

## Improving access to the criminal justice system through legislative change

The Department of Justice is currently reviewing the Criminal Code and the Canada Evidence Act *to improve access for persons with disabilities to the criminal justice system.*

*To this end, the department released a consultation paper in May 1993, discussing areas where improvements to the legislation could be made. This article briefly highlights some of these proposals for legislative reform.*

*The department has benefited from the input of many groups representing persons with disabilities, particularly the Canadian Disability Rights Council. The council is a community-based umbrella organization to which more than 25 community groups belong. Designed by persons with disabilities to advance their equality rights, the council is coordinating the response to this review of federal legislation from persons with disabilities across Canada.*

*However, the Department of Justice is seeking further views from persons with disabilities and from other involved groups (such as police, defence lawyers and provincial attorney generals) on issues raised by the consultation paper.*

*Copies of the complete paper are available from the Department of Justice<sup>(2)</sup> - in regular print, large print or as a sound recording. A starting point... In 1990, the Standing Committee on Human Rights and the Status of Disabled Persons called on the federal government to review and, where necessary, amend legislation to ensure persons with disabilities full participation in the criminal justice system.*

In 1991, the federal government responded by announcing a five-year strategy on disability. The first step in the National Strategy for the Integration of Persons with Disabilities was the adoption of Bill C-78.<sup>(3)</sup> This was the first piece of federal legislation dealing exclusively with the concerns of persons with disabilities. The provisions of Bill C-78 were intended to improve the access of persons with disabilities to, for example, Canada's national transportation system, government records and personal information (through alternative formats such as sound recordings), and the courts. Key provisions of the bill came into force in June 1992. The Department of Justice consultation paper Bill C-78 contained just one amendment to the *Criminal Code*, which related to section 486 (2.1): "... in the case of certain sexual offences, evidence may be given behind a screen or outside the court room by a person whose mental or physical disability, coupled with the trauma of testifying, renders his or her communication of evidence difficult." However, the Department of Justice is considering further legislative changes to increase access for people with disabilities to the criminal justice system and has prepared a consultation paper discussing several potential changes. Hearsay evidence is court testimony based on the statement(s) made by another person, rather than on the firsthand knowledge of the witness. Hearsay evidence is usually inadmissible in court. But a 1990 Supreme Court of Canada decision, *R. v. Khan*,<sup>(4)</sup> relaxed restrictions against hearsay testimony somewhat, allowing witnesses to repeat what a child has told them if the child is unable (for various reasons) to testify. This can occur only when it is absolutely necessary and when the information is deemed reliable.

The consultation paper questions whether it would be appropriate to extend this exception to adults with

disabilities if that would be the only way to accurately bring information into court. Vulnerable adults can face many of the same problems as children in attempting to communicate in the often confusing environment of a courtroom. Identification of the accused The department is also considering whether it would be appropriate to change legislation to deal with the difficulties victims with disabilities experience in identifying the accused. Many persons with disabilities feel that police officers and Crown prosecutors sometimes decide not to charge alleged offenders because a victim with a disability may have difficulty identifying the accused in the "usual" manner.

Legislation authorizing the wide acceptance of alternative ways of identifying an alleged offender, such as voice identification and voice line-ups, may be required to address situations where witnesses are blind or have very poor vision and cannot simply point out the accused. Videotaped evidence Section 715.1 of the *Criminal Code* represents one of the most significant recent legislative changes concerning the testimony of children. This section allows, in cases of alleged child sexual abuse, the use of the child's videotaped testimony. Soon after the alleged offence, a videotape is made, in which the child describes the acts complained of to help preserve his or her recall until the trial takes place.

The assumption that children have limited and inaccurate recall often renders their testimony vulnerable to attack. Preserving testimony on videotape close to the time of the incident improves the likelihood that the court will consider their testimony credible, reliable and useful. The consultation paper suggests that perhaps videotaped testimony should also be an option for persons with disabilities affecting their ability to recall. Should this opportunity not be available to any witness who, for one reason or another, is vulnerable in dealing with the criminal justice system? Disqualification of Jurors At the heart of the jury process is the belief that juries represent the community. Yet, community groups representing disabled persons claim that people with disabilities are systematically disqualified from serving on juries. This therefore prevents juries from being fully representative of the community.

The consultation paper identifies a number of possible roads to reform in this area. For example, some groups have called for a statement of principle to be added to the *Criminal Code*, similar to the already existing statement concerning gender discrimination, prohibiting the disqualification of jurors on the basis of a disability.

Another option could be to modify section 638<sup>(1)</sup>(e) of the *Criminal Code*, which allows either the Crown prosecutor or the defence lawyer to challenge (for cause) prospective jurors "physically unable to perform properly the duties of a juror." Should this section be changed to prevent the interpretation that disability in and of itself, is sufficient to disqualify a prospective juror? Should the provision instead ensure that if assistance would allow persons with disabilities to serve as jurors, the disability becomes unchallengeable? Discussion The Department of Justice has not concluded that legislative reform is the only, or even the best, approach to making the criminal justice system more accessible to people with disabilities. Change can often be achieved more quickly through other channels.

For example, the *R. v. Khan* decision could simply be broadly interpreted by the courts to include people with disabilities in the exception to the hearsay rule.

Clearly, legislative reform is not the absolute cure for accessibility problems in the criminal justice

system. Legislative reform is, however, one of several fronts on which change can occur.

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(3)*An Act to amend certain Acts with respect to persons with disabilities.*

(4)(1990) 2 S.C.R. 531.