter of Fairness: Report of the Special Committee on the Review of the Employment Equity Act* (1992). See s. 13 of the Act. The majority report of the Committee contains 30 recommendations in response to the criticisms of the Act.

[351] It recommends that Employment and Immigration Canada be given clear authority and powers to *monitor* performance and compliance under the Act, but that the CHRC be given a clear enforcement mandate and powers. Ibid, pp. 28-29.

[352] Ibid, p. 29, recommendation 4.5.

[353] Bill 79, the *Employment Equity Act* received first reading in the legislature on June 25, 1992, following a two- year period of consultation with target groups, employers and unions.

[354] Under s. 50(2) of Bill 79, Cabinet is empowered to make regulations governing the content of plans which may require plans to contain numerical goals determined in a manner to be prescribed by regulation. The regulation may also provide that goals shall be determined with reference to percentages approved by the Commission that, in the opinion of the Commission, fairly reflect the representation of the designated groups in the population of the geographic area or in any other group of people.

A general criticism of the Bill has been that it provides a mere framework and that too many substantive issues of importance have been left to regulations, creating a great deal of uncertainty concerning obligations under the Act. See Elliot, *Ontario Equity Laws* (1993), part VIII, pp. 22-23.

employees to comply with the Act, and the Employment Equity Tribunal to adjudicate complaints under the Act.[355]

5.3.3 Dispute-resolution Processes

For some time, there has been significant dissatisfaction with access to human rights procedures and appropriate remedies at both federal[356] and provincial levels. The most serious complaints of lack of access and undue delay have been made in Ontario and resulted in the striking of the Ontario Human Rights Code Review Task Force which issued its report, *Achieving Equality*, in June 1992.[357] The report finds many of the criticisms of the Ontario procedures concerning delay and denial of access to a hearing to be substantiated[358] and recommends sweeping procedural reform to introduce a more consumer-oriented, community-driven and proactive approach to human rights mechanisms. Critical to this emphasis on access to justice are recommendations to empower the claimant community by giving it direct access to a hearing of its claims, and the ability to direct its claim presentation and to choose its preferred form of dispute resolution through mediation or adjudication.[359] To accomplish this, the report suggests a major restructuring of the administrative and adjudicative machinery of the Commission. It recommends the creation of three new permanent and independent bodies to enforce human rights legislation:

- Human Rights Ontario, a new commission to focus on identifying and dealing with larger issues of systemic discrimination and proactive measures, such as education at all levels, to advance equality concerns. Although it would no longer deal with individual complaints, it would monitor and report on the operation of the human rights system;[360]
- an Equality Rights Tribunal to hear and adjudicate claims brought by individuals, organizations, unions and the Commission dealing with pay equity and employment equity legislation as well as human rights code complaints;[361]

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[355] The Tribunal appears to have quite broad remedial authority under s. 33 to make any order it considers just, including orders to create or amend an employment equity plan, orders requiring the employer creation of an equity fund and orders appointing an employment equity plan administrator. The Act creates only three specific offences related to confidentiality requirements, obstruction of employees of the Commission, and intimidation or coercion of persons for exercising their rights under the Act. However, there is a very broad fourth offence of failure to comply with an order of the Tribunal (s. 38).

[356] *Annual Report* (1991), pp. 14-15 and 77. P. 77, the CHRC notes there were several cases in 1991, where the Federal Court quashed complaints due to the prejudice to the employer caused by the delay at the Commission in investigating them and bringing them to hearing. P. 14, notes that the Commission has not had a sufficient increase in resources or staff to keep up with a 100 percent increase in the number of complaints between 1987 and 1991.

[357] *Achieving Equality: A Report on Human Rights Reform*, pp. 1-4.

[358] The report notes there is still a large backlog of cases with delays from filing a complaint to commencement of a board of inquiry hearing of up to six years or more. The delay often results in great pressure on claimants to accept unsatisfactory settlements or abandon their claims. A small percentage of claims are successful in obtaining reference to a Board of Inquiry hearing (only two percent in 1991 and three or four percent in 1992). Ibid, pp. 17 and 20-22.

[359] Ibid, pp. 1-7.

[360] Ibid, recommendation 8, p. 204.

[361] Ibid, recommendations 2, 13 and 15. The Tribunal would also have the mandate of training and certifying labour arbitrators who would only be allowed to deal with *Code* discrimination issues if they had the Tribunal's certification. This is perhaps the most impractical of the report's recommendations (recommendations 20 and 21, pp. 209-210).

and

- an Equality Service Board to plan, coordinate and deliver the advocacy services needed by the claimant community in Ontario.[362]

The Task Force report discusses the concern that the *Bhadauria* v. *Bd. of Governors of Seneca College*[363] ruling that blocks civil claims in tort for discrimination on the basis of grounds covered by human rights legislation is a serious impediment to access to justice for those who are the victims of discrimination. Some critics have urged legislative action to overcome the *Bhadauria* principle.[364] The Ontario Task Force concludes that human rights claims should be restricted to a special human rights process under the *Code* because of concerns about the lack of expertise among judges, and judicial values that tend to focus on an individualistic, legalistic approach to human rights issues which could return the focus to blame and intent. However, the Task Force suggests that if its recommendations to empower complainants and provide access to a hearing are not implemented then legislation to provide access to the courts to litigate human rights issues should be considered.[365]

These specific concerns on the capacity of existing human rights dispute resolution processes to ensure access to justice to members of racial and cultural minorities raise the more general issue of the implications of alternative dispute resolution (ADR) processes for multicultural concerns. The potential for ADR mechanisms to resolve conflict more quickly, less expensively, and more accessibly continues to be a subject of considerable debate.[366] There may be greater potential for their use in ethnic communities with established norms to resolve disputes by informal, community-rooted methods. However, critics have expressed serious concerns about ADR and its potential for stifling dissent, muffling legal rights, and ratifying imbalances of power.[367] These frailties may be felt most acutely by members of communities who wish to exercise their formal legal rights.[368]

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[362] Ibid, recommendation 6, pp. 202-203.

[363] 1981, 124 D.L.R. (3d) 193, [1981] 2 S.C.R. 181. The Supreme Court of Canada rejected the attempt by the Ontario Court of Appeal to recognize a new tort of discrimination to fill a void in the common law. The Court held that a common law right of action could not spring from the public policy recognized on the *Ontario Human Rights Code* because the comprehensiveness of the administrative and adjudicative features of the legislative initiative found in the *Code* established a different regime which excluded the courts as fora of first instance but made them part of the enforcement and appeal machinery under the *Code*. C.J. Laskin held:

> ... not only does the *Code* foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the *Code*. The *Code* itself has laid out the procedures for vindication of that public policy... (pp. 194-195 S.C.R.).

[364] Etherington, et al., C.D. 2.35, p. 81, note that several Roundtable discussants advocated such reform.

See *Re Canada Trust Co. and Ont. Human Rights Comm.* (1990) 69 D.L.R. (4th) 321 (Ont. C.A.), where J.A. Tarnopolsky, in a concurring opinion, suggests the Court may be prepared to reconsider or at least restrict the *Bhadauria* principle in certain types of civil actions based on discrimination where the *Ontario Human Rights Code* does not provide sufficient remedies for civil discrimination which is contrary to public policy. If this principle were to be recognized by the courts in the future as a basis for taking jurisdiction in discrimination cases it could seriously undermine the *Bhadauria* bar to access to the courts.

[365] *Achieving Equality*, pp. 94-95.

[366] Nader, Laura, "The ADR Explosion -- The Implications of Rhetoric in Legal Reform" (1988) 8 Windsor Year b. Access Justice, p. 269.

[367] Ibid; and Shaffer, Martha, "Divorce Mediation: A Feminist Perspective" (1988) 46 U. of Toronto Fac. of Law Rev., p. 162. See also, Scutt, "The Privatization of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation" (1988) 11 Women's Studies Int'l Forum, pp. 503-520.

[368] Chan, Janet B.L., and John Hagan, *Law and the Chinese in Canada: A Case Study in Ethnic Perceptions of the Law*, Toronto: Centre of Criminology, University of Toronto (1982).

6.0 PUBLIC LEGAL EDUCATION ISSUES

6.1 Development and Delivery of Culturally Sensitive and Relevant PLE Information

Several reports attempt to assess the public legal education (PLE) needs of racial and cultural minorities in Canada.[369] Although some reports appear to focus on the needs of particular groups[370] within racial and ethnic minorities, there are several common themes identifying PLE needs.

The general theme of all the reports is the need to make more culturally sensitive PLE accessible to members of minority communities. There are several considerations to making that possible. First, the reports generally suggest the need for more English- and French-language training for adults to help them overcome language as a barrier to PLE.[371] They also note the need for greater provision of PLE in the first language of minority communities to improve accessability, particularly for immigrants.[372] In addition, some reports suggest the need for a multi-media approach to delivery of PLE.[373]

A second common observation in the reports is the need to develop the PLE program or mechanism by or in consultation with members of cultural communities in order to make it responsive to their problems and needs and to present it in a meaningful and understandable manner. This was the approach followed by the Law Courts Education Society of British Columbia in developing its PLE brochures and programs.[374]

A related but different point is the shared observation that many members of minority communities rely heavily on government social service agencies and non-governmental social service organizations for legal information or referrals to legal information services. Thus, several reports stress the importance to have these agencies and organizations involved in the development and delivery of culturally sensitive PLE. It is also important that these service providers have the resources and capacity to deliver PLE to members of minority communities.[375] This can entail employing members of minority communities as well as using translators. It can also entail employing a person with special PLE abilities — for example, a legal aid lawyer or law student — in a social

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[369] See *Comparative Justice Systems Project*; *Focus Groups*; C.D. 2.35; and Jamieson, et al., *Survey*.

[370] For example, C.D. 2.35 and *Comparative Justice Systems* appear to focus on the PLE needs of immigrants and refugees, while the *Survey of Selected Non-governmental Organizations* tends to focus on the needs of minority women.

[371] *Comparative Justice Systems*; C.D. 2,35; Jamieson, et al., *Survey*; and Etherington, et al., C.D. 2.34, p. 82.

[372] Several organizations have made significant inroads in the provision of information in minority community languages. See *Comparative Justice Systems*, p. 1 of the summary, describing the creation of community language brochures for the Chinese-Canadian, Indo-Canadian and Latin-Canadian immigrant communities in the Vancouver area which compare and contrast the Canadian justice system to the justice system of their countries of origin.

[373] *Comparative Justice Systems*, p. 14 of the summary. Note that the Law Courts Education Society of B.C. puts on demonstration mock trials to enable members of the three largest immigrant communities in the Vancouver area to learn fundamental Canadian legal concepts through non-threatening first-hand experiences.

[374] Ibid, p. 2 of the summary.

[375] See Jamieson, et al., *Survey*, p. 8. See also C.D. 2.35; and *Focus Groups*, p. 12 of the summary.

service agency to provide access to culturally sensitive PLE and legal services.[376]

Further, special legal aid clinics can be established to provide services to members of minority racial and cultural communities. Ontario has already taken such steps in recent years by creating the Metro Chinese and Southeast Asian Legal Clinic,[377] and announcing the creation of a new legal aid clinic in Toronto to serve the black community.[378]

Several reports express concern about the special problems minority women, especially recent immigrants, might face in accessing legal information because of traditional community values concerning the roles of women and men.[379] And, some refer to the importance of ensuring access to shelter and culturally sensitive PLE for women and children in family violence situations, particularly when a woman might be dependent on her spouse for her immigrant status in Canada.[380]

Many reports agree on the particular subject areas of greatest need for legal information by members of minority communities. For the most part, the needs seem to be in non-criminal areas of law such as family, landlord-tenant, employment (including human rights), immigration, and rights and entitlements vis-a-vis the delivery of social services and government regulation.[381] This identification of PLE needs supports the discussion above in this report on the need to focus more attention on multiculturalism and justice issues in the non-criminal sphere.

Finally, several reports stress the importance of outreach PLE measures to overcome the reluctance by some minority community members to contact or deal with the Canadian justice system because of fears or distrust based on their assumptions about the system and system actors derived from experiences with corrupt and repressive regimes in countries of origin. The report, *Comparative Justice Systems*, identifies this as a major barrier to effective PLE and proposes a comparative PLE to contrast the Canadian system with that of countries of origin as a means of overcoming these barriers.[382]

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[376] C.D. 2.35, p. 4 of the summary.

[377] See note 99 and text above.

[378] "Legal clinic planned for Blacks," *Globe and Mail*, [Toronto] May 4, 1993, p. A4. Attorney-General Marion Boyd described the new clinic as simply an "expansion of an existing program to a group that has not been served by those specialized services," comparing it to the prior creation of specialty clinics for the Chinese and Southeast Asian community, native people and the disabled. However, the announcement received a mixed reaction from an association of 75 black lawyers in Ontario, the Delos Davis Law Guild. Its president, Ms. Herbert, said that while a need exists to fight discrimination using the justice system, she is not sure that setting up a clinic only for Blacks is the way to do it.

The announcement of the clinic for blacks has also been described as "unusual," in that normally funding for such clinics is awarded to communities after extensive research has proved they are needed and can be supported and their mandate and purpose has been identified. But, in this case, the funding was announced before any specific proposals were put forward by members of the community. The clinic funding manager for the Ontario Legal Aid Plan, Joana Kuras, confirmed that they had received no proposals and that it still was not clear exactly what the clinic was supposed to do. "Funding for Black Legal Aid Clinic By Province `Unusual,'" *Law Times*, 4, 22 (June 14-20, 1993), pp. 1-2.

[379] *Comparative Justice Systems*, p. 6 of the summary; C.D. 2.35, p. 4 of summary; and Jamieson, et al., *Survey*, p. 4 of the summary.

[380] C.D. 2.35, p. 2 of the summary.

[381] For the most part, the descriptions of needs in the various reports reflect the experiences of the focus groups, community members, or organizations consulted by the authors. See C.D. 2.35; *Comparative Justice Systems*; *Focus Groups*; and Jamieson, et al., *Survey*. The one criminal topic mentioned repeatedly was the need for greater information on family violence and what to do about it.

[382] See note 315.

7.0 IMMIGRANT EXPERIENCE ISSUES

Several reports deal with multiculturalism and access to justice concerns that arise within the immigrant experience. The emphasis is on problems peculiar to members of racial and cultural minorities who are immigrants to Canada, and the problems they may share with others but which are felt more severely by immigrants.

Although it is important to avoid assumptions equating racial and ethnic minority status with immigrant status, the influx of immigrants since 1945 and changes in our immigration policy in the late 1960s allowing for more non-European immigrants[383] were critical elements of the socio-political context for creating our multiculturalism policy.[384] For many members of ethnic groups, and particularly for members of visible minority groups who only recently were admitted to Canada on a widespread basis, the multicultural experience is an immigrant experience. According to a 1992 government report, one in every six Canadians was born outside of Canada.[385]

7.1 Refugee Determination Issues

Canada's refugee determination policy remains the subject of much controversy, despite two recent attempts at reform. In 1985, the processes for determining refugee status under the *Immigration Act* (1976), were found to be contrary to the *Charter* because of the absence of an appropriate hearing mechanism.[386] After several reviews of the procedure and much debate, Bill C-55 came into force on January 1, 1989. The Act's new procedures were intended to create a process that would comply with the *Charter* and meet Canada's international obligations and yet be streamlined and speedy. They were also intended to grant Canadian protection to those in need of it, and to deter abuse of the system by applicants who either had a better claim in another country or had no basis to seek refugee status.[387] Although the new process provided for a two-stage hearing process, with an oral hearing guaranteed at the initial stage and stipulations that any benefit of the doubt would go to the claimant at that stage,[388] there have been

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[383] The 1960s and 1970s brought a transition from an apparently racist immigration policy to a policy designed to help meet our demographic needs for more citizens through criteria which were to reflect economic, humanitarian and family concerns.

[384] Breton, "Multiculturalism and Canadian Nation Building", in eds., Cairns and Williams, *The Politics of Gender, Ethnicity and Language in Canada* (1986) Report No. 34 for the MacDonald Commission, pp. 32-42.

[385] Immigration Canada, *Managing Immigration: A Framework for the 1990s* (1992), p. 9.

[386] *Singh* v. *Min. of Employment and Immigration* [1985] 1 S.C.R. 177.

[387] See s. 2.1 of the Act, R.S.C. 1985, c. I-2, as amended by R.S.C. 1985 (1st Supp.), c. 31; R.S.C. 1985 (2nd Supp.), cc. 10, 46; R.S.C. 1985 (3d Supp.), c. 30; S.C. 1988, c. 2; and S.C. 1988, cc. 35, 36, and 37.

[388] This pro-claimant stance at the initial stage is accomplished by requiring unanimity for a negative finding (against refugee status) between two decision-makers -- an adjudicator and a member of the Convention Refugee Determination Division (CRDD). The burden placed on the claimant is very minimal. As long as either the adjudicator or the Refugee Division member finds that there is some credible evidence upon which the CRDD might determine the claimant to be a convention refugee, then the claim must be referred to the second (full) hearing stage. *Immigration Act*, s. 46.01(6). Also under s. 46.01(7), the Minister's representative can concede the credible basis for the claim and a 92 percent concession rate since its introduction would support the suggestion that the initial stage is structured in a "pro-refugee" manner.

See Law Reform Commission of Canada, *The Determination of Refugee Status in Canada: A Review of the Procedure (A Preliminary Study)* (February 1, 1991), p. 8.

numerous criticisms and challenges to it under the *Charter*.[389]

A study of the 1989 procedures by the Law Reform Commission of Canada highlighted several problems directly related to Canada's commitment to multiculturalism.[390] It reported that:

- some Convention Refugee Determination Division (CRDD) members (at the initial stage hearing, one decision-maker is a CRDD member; at the full hearing, both decision-makers are CRDD members) are identified as outspoken, frequently badgering witnesses, reactionary, biased, contemptuous and cynical;[391]
- incidents of racism and insensitivity to cultural difference were recorded on several occasions to the extent that some counsel in Montreal simply refuse to appear before certain CRDD members. Several Toronto counsel referred to this as a tendency to interpret situations and individuals through Canadian spectacles, with little or no sensitivity to cultural difference. There appeared to be a need for ongoing training in cultural sensitivity;[392]
- although interpreters were key actors in the process, problems in interpretation were numerous and could be very serious.[393] Because credibility is the major issue the emphasis is placed on inconsistencies and contradictions, rendering error-free translation and the ability of counsel and decision-makers to work with interpreters crucial. Unfortunately, these two elements are often lacking;
- there are no specific training courses for interpreters, which is seen as a major problem in every region, and there was general consensus among interpreters that some form of training and accreditation was essential;[394] and
- concerns were expressed at several levels regarding the activities of immigration consultants and unqualified personnel. The *Immigration Act* empowers Cabinet to

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[389] The criticisms are too numerous to detail here. They include the provision for a relative summary and speedy return of ineligible applicants to `safe third countries' when no international arrangements made with such countries; the allocation of duty counsel to unrepresented claimants or to claimants whose chosen counsel is not ready to proceed with dispatch; uncertainties arising from the `credible basis' test; the role of the Minister's representative (the Case Presenting Officer); the absence of any right to appeal on the merits; the restrictions on the availability of judicial review following on the requirement to apply first for leave to seek review; the shortness of time allowed for consultation with a lawyer following a removal order and to seek leave for review of a removal order (72 hours -- s. 49(1)(b) and s. 82.1(1) of the *Immigration Act*; the quality of individual decisions and decision-makers and the appearance of bias for some; regional inconsistencies in decision-making; the quality of interpreters and interpretation; and, perhaps most notably, the increasing gap between the initiation of a claim and its final determination.

See Law Reform Commission of Canada, *The Determination of Refugee Status*, pp. 12-14 and pp. 29-31, for a brief summary of *Charter* challenges.

In 1991, the Immigration Department took measures to revise the initial stages of the refugee determination process with the objective of streamlining the process and reducing its cost. The changes, which have been tested in pilot projects in several major cities, involve replacing the oral hearing at the first stage with a `paper inquiry' allowing for a fast-tracking of claimants to a full hearing in most cases. See "Fast track installed for refugees," *The Globe and Mail*, [Toronto] April 27, 1991, p. A4.

[390] Law Reform Commission of Canada, *The Determination of Refugee Status*, p. 36. The researchers observed 69 initial hearings and 76 full (second stage) hearings, reviewed tape recordings of 15 more full hearings, and read 450 written decisions. They also conducted extensive interviews with participants in the system -- claimants, case presenting officers, adjudicators, review hearings officers, CRDD members, legal counsel and consultants.

[391] Ibid, p. 39. The views of counsel and government review hearings officers often coincided on these observations and several counsel suggested that multiracial membership did not necessarily lead to an absence of racial bias.

[392] Ibid. The authors, however, did not find that these well-founded criticisms of some individuals indicated a systematic attitudinal problem.

[393] Ibid, p. 58. They include fragmentation of the narrative; no interpretation or poor interpretation of technical advice given to the claimant; inability to deal with interruptions with the result that not everything that was said was translated; and translation mistakes in general.

[394] Ibid, p. 59.

make regulations to require immigration consultants or others seeking to appear before the Refugee Division to obtain a licence from such authority as may be prescribed, but this authority has not been used.[395]

The refugee determination process was amended significantly again by Bill C-86 in December 1992,[396] but these amendments appear to be primarily directed at streamlining and speeding up the process and do little to address the concerns of the LRCC. Although the new Act removes the initial "credible basis" hearing as recommended by the LRCC and others,[397] it gives responsibility to senior immigration officers to make initial determinations as to eligibility to apply for refugee status, without a requirement for a hearing or right to a counsel.[398] It expands the grounds of ineligibility and removes some of the Ministerial safeguards against improper removal on the basis of criminality or security concerns that existed previously. It also expands and operationalizes the senior immigration officer's authority to exclude claimants on the basis that they came through some "safe" third country en route to Canada.[399] *Charter* challenges to several of the new provisions are predicted.[400]

Concerns about access to competent legal services and the legal system for immigrants because of their language and cultural differences can be intensified for refugee claimants due to the urgency of the situation they face. Issues arising from ignorance of legal rights and avenues of redress, the need for accessible PLE, access to legal aid funding or clinical legal counsel, and concerns about abuses of vulnerable immigrants or refugee claimants by unscrupulous lawyers or paralegals/immigration consultants must be addressed.[401]

7.2 Access to Language Training, Job Training, and Social Services

There is also widespread concern about the treatment of other categories of immigrants under present legislation and programs. There are concerns about the extent to which immigrants (in particular, women) are over-represented in low-skill and low-wage jobs[402] within declining industries in the Canadian economy. The Windsor

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[395] *Immigration Act*, s. 114(1)(v). Ibid, p. 61. The authors note one suggestion to confer licensing authority on the Immigration and Refugee Board itself.

[396] S.C. 1992, c. 49. Most of the Act was proclaimed in force in February, 1993.

[397] The LRCC recommended its abolition because 94 percent of all claimants passed the credible basis test, making the initial hearing appear to be a waste of resources in terms of a screening mechanism that would ensure all claimants received a hearing.

[398] Not a counsel paid for by the Ministry if necessary, as was the case under the 1989 legislation. Margaret Young, *Legislative Summary of Bill C-86: An Act to Amend the Immigration Act*, Library of Parliament, (July, 1992), pp. 2-6.

[399] Ibid, pp. 6-7.

[400] Ibid, pp. 31 and 33.

[401] Bogart and Vidmar, *Empirical Study of Activities of Paralegals* (1989), Study Paper Prepared for Ontario Task Force on Paralegals.

See also Reiman, "Policing the Practice Proves Problematic," *Law Times*, March 18-24, 1991, pp. 9-10. The article discusses problems related to incompetent immigration counsel and consultants. It also points out that the absence of a licensing or accreditation system for immigration consultants makes it virtually impossible for police to regulate their practices to protect immigrant consumers, while immigration counsel are subject to policing and discipline by their law society. The recent disbarments of Martin Pilzmaker and R. Sainaney for unethical activities in their immigration practices were cited as examples of the effectiveness of professional regulation. The article suggested the need for some form of regulation of immigration consultants and pointed out that many consultants recognize the need for some form of accreditation and licensing.

[402] For example, in service industries as domestics or cleaning personnel, or in processing, assembly or fabricating industries such as textile, fur and leather industries.

Roundtable report[403] notes that older male immigrants who arrived from traditional sources prior to 1971 and immigrant women who arrived from non-traditional sources between 1981 and 1986 are most disadvantaged because of their prevalence in these declining industries.[404] They face particular problems in terms of limited job mobility and the need for extensive labour adjustment programs.[405] Yet, critics contend that the government has not taken measures to increase such programs or make them more accessible to the most disadvantaged groups.[406] These problems are intensified during periods of economic recession.

The Windsor Roundtable report cites several studies which argue that existing immigration categories for admission and sponsorship of family members, coupled with government policy on access to language and employment training skills upgrading programs, operate to ghettoize immigrant women, particularly those from racial minorities in low-skill and low-wage occupations.[407] Immigration statistics from 1986 show that almost 40 percent of all women immigrants 15 years of age or older had no knowledge of either official language on arrival in Canada.[408] Thus, access to language training can be important for job mobility and the level of economic status that can be attained by immigrant women.[409]

Until recently, however, immigrant women faced serious disadvantages in access to language training. More immigrant women than men enter Canada as sponsored immigrants, either in the family class or as assisted relatives within the independent class.

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[403] See note 2, p. 89.

[404] Seward, *Immigration and Labour Adjustment*, Institute for Research on Public Policy, (1990), pp. 1-3. Presented to the House of Commons Standing Committee on Labour, Employment and Immigration, May 15, 1990. Seward suggests that although immigration has been viewed as a tool for improving the quality of the workforce and facilitating structural change, it has become less selective in the past 15 years. Between 1972 and 1988, there were significant decreases in the number of immigrants accepted in the independent class (70 percent in 1972, 30 percent in 1983, 52 percent in 1988) and increases in the proportion of immigrants accepted on family sponsored status (27 percent in 1972, 54 percent in 1983, 32 percent in 1988) or as refugee claimants (4.2 percent in 1972, 17 percent today). See Valpy, "Questioning immigration ethics during Canada's hard times," *The Globe and Mail*, [Toronto] October 18, 1990. These trends continued through to 1991. See *Managing Immigration*, p. 14, showing over 40 percent in the family class, about ten percent in assisted relatives and only approximately 30 percent in independent and business class categories combined.

[405] The long-term male immigrant group includes a high proportion of older workers with almost 60 percent over 45 and almost one-third over 55. This group also is characterized by low levels of formal education. The recent female immigrant group from non-traditional sources is characterized as one of the youngest groups of workers in the labour force, but with a much higher percentage of women with little formal education than the total female workforce. The recent female immigrant group also has a high proportion of women who do not speak French or English. Difficulties of labour adjustment are likely to be greater for workers with low levels of education, workers without official language abilities, women and older workers. The recent female group faces all of these difficulties except age, and the older male group faces two large disadvantages, age and education. Seward, *Immigration*, pp. 7-9.

[406] Seward, *Challenges of Labour Adjustment: The Case of Immigrant Women in the Clothing Industry*, A Discussion Paper for the Studies in Social Policy Program, The Institute for Research on Public Policy (1990); and Seward and McDade, *Immigrant Women in Canada: A Policy Perspective*, A Background Paper for the Cdn. Advis. Coun. on The Stat. of Wom. (1988).

[407] Seward, *Challenges of Labour Adjustment* (1990); Seward and McDade, *Immigrant Women in Canada* (1988); Ng, "Immigrant Women and Institutionalized Racism," in eds., Burt, Code, and Dorney, *Changing Patterns, Women in Canada* (1988); and Ng, "Immigrant Women: The Construction of a Labour Market Category" (1990).

[408] Ibid, p. 13. Of those assessed in the independent class point system, 19 percent had no official language ability. For family class, the number was 43.9 percent and for refugees, 80.8 percent.

[409] As Seward and McDade, *Immigrant Women in Canada* (1988) point out, 76 percent of all workers employed in Canada's textile industry are women and one-half of those women are immigrant women. Southern European and Asian women are heavily concentrated in textile occupations, in large part because they are most disadvantaged in terms of official language ability. This, combined with limited work-related skills and education (often due to the patriarchy of their initial society), forces them to take employment in low-skill textile industry jobs where language skills are not necessary and they will have little opportunity to learn an official language or other job skills. "Once in these job ghettos, immigrant women's occupational mobility is very limited." See note 407, p. 16.

Although sponsorship often facilitated the entry of immigrant women who could not qualify as independent status applicants under the point system, it generally made them ineligible for the basic training allowance for Employment and Immigration Canada (CEIC) language training. Immigrant women who worked to earn income for their families were also not able to participate in full-time CEIC training. In addition, applicants for basic CEIC training had to show that their lack of fluency in an official language was a barrier to suitable employment. In the case of unskilled workers with limited qualifications, suitable employment is seen as low-wage service sector jobs or low-skill and wage jobs in industries such as textiles. Because official language ability is not considered necessary for these jobs, the workers (mostly immigrant women) were denied access to CEIC language training. This lack of access to language training "exacerbates the ghettoization of particular groups of immigrant women in dead-end occupations."[410] The Windsor report contends that these problems are worsened by cuts to funding for general-language training for immigrants in the 1989 budget.[411]

Criticism of the impediments for immigrant women to access language training have been repeatedly voiced by immigrant women's organizations[412] and their concerns have been echoed by the Canadian Human Rights Commission[413] and several reports reviewed in this paper.[414]

In January 1992, the government announced several measures to address these language-training concerns. Its purpose is to make a "range of flexible training options accessible to a greater number of immigrants, regardless of their labour market intentions."[415] To provide basic language training for all immigrants, a Language Instruction for Newcomers to Canada (LINC) program will be introduced. All permanent residents, including refugees, will be eligible for this program, normally during their first year in Canada, regardless of their labour market intentions.[416] A second new program, Labour Market Language Training (LMLT), will provide specialized or advanced training oriented to labour market needs. The focus is on langauge training needed to acquire job

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[410] Seward and McDade, *Immigrant Women in Canada* (1988), pp. 24-25. The authors point out that the lack of language ability often makes it difficult for immigrant women to participate in skills upgrading or employment programs offered by CEIC which could facilitate their exit from these job ghettos.

[411] Until April, 1990, sponsored immigrants could participate in Citizenship Instruction and Language Training (CILT) programs provided by provincial institutions with funding for 50 percent of provincial expenses and 100 percent of textbooks and supplies provided by the federal Secretary of State. Although there was no training allowance, making it difficult for many immigrant women with jobs or child-care responsibilities to attend, it was an important source of language instruction for immigrant women. However, in the April, 1989, budget, the federal government announced it was ceasing funding for the CILT language programs and all agreements with the provinces were cancelled as of April 1, 1990. Seward, *Challenges* (1990), p. 11.

[412] See for example the references in Seward and McDade, *Immigrant Women in Canada* (1988), p. 25, to the recommendations found in Action Committee on Immigrant and Visible Minority Women (ACIVMW), *Final Report, June 1985 - January 1987* (1987), p. 30. The Committee recommended adequate official-language training with training allowances, day care and travel allowances to facilitate training for all who needed it, regardless of their status or length of residence in Canada. The ACIVMW was replaced by the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC) in 1986.

[413] In its 1986 annual report, the Commission suggested that federal-language training policy seemed to have an adverse effect on a group of persons (immigrant women) on the basis of a prohibited ground of discrimination. *Annual Report*, 1986 (1987), p. 15.

[414] C.D. 2.31; C.D. 2.35; and Jamieson, et al., *Survey*.

[415] *Managing Immigration* (1992), p. 26.

[416] Ibid. Emphasis will be placed on ensuring a first-level of language competence and introducing newcomers to Canadian rights and responsibilities. Priorities will be established in consultation with the provinces, trainers and other concerned organizations so that funds can be directed to those most in need.

skills, or to use existing skills which are in demand. Both programs must be monitored closely, particularly with respect to how well they provide opportunities for immigrant women to break out of the job ghettoization referred to above.[417]

Immigrant women under sponsorship status are also restricted from access to income assistance and other social welfare programs such as legal aid or public housing. When faced with spousal violence or marriage breakdown, sponsored women immigrants must prove that the sponsorship relationship has broken down before they can receive assistance. This requirement can discourage application for such assistance or cause serious delay in attaining access to urgently needed assistance and shelter.[418]

7.3 Domestic Workers Issues

Immigration policy for temporary entry of migrant women as domestic workers and the exclusion of domestics from some aspects of employment standards and collective bargaining legislation has come under increasing scrutiny for its potential to ghettoize immigrant women,[419] especially visible minority immigrant women.[420]

In November 1981, the federal government introduced a revised policy known as the Foreign Domestic Worker Program (or Foreign Domestic Movement) which established new criteria for entry and enhanced the ability of domestic workers to gain entry as permanent residents from within Canada once they are on the program.[421] Yet, domestic workers continue to face disadvantages with uneven employment standards legislation in different provinces — some provinces exclude domestics from basic employment standards protection such as maximum hours of work or overtime requirements — and the failure of the federal government to be proactive in monitoring and enforcing domestic-employer agreements.[422] These problems can mean that foreign domestics are unable to demonstrate financial self-sufficiency to qualify for permanent

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[417] Ibid. The Immigration Canada publication contends that in the LMLT program "special efforts will be made to help women, visible minorities and immigrants with disabilities achieve the language skills needed for full participation in the labour market."

[418] Seward and McDade, *Immigrant Women in Canada* (1988), p. 19. In sponsorship arrangements in the family class, the sponsor is required to sign an undertaking to provide lodging, care, and maintenance to the applicant and accompanying dependents for a period of between one and ten years, although until recently immigration officers imposed a 10-year period as a matter of routine (p. 20). Sponsorships for those in the assisted relatives category within the independent class are for up to five years (p. 6).

[419] Ibid, pp. 40-49. Prior to 1973, over 50 percent of persons entering Canada as domestic workers were females with landed immigrant status and almost 47 percent were foreign women on temporary authorization permits. Following changes in 1973 to make entry on temporary work permits easier, by 1981, only 5.5 percent of domestics were women with landed or permanent resident status. Almost 88 percent were foreign women with temporary work permits who could be asked to return to their country of origin (pp. 40-41).

In 1981, the Task Force on Immigration Practices and Procedures found that the temporary authorization program maintained the supply of domestics by restricting their mobility and inhibiting the type of improvements in wages and conditions which might attract Canadians to the jobs. Canadian Task Force on Immigration Practices and Procedures, *Domestic Workers on Employment Authorizations* (1981), pp. 13-14.

[420] For the most recent and most comprehensive critical commentary on the history of the foreign domestic worker program and its current operation, with special emphasis on its implications for visible minority women, see Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant" (1992), 37 McGill Law Journal p. 681.

[421] Employment and Immigration Canada, *Domestic Workers on Employment Authorizations: A Revised Policy* (1981). The policy also required employers and domestics to sign a written contract of employment which set out duties and working conditions, and a requirement that the worker be provided with three hours off per week and up to $20.00 per month from the employer toward upgrading of skills for the domestic. It also required that the services of Canada Employment Centres be extended to domestics on temporary authorization permits.

[422] See Macklin, "Foreign Domestic Worker...," for commentary on both points.

resident status after two years.[423] In addition, many domestics encounter the same difficulties discussed above for immigrant women obtaining access to official language training.

In April 1992, the Minister of Immigration announced several important changes to the foreign domestic program. Under the renamed Live-in Care-giver Program (LCP), educational and training requirements have increased significantly,[424] but there is some relaxation in the criteria for obtaining landed immigrant status after two years as a domestic.[425] The government will also provide domestics with information on terms and conditions of employment and their rights under Canadian law and will support and encourage domestic workers' advocacy groups. Critics of previous programs have called for close scrutiny of the operation of the new regulations. Some have already speculated that lowering the landing requirements while increasing the educational requirements for admission may have a disproportionately negative impact on women from less-developed countries such as the Philippines and Caribbean nations, most of whom are women of colour.[426]

Finally, the Windsor Roundtable report argues for caution in assigning blame for the plight of immigrant women. Although blame is often placed on the patriarchal nature of their society of origin, from the discussion above on problems of categories of immigration, access to language and job training or other social services, it is necessary to question the extent to which relations of patriarchy are maintained and supported by the structures of immigration and support and settlement for immigrants imposed in Canada.[427]

7.4 Other Immigrant Issues

The Windsor report identifies concerns to the barriers for immigrants presented by the failure of our academic institutions, professional governing bodies, and state institutions and employers to recognize non-Canadian, non-North American or non-European educational qualifications or work credentials and experience.[428] An Ontario

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[423] Seward and McDade, *Immigrant Women in Canada* (1988), p. 45. The International Coalition to End Domestics' Exploitation (INTERCEDE) has been most active in lobbying at both the federal and provincial level. It has urged the Minister for Immigration to look at the reasons for an increase in the rejection rate of applications by domestics from within Canada for landed status, from four percent in 1983 to 16 percent in 1985. INTERCEDE suspects that a disproportionate number of those rejected in recent years were visible minority women who are being rejected on a discriminatory basis. INTERCEDE lobbies provincial governments for employment standards protection, with the focus on wages and maximum hours regulation. In many provinces domestics are totally or partially excluded from such projections, although some provinces have undertaken recent legislative initiatives to provide some protection for domestics. See summary of legislation in Seward and McDade, pp. 55-58.

[424] The new regulations require the equivalent of a Canadian grade 12. Applicants must also now have at least six months formal training in a care-giver occupation and practical experience will no longer suffice. Macklin, "Foreign Domestic Worker...," p. 757.

[425] Ibid. The domestic must still prove two years employment as a full-time, live-in domestic but is no longer required to show skills upgrading, savings or community involvement.

[426] Ibid, p. 759. Macklin points out that the new educational requirements would exclude almost one-half of the domestic workers approved for permanent residence in 1989, most of whom were Filipino or Caribbean.

[427] Etherington, et al., C.D. 2.34, p. 97.

[428] Ibid, p. 98.

Government Task Force recently found there were significant access barriers to professions and trades in Ontario for foreign-trained people.[429]

Finally, there has been some study of social and mental health problems faced by immigrants and refugees and difficulties of access to assistance services after gaining entry to Canada.[430] As well, many immigration applicants, in addition to dealing with problems associated with separation from family, live in fear of obtaining medical assistance because of the apprehension that health restrictions will make them ineligible for immigration, even after they have gained entry to the country.[431]

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[429] See Ng, "Immigrant Women..." and Seward and McDade, *Immigrant Women in Canada*. See also, *ACCESS!: Report of the Task Force on Access to the Professions and Trades in Ontario*, Toronto: Queen's Printer for Ontario (1989). It found that barriers were created by the absence of standardized, objective and open procedures for prior learning assessment (a problem which has worsened in the last 20 years because of changing immigration patterns bringing immigrants from countries which Canadians have less information about), licensure testing which may be unnecessary and not culturally sensitive, inadequate language training and difficulties for some categories of immigrants in qualifying for training, inadequate or improper language testing, inadequate retraining facilities or programs for immigrants, and inadequate or non-existent mechanisms for review of decisions to deny access to professions or trades. The report makes numerous recommendations to overcome these problems in the Ontario context which could be usefully considered for all jurisdictions in Canada, the central one being the government establishment of an independent agency to operate a Prior Learning Assessment Network, which could be linked with an international assessment network.

[430] *After the Door Has Been Opened: Mental Health Issues Affecting Immigrants and Refugees in Canada*, Report of the Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees (1988).

[431] See Etherington, et.al., C.D. 2.34, p. 99. Basic standards of good health, mental and physical, and good character are required for the family class and the independent class and assisted relatives. In its recent amendments to the *Immigration Act* (Bill C-86), the government empowered Cabinet to enact regulations to provide a clearer definition of what types of health problems would constitute an excessive demand on Canadian health and social services and thus result in medical inadmissibility. It will also remove references to "disability" and "disorder," in an attempt to avoid possible *Charter* violations. *Managing Immigration* (1992), p. 19.

8.0 THE RELATIONSHIP BETWEEN RACE/ETHNICITY/CULTURE, GENDER, CLASS AND AGE

8.1 Minority Women and Justice System Issues

Although the interaction between multiculturalism or racism and other critical perspectives such as feminism or classism as an explanation of disadvantage is seldom mentioned in the reports recently, there has been a great deal of social services analysis of the significance of race/ethnicity, class and gender to determine the important differences.[432] The Windsor Roundtable report stresses the importance of a multi-factor or multi-cause analysis to ensure that attention is paid to other significant barriers such as gender and class; that diversity within cultural minorities is recognized; and that further barriers created by stereotyping in terms of disadvantage and participatory needs is avoided. The multi-factor approach is also important to identify those who may be doubly or triply disadvantaged by structures, norms and attitudes and most in need of measures to remedy the situation. The discussion of the particular problems of immigrant and visible minority women in several of the reports — concerning access to language and job training, social services, public legal education on family law and other legal rights, protection from spousal violence, access to safe shelter counselling and legal services — demonstrates the manner in which race, gender and class can unite to produce a "devastating" disadvantage.[433]

The relationship between race and gender, and the need to recognize the different experiences of women of colour when discussing gender issues has gained prominence in recent years in the literature and the activities of organizations formed to deal with gender issues and advance the interests of women. Many feminist scholars have been criticized for failing to consider the interests of visible minority women in much of their scholarship.[434] And a great deal of contemporary feminist scholarship and activism is

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[432] See Professor Li, "Race and Gender as Bases of Class Fractions and Their Effects on Earnings" (1992), 29 Can. Rev. of Soc. & Anthro. 488-510, and the extensive list of references on this topic found at pp. 507-510.

[433] See Etherington, et.al., C.D. 2.34, pp. 99-104; Jamieson, et al., *Survey*; C.D. 2.35; and Hamid, *Minority Women and Justice System* (1991) (C.D. 2.28).

[434] Thornhill, "Focus on Black Women!" (1985) 1 Can. J. of Women & Law 153, pp. 154-155 and 160, links the problems of white feminists' inattention to the plight of women of colour to institutionalized racism. She reveals some of the underlying assumptions of the work of white feminists who work to exclude the interests and experiences of black women from feminist writing. She also demonstrates how white women writers as members of the dominant racial group have the power to present their experiences as representative of all women, and to treat women as a single oppressed group, thereby failing to recognize differences among women and varying degrees of oppression experienced by women due to racism in society. Thornhill and other feminists of colour have challenged feminist theorists to reconsider white feminist writing from a perspective which is attentive to considerations of race.

See also N. Duclos, "Lessons of Difference, `Feminist Theory on Cultural Diversity'" (1990) 38 Buff. Law Rev. p. 325; ed., B. Smith, *Home Girls: A Black Feminist Anthology* (1983); B. Hooks, *Ain't I a Woman: Black Women and Feminism* (1981); B. Hooks, *Feminist Theory: From Margin to Center* (1984); B. Hooks, "Sisterhood: Political Solidarity Between Women" (1986), 23 Feminist Rev. p. 125; Stasilius, "Rainbow Feminism: Perspectives on Minority Women in Canada" (1987) 16 Resources for Feminist Res.p. 5; Lees, "Sex, Race and Culture: Feminism and the Limits of Cultural Pluralism" (1986) 22 Feminist Rev. p. 92.

Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harv. Women's Law J. 115-150, p. 121, identifies three interrelated tendencies in contemporary feminist writing: the tendency to overlook racial identity when considering the effect of an issue on women; the tendency to identify issues in ways that address the experiences of white women more significantly than those of women of colour; and the tendency to over-simplify the sites and causes of women's oppression.

concerned with addressing these concerns.[435]

A recent Canadian study on the impact of race and gender as fractions of classes and their impact on earnings concludes that women systemically earn less than men in all classes regardless of race, and that race seems to make an important difference in the earnings of men but is only marginally significant in the earnings of women. Although these results support the assertion that all social relations in Canada have elements of class, gender and race, the persistent earning gaps among the gender and racial groups call for further study on the primacy of class, gender and race in producing social inequality.[436]

Finally, the Windsor Roundtable report suggests that those interested in advancing the interests of multiculturalism in the justice system have a great deal to learn from the experiences and history of other critical perspectives on the law and disadvantaged groups, such as feminism. The impact of feminism on the law and law reform in recent years has been significant in a wide range of areas.[437] The process has been gradual, brought on by the lobbying efforts of women's organizations; the increasing presence of women in the law schools, the profession and its governing entities, legislative bodies and (most recently) the bench; an increasingly strong tradition of feminist scholarship; and a corresponding increase in the incorporation of feminist perspectives in all courses in law schools to the extent that even "mainstream" traditional legal teaching materials have included some material on feminist perspectives. These changes have made a difference. One can see the potential for similar developments in multiculturalism as a critical perspective on law and law reform if similar measures are pursued.

8.2 Minority Youth and Justice System Issues

Only one of the reports deals primarily and directly with justice system concerns of particular significance to minority youth.[438] Nevertheless, the importance of identifying and dealing with the problems of minority youth to ensure equality and equity in the operation of the justice system in the future is obvious. Yet, there has been "little research in Canada on juvenile justice and racial/ethnic minorities."[439] The *Minority*

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[435] Criticisms have resulted in conscious efforts to ensure greater visible minority presence in the management of women's organizations and advisory committees established to advise governments on gender issues.

[436] Li, "Race and Gender", p. 503, found that despite controlling for inter-class variations and inter-group differences in the pattern of work and individual factors, white men had the highest income, followed by non-white men. Non-white women have the lowest income, but only marginally lower than white women. Thus, the gender gap in earnings was the most pronounced, while race was important in segmenting the earnings of men.

[437] A few of the more notable examples include abortion and reproductive rights, family law and property rights, sexual harassment laws, pregnancy and discrimination, pay equity, affirmative action and employment equity, criminal law related to sexual assault, or the recognition of the battered wife syndrome in the self-defence area.

[438] Hamid, *Minority Youth* (1991) (C.D. 2.26).

[439] Brodeur, C.D.2.2, pp. 107-109. There have been several articles written on the problems of members of various youth minorities in the criminal justice system in Canada. Such articles have tended to highlight the cultural conflicts which an immigrant youth can face in the clash between the culture of his or her parents and the dominant culture of Canada, or finding oneself educationally disadvantaged due to differing standards of education between Canada and the country of origin. See for example, Martin and White, "West Indian Adolescent Offenders" (1988) 30 Can. J. Crimin. p. 367; Douyon, "Les Jeunes Haïtiens et la Justice des Mineurs au Québec," in *Enfant de migrants Haïtiens en Amérique du Nord*, Centre de Recherches Caraïbes, Université de Montréal (1981), p. 104; Kabundi, "Jeunes immigres, marginalité et déviance

Youth report, however, indicates there are several issues to be examined.

Although the report concludes that evidence of discrimination in the exercise of discretion (which can be very broad) in the juvenile justice system is inconclusive, it notes that there is some evidence of over-representation of minority youth in detention in some parts of the Canada.[440] It also refers to American studies which report over-representation of minority youth in decisions to transfer juvenile accused to be tried in adult court and suggests that subtle or indirect discrimination is a factor because of "neutral" factors used by judges to bring elements of social class and neighbourhood into the decision.[441] The *Minority Youth* report consequently recommends research be undertaken to determine whether over-representation of minority youth exists in transfers to adult court in Canada and, if so, the extent to which it is a result of overt or subtle racial bias due to consideration of factors such as the lack of rehabilitative facilities within the community.[442]

On related issues the report urges developing national standards for alternative measures programs offered by the provinces under the *Young Offenders Act* and recommends research on the extent to which alternative measures programs adequately address minority youth concerns.[443] It also urges youth court judges to take a leadership role to ensure minority communities become involved in developing programs for minority youth and that dispositions are sensitive to the family and community factors that impact on minority youth.[444]

There is some discussion on the rise of youth gangs in a number of Canadian urban centres and the perception by some justice system actors on the susceptibility of minority youth, particularly immigrant youth, to join in their activities.[445] In a report from the Canadian Association of Chiefs of Police[446] and another prepared for the British Columbia Solicitor General[447] concerns are raised about their perspectives on the increasing involvement by immigrant and minority youth in criminal youth gang activity and the need for measures to combat such involvement. Both reports stress that youth gang activity is widespread in non-minority and non-immigrant segments of the population.[448] The report to the British Columbia Solicitor General makes

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au Québec" (1988) 1 Revue Beccaria p. 1; and other articles cited in Hamid, C.D. 2.26, p. 4.

[440] The specific reference is to Quebec where eight percent of youths held in detention centres are minority youths and 16 percent are in Montreal detention centres. Hamid, C.D. 2.26, p. 2, citing Pare, "La couleur de la misère des jeunes amoches", *Le Devoir*, 26 February, 1991, p. B-1.

The evidence of over-representation in the United States is well documented. See Allen-Hagan, "Public Juvenile Facilities, Children in Custody," U.S. Dept. of Justice, National Institute of Justice Reports, no. 223, (1991), pp. 20-21, cited in Hamid, C.D. 2.26, at note. 5.

[441] Hamid, C.D. 2.26, p. 5.

[442] Ibid, pp. 8-9.

[443] Ibid, pp. 11-12.

[444] Ibid, pp. 13-14.

[445] Ibid, pp. 14-22.

[446] Canadian Association of the Chiefs of Police, *1991 Organized Crime Committee Report* (1991), pp. 43-48.

[447] Pearcey, "Youth/Criminal Gangs in British Columbia," A Report to the Ministry of the Solicitor General, (1990), pp. 1-2.

[448] This is an area where there is a need for extreme caution to avoid the furthering of stereotypes, sometimes encouraged by media interest (see for example, "Terror in the Streets", *Maclean's*, March 25, 1991, pp. 18-19) of excessive immigrant and minority participation in criminal gang activity. The point addressed here is the need to identify causes of minority youth problems with the justice system, including criminal gang

recommendations to address the issues of youth gang activity in general, but it acknowledges "an emphasis on issues relating to immigration and the plight of refugees." It notes that the need for services for these groups is repeated often in discussions and in a literature review. Finally, it suggests that addressing the language, cultural and psychological needs of new Canadians would reduce their vulnerability to gang involvement.[449] In addition to making several specific recommendations, the report, *Minority Youth*, stresses the need for a coordinated approach involving all levels of government, police, schools and non-governmental community organizations to satisfactorily address the problem of youth gangs. It advocates cooperation to develop a national strategy to tackle the problem of youth gangs.[450]

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activity, and to develop measures to address those causes.

[449] Pearcey, "Youth/Criminal Gangs...," pp. 1-2. Hamid, C.D. 2.26, pp. 18-19, provides an extensive summary of recommendations to address problems of minority youth involvement in gang activity. They include the need to:

- select effective programs for particular targeted groups (ranging from prevention programs for minority youth new to Canada, prevention and intervention programs for ESL students having adaption difficulties, to intervention programs to those known to corrections, parole and police);
- develop culturally specific parenting education and counselling programs;
- develop and expand overall youth programming, such as recreation or street work of which immigrant youth would form a part;
- increased funding for ESL programs;
- develop more coordinated school programs to support newly-arrived immigrant students;
- incorporate more multi-lingual services into the educational system;
- develop special educational programs for "high-risk" immigrant youth; and
- provide adequate funding and coordination of community agencies providing preventive services to youth and their families.

Several of these measures have and are being tried by existing programs. One example is the Law Courts Education Society of British Columbia programs for immigrant and minority youth.

[450] Hamid, C.D. 2.26, pp. 21-22.

APPENDIX

DOCUMENTS AND REPORTS REVIEWED

2.1 Anand, Raj, *Visible Minorities and Access to Justice*

2.2 Brodeur, Jean-Paul, *Access to Justice and Equality of Treatment*

2.3 Kaiser, Archibald, *The Criminal Code of Canada: A Review Based on the Minister's Reference*

2.4 Young, Alan and Marc Gold, *The Criminal Law and Religious and Cultural Minorities*

2.5 Hamid, Kazi, *Provincial Law Society Disciplinary Proceedings*

2.6 Hamid, Kazi, *Statutory Comparison of Provincial Judicial Council Disciplinary Proceedings*

2.7 Doob, Anthony, *Material Related to the Collection of Race Crime Statistics*

2.8 *Background*

2.9 *Demographics in Ethnic Groups in Canada*

2.10 Hamid, Kazi, *Racism in Canada*

2.11 *Equal Access to Justice, Equitable Treatment and Respect*

2.12 *A Multicultural Criminal Justice Advisory Council*

2.13 *Cross Cultural Training, Increased Hiring of Minorities and Community Liaison*

2.14 Pomerant, David, *Languages of Accused and Multicultural Issues*

2.15 Hamid, Kazi, *Ethnic Data Collection*

2.16 *Police*

2.17 *Crown Prosecution Service*

2.18 *Bail*

2.19 Pomerant, David, *Jury Selection and Multicultural Issues*

2.20 *Are Minorities Over-represented in the Criminal Justice System*

2.21 *Corrections*

2.22 Cohen Stanley and Steve Coughlan, *Access to Remedies*

2.23 *Statutory Criminal Law*

2.24 Pomerant, David, *Canada Evidence Act and Multicultural Issues*

2.25 *Corrections*

2.26 *Minority Youth*

2.27 *Demographics of Ethnic Groups in Canada*

2.28 Hamid, Kazi, *Minority Women and Justice System*

2.29 Hamid, Kazi, *Criminal Law Issues Involving Religion and Conscience*

2.30 Hamid, Kazi, *A Note on Racism*

2.31 Law Courts Education Society of B.C., *Comparative Justice Systems Project: A Study of Problems and Issues Concerning Immigrants Adjusting to the Canadian Legal System*

2.32 *Focus Groups on Public Legal Information: Needs and Barriers to Access*

2.33 Interview Tapes from Focus Groups Study

2.34 Etherington, Brian, Bogart, Irish and Stewart, *Preserving Identity by Having Many Identities: A Report on Multiculturalism and Access to Justice*

2.35 Department of Justice Officials, Reports of Site Visits to Various Ethnic Organizations

2.36 Jamieson, Beals, Lalonde & Associates, *Survey of Non-governmental Multicultural Women's Organizations on Justice Issues*