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**Report of  
the Commission on Systemic Racism  
in the Ontario Criminal Justice System**

December 1995





AWY 1898

Commission on Systemic Racism in the Ontario Criminal Justice System

Commissioners: Margaret Gittens (Co-Chair), David Cole (Co-Chair), Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam, Ed Ratushny.

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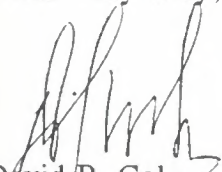
The Honourable H.N.R. Jackman  
Lieutenant Governor of Ontario  
Suite 131  
Main Legislative Building  
Queen's Park  
M7A 1A1

Your Excellency:

Pursuant to our appointment by Order in Council 2909/92 dated October 1992, we are pleased to submit to you our Final Report on Systemic Racism in the Ontario Criminal Justice System.


The Commission appreciates the time, energy and hard work contributed by hundreds of people across the province, as well as the contribution of people nationally and internationally.

Yours very truly,

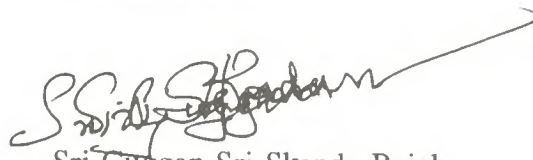
  
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# Acknowledgements

The final report of the Commission reflects the contributions of hundreds of people across the Province of Ontario. Our work was invaluable enhanced by the contributions of formal presenters, participants in focus groups and other community meetings, and many others who took the time to write or telephone the Commission throughout the life of our mandate. We also express our appreciation for the formal and informal co-operation we received from officials in several government ministries and other organizations, including the police and judiciary. We are grateful for the assistance of academics and consultants who showed keen interest in our work, and willingly offered advice and numerous suggestions.

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We express thanks to the youth, women and men behind bars who spoke to us in less than elegant circumstances and shared their experiences, knowledge, insight and suggestions with us. We thank the superintendents, correctional officers and staff of federal and provincial penal institutions for their co-operation during visits to these facilities and to other requests that we made.

Our work was enhanced by the contributions of individuals, activists and people from diverse communities and we thank them. We also express our appreciation for the co-operation we received from the Ministers and staff of the three related Ministries of Attorney General, Solicitor General and Corrections, and Community and Social Services. We also acknowledge the contributions of Chiefs of police and members of Police Associations.

Finally, to all those who related their experiences time and time again because they had a hope and vision of a more just and equal society, we hope this report begins that process of change.





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# Executive Summary

The Commission was established in 1992 to inquire into and make recommendations about the extent to which criminal justice practices, procedures and policies in Ontario reflect systemic racism. As directed by our Terms of Reference, “anti-black racism” was a focal point of the Commission’s inquiry, and the experiences and vulnerabilities of all racial minority communities were also recognized.

The inquiry examined practices, procedures and policies in the three major components of the criminal justice system: the police, courts and correctional institutions. Professionals involved in the administration of justice and members of the public were consulted extensively by such means as interviews, public meetings, focus group sessions, written and oral submissions, and public hearings across the province. The Commission also conducted empirical studies of perceptions, experiences with and outcomes of the criminal justice process.

## **Racism In Justice: Perceptions**

Many Ontarians believe that racial minority people are treated worse than white people in the criminal justice system. A major survey conducted in Metropolitan Toronto found that more than five in ten (58%) black residents, three in ten (31%) Chinese residents and more than three in ten (36%) white residents believe judges do not treat black people the same as white people. More than eight in ten of those who perceive differential treatment believe judges treat black people worse than white people.

Perceptions that judges discriminate against Chinese people were less common but still significant. Four in ten (40%) black residents, close to three in ten (27%) Chinese residents and about two in ten (18%) white residents believe judges do not treat Chinese people the same as white people. Eight in ten of those who perceive differential treatment believe judges treat Chinese people worse than white people.

Surveys of judges and lawyers indicate substantial variation in views about racial discrimination in the criminal justice system. While many judges and lawyers reject – some flatly – even the possibility that systemic racism might be a genuine problem in Ontario’s criminal courts, others acknowledge differential treatment within the system based on race as well as class or poverty. Four in ten (40%) defence counsel and three in ten (33%) provincial division judges appointed since 1989 perceive differential treatment of white and racial minority people in the

criminal justice system. About one in ten crown attorneys (13%), general division judges (10%) and provincial division judges appointed before 1989 (10%) also perceive unequal treatment by race.

### **Racism In Justice: Understanding Systemic Racism**

Racism has a long history in Canada. It was fundamental to relationships between Canada's First Nations and the European colonizers. Racism has shaped immigration to this country and settlement within it. It has led to denials of basic civil and political rights to Canadian citizens, excluded adults from jobs and children from schools, limited opportunities to acquire property, and barred people from hotels, bars, theatres and other recreational facilities. In these ways racism has restricted the opportunities and deformed the lives of some Canadian residents, while directly benefiting others.

Though many Canadians throughout history have accepted racism, others have campaigned and protested against the fundamental denial of humanity that it represents. These efforts have had significant results. While the law once permitted or promoted unequal treatment because of race, today it generally prohibits such discrimination. Equality is now a fundamental right.

Despite these formal changes, racism continues in practices that affect the lives and opportunities of people in Ontario. The current challenge is to grapple with this systemic dimension of racism.

Systemic racism means the social processes that produce racial inequality in decisions about people and in the treatment they receive. It is revealed by specific consequences, incidents and acts that indicate differential decisions or unequal treatment, but it is the underlying processes that make such events "systemic." One key process is racialization, the other is the social system.

Racialization in Canada consists of classifications of people into racial groups by reference to signs of origin – such as skin colour, hair texture and place of birth – and judgments based on these signs about their character, skills, talents and capacity to belong in this country. These social constructions of races as different and unequal have historically justified economic exploitation of other societies by European imperial powers. Imperial elites organized societies they colonized using racialized classifications and judgments, which they incorporated into the religious, educational, cultural and political practices of their own societies.

Once accepted by a society, judgments about races being different and unequal may be adopted, established and perpetuated by social systems. Social systems are ways of organizing action in order to accomplish tasks. They are made up of personnel and policies, decision-making procedures and operating norms for managing their work. Racialization is introduced into social systems through the decisions and actions of system personnel. However, it is often impossible to identify those responsible for introducing or perpetuating racialization because its transmission and



acceptance are often cumulative and diffuse. Racialization within a system has an adverse impact upon racialized persons, but may pass unrecognized by those who do not experience its effects.

Racialization may be tolerated by the policies, procedures and norms of a system. It may be transmitted within particular systems or among different systems. These processes of introducing, perpetuating, tolerating and transmitting racialization within social systems constitute systemic racism.

## **Prison Admissions**

Isolating people from society and confining them in prisons is the harshest action that the Canadian criminal justice system can take. The principle that everyone is equally protected against unfair or unjust imprisonment and the principle of restraint are fundamental to the state's authority to take this action. But practices do not always live up to principles when officials are granted broad discretion.

A major study of admissions to Ontario prisons indicates that for the period studied, the majority of prisoners are white, but that black men, women, and male youths are massively over-represented. Aboriginal men, women and youths are also over-represented in provincial prisons, but not to the same extent as black people. Members of other racialized groups are generally not over-represented.

The over-representation of black people reflects a dramatic increase in their admissions to prison between 1986/87 and 1992/93. By the end of these six years, black adults were admitted to prison at over five times the rate of white adults, proportionate to their representation in Ontario's population.

Although many more black men than black women are in jail, black women are more over-represented among prison admissions than black men. Whereas black men were admitted to prison at a rate just over five times that of white men in 1992/93, the admission rate for black women was almost seven times that of white women.

The over-representation of black adults is much worse among those imprisoned before trial than among sentenced admissions. While white people were imprisoned before trial at about the same rate as after sentence (approximately 329 per 100 000 persons in the population before trial, and 334 after sentence), the pre-trial admission rate of black people was twice their sentenced admission rate (approximately 2,136 per 100 000 before trial, and 1,051 after sentence).

The most dramatic differences in admission rates of white and black adults involve pre-trial imprisonment for highly discretionary charges. In 1992/93 the black pre-trial admission rate for drug trafficking/importing charges was 27 times higher than the white rate; for drug possession charges, the black pre-trial admission rate was 15 times higher, and for obstructing justice charges, the black pre-trial admission rate was 13 times higher.



These data cannot be rationalized by racial or cultural propensities to commit offences. Nor can they be explained as a product of a criminal justice system composed of overtly or covertly racist officials.

However, racialization in Canadian society is a recognized fact both inside and outside the criminal justice system. Wherever broad discretion exists, racialization can influence decisions and produce racial inequality in outcomes. Such discretion is evident at several stages of the process that results in imprisonment before trial or after conviction.

### **Imprisonment Before Trial**

The discretionary powers of officials who deal with accused persons before trial provide considerable scope for racialization to influence detention decisions. Racialization may influence police decisions about whether to release accused persons, and may affect the bail process through information the police supply to crown attorneys. Racialized decisions may also be promoted by criteria used to predict whether an accused will fail to appear at trial or is "substantially likely" to commit a criminal offence before trial.

A major study of detention decisions about black and white accused charged with the same offences indicates that white accused were more likely to be released by the police and less likely to be detained after a bail hearing. White accused were treated more favourably even though they were more likely than black accused to have a criminal record and to have a more serious record.

Detailed analysis of these data revealed no evidence of differential treatment for some types of charges laid against white and black accused, but substantial differences for other charges. Differential treatment was most pronounced for accused charged with drug offences. Within this sub-sample, white accused (60%) were twice as likely as black accused (30%) to be released by the police. Black accused (31%) were three times more likely than white accused (10%) to be refused bail and ordered detained.

Further analysis of the drug charge sample indicates separate patterns of discrimination at the police and court stages of pre-trial detention. Across the sample as a whole, the results of differential treatment evident at the police stage were subsequently transmitted into the court process. Police decisions to detain black accused at a higher rate than white accused meant that the bail courts saw a significantly higher proportion of black accused. Thus, even similar rates of denying bail at court resulted in larger proportions of black accused being jailed before trial.

Employment status (as described by the police) accounted for some of the racial inequality in imprisonment before trial, both for the sample as a whole and for the drug charge sample. But it does not fully explain the findings. Other ties to the community considered at bail court, such as fixed address and single status, also fail to account for the differential outcomes.

The data disclose distinct and legally unjustifiable differences in detention decisions about black and white accused across the sample as a whole and for some specific offences. The conclusion is inescapable: some black accused who were imprisoned before trial would not have been jailed if they had been white, and some white accused who were freed before trial would have been detained had they been black.

In light of these findings, the Commission makes 13 major recommendations to address differential treatment in the bail process. The Commission recommends training programs and operating guidelines based on the principle of restraint in exercising powers to detain. The police should be required to explain their decisions to detain people, and should receive explicit direction about preparing reports on accused persons for bail hearings. The *Crown Policy Manual* should be amended to help crown attorneys address the problem, and education for judges should emphasize avoidance of discriminatory assumptions and practices. Persons in police custody should be assisted in preparing for bail hearings to ensure that they are not detained because the bail court lacks crucial information about them.

## Charge Management

Charge management is the complex administrative system for processing criminal charges outside trial courts. It includes decisions about laying and reviewing charges, diversion of cases away from court proceedings, plea negotiations and other resolutions before charges are tried, and criminal justice services for accused persons and victims. Discretion is the essence of charge management. Access to high-quality services is necessary to ensure that people do not experience the charge management system as discriminatory.

During the early stages of criminal proceedings, police, crown attorneys and defence counsel often made rapid decisions, based on limited information and hidden from public scrutiny. Racialized assumptions and stereotypes may influence these decisions in various ways, some quite subtle. Decision-makers engaged in their daily routines may not recognize any such bias unless they are constantly alert to the risk.

Commission research disclosed widespread perceptions and many experiences of racial discrimination in police charging. A Commission study comparing outcomes of crown attorney decisions to proceed summarily or by indictment indicates small but statistically significant differences favouring white accused.

Inadequate access and low participation rates of racialized people in diversion programs are serious concerns. Some defence and duty counsel say these problems reflect arbitrary guidelines and unwillingness by crown attorneys to divert charges. Others blame the police for failing to tell eligible accused persons from racialized communities how to apply for diversion programs.

Racialized Ontarians have serious concerns about access to legal aid services. Services need to be expanded and publicized so that all Ontarians know about the legal aid system and understand their rights to apply for assistance.



Deep distrust of plea negotiations was among the most recurrent themes of the Commission's public consultations. Three aspects of this system are of particular concern. First, many unrepresented accused who may be offered a resolution in return for a guilty plea have little understanding of the case against them or how the evidence may affect the resolution proposal. Second, represented accused persons are generally excluded from discussions about resolving the charges without a contested trial, which creates suspicion about the agreements that lawyers present to their clients. Third, even after apparently accepting an agreement, many accused persons from racialized communities do not understand its implications.

The dominant issue of systemic racism raised by victims concerned mandatory charging policies in family violence cases. These policies are intended to reduce or eliminate police discretion to handle family violence informally and crown attorney discretion to withdraw charges or otherwise abandon prosecutions. They require charges to be laid and prosecutions to proceed even against the wishes of the victim.

There are two conflicting views about whether these policies protect women from racialized communities. One is that mandatory charging may be driving family abuse underground. Women who require protection but are unwilling to pursue criminal prosecution may not call for police protection from violence. The second is that directives to charge and prosecute are still not treated as mandatory by the police and crown attorneys when the victim is from a racialized community.

The Commission makes 17 major recommendations to structure the exercise of discretion and improve the charge management process. They include alternatives to police charging, expanding the scope of diversion programs, reforms to legal aid services, greater openness in resolution discussions, more flexibility in the prosecution of violent offences within families, and expansion of services for victim/witnesses.

## **Court Dynamics**

Many Ontarians perceive courts as unfairly biased against black or other racialized people. Toleration of practices that may contribute to such perceptions is a significant problem because Ontario legal tradition has long held that public confidence is fundamental to an effective criminal justice system. Nowhere is this confidence more important than in the courts, where the system's commitment to equality is most visible.

Commission studies indicate that some judges, justices of the peace and lawyers frequently refer in open court to the foreign origins or ethnic backgrounds of the accused, and sometimes also of victims or other witnesses. Some references were obviously intended to be benign, and in a few instances were linked to a legally relevant issue. More often, it was hard to discern any legitimate purpose; occasionally, foreignness was explicitly mentioned as a reason for a harsh decision about an accused person. The tendency for some judicial officers and lawyers to act as if a person's origin matters to the criminal justice system results in a sense of

exclusion among members of racialized communities and lack of confidence that the system treats everyone equally.

Communication barriers also cause black and other racialized participants in court proceedings to feel excluded. Under-representation of black and other racialized persons among jurors, judges and lawyers creates a sense of exclusion by conveying an image of the criminal justice system as a white institution.

The Commission makes 12 major recommendations to modify courtroom practices and dynamics that contribute to the appearance of racial injustice. These include procedures to restrict references to race, foreign origins or immigration status; reforms to complaints mechanisms; improvements to in-court interpretation services; and measures to ensure more representative juries.

### **Imprisonment After Conviction**

Sentencing is highly discretionary, with considerable scope for disparate outcomes. Differences in how the facts of a case come before judges, how judges view those facts, the goals and principles of sentencing and the role of courts in passing sentence may all contribute to disparities.

Racialized judgments and assumptions may also contribute to differential sentencing. They may directly influence the decisions of sentencing judges, or may be transmitted from decisions made at earlier stages of the criminal justice process.

A major study of imprisonment decisions for the same offences indicates that white persons found guilty were less likely than black persons to be sentenced to prison. White people were sentenced more leniently than black people found guilty, even though they were more likely to have a criminal record and to have a more serious record. The differential was most pronounced among those convicted of a drug offence. Within this sub-sample, 55% of black but only 36% of white convicted persons were sentenced to prison.

Detailed analysis revealed no significant differences in the incidents that led to the charges. Employment status and differences in criminal justice variables such as imprisonment before trial accounted for some of the racial inequality in incarceration rates. But a significant (though small) differential in incarceration rates remains, which is not due to gravity of charge, record, plea, crown election, pre-trial detention, unemployment or other social factor. The most likely explanation for this differential is racial discrimination at sentencing.

The average prison terms of black prisoners in this study were significantly shorter than those of white prisoners. This is consistent with differential incarceration rates producing imprisonment of convicted black persons whose offences and records would not have led to imprisonment had they been white. Another reason may be that because black accused are more likely to have been imprisoned before their



trials, they are more likely than white accused to receive discretionary “credit” for their pre-trial detention.

The Commission makes six major recommendations to address differential outcomes in sentencing. These include a call for restraint in the use of prison sentences, education for judges on the practical implications of imprisonment, providing more information on programs for serving sentence in the community, and reforms giving crown attorneys more guidance on sentence submissions.

### ***Racism Behind Bars Revisited***

The treatment of black and other racialized prisoners was the subject of the Commission’s Interim Report, *Racism Behind Bars*. This report showed that racism may operate as an indirect means of controlling prisoners and made 10 major recommendations to reduce overt and systemic racism in Ontario prisons.

Racialized judgments and assumptions may also influence direct mechanisms of control in prisons, such as the discretion of authorities to impose punishments, and to limit access to benefits, such as discretionary release programs.

An exploratory Commission study indicates racial differences exist in the application of institutional discipline. The data suggest trends indicating over-representation of black men, women and male youths among prisoners charged with misconducts. They also indicate that black prisoners were more likely than white prisoners to be charged with the types of misconducts over which correctional officers exercise greater subjective judgment. Black prisoners were less likely than white prisoners to be disciplined when the discretionary powers of correctional officers are limited by the need to show objective proof.

Discretionary release programs, such as temporary absence and parole, allow convicted prisoners to begin supervised reintegration into the wider community while serving sentence. Exploratory studies indicate that prisoners from racialized and linguistic minority communities are more likely to obtain equal access to these programs if institutions adopt a proactive “case management” model rather than a reactive, ad hoc approach.

The Commission makes seven major recommendations to supplement those in the Interim Report. These include measures to enhance openness and public accountability of prison practices, review of the discipline process to foster greater restraint and consistency in their application, and establishment of a case management system to advise and counsel every prisoner about available prison services and programs.

## Community Policing

Community policing is based on a philosophy of partnership between the police and the community, emphasizing peacekeeping, problem-solving and crime prevention. Many Ontario police services have recently adopted policies that reflect this philosophy. However, members of black and other racialized communities, particularly women and youths, feel excluded from co-operative partnerships with the police and fear that racial equality is not on the community policing agenda.

Perceptions that the police discriminate against black and other racialized people are widespread. A Commission survey shows that 74% of black, 54% of Chinese and 47% of white Metropolitan Toronto residents believe that the police do not treat black people the same as white people. About nine in ten of those who perceive differential treatment believe the police treat black people worse than white people, and more than seven in ten think it occurs about half the time or more.

Perceptions of discrimination against Chinese people are less common but still significant. In Metropolitan Toronto, 48% of black, 42% of Chinese and 24% of white residents think the police do not treat Chinese people the same as white people. Eight in ten of those who perceive differential treatment believe the police treat Chinese people worse than white people, and more than half think such differential treatment occurs about half the time or more.

How the police exercise their discretion to stop and question people contributes significantly to lack of confidence in equal treatment. Black Metro residents (28%) are much more likely than white (18%) or Chinese residents (15%) to report having been stopped by the police in the previous two years. Black residents (17%) are also more likely than white (8%) or Chinese (5%) residents to report multiple stops in the previous two years.

Black men are particularly vulnerable to being stopped by the police. About 43% of black male residents, but only 25% of white and 19% of Chinese male residents report being stopped by the police in the previous two years. Significantly more black men (29%) than white (12%) or Chinese (7%) report two or more police stops in the previous two years.

The Commission makes nine major recommendations designed to improve the governance and delivery of community policing in Ontario. These include local community committees to establish policing objectives that reflect community needs, action plans to secure equality in policing, guidelines for the exercise of police discretion to stop and question people, and enhancing the complaints system to promote systemic monitoring of police practices.



## **Systemic Responses To Police Shootings**

Since 1978, 16 black civilians have been shot – 10 fatally – by on-duty police officers in Ontario. The number of shootings and their circumstances have convinced many black Ontarians that they are disproportionately vulnerable to police violence. These concerns have spurred strong opinions about how the criminal justice system should respond to police shootings of black and other racialized people. One key demand is that any death or serious injury caused by the police be closely scrutinized by an open and fair process designed to determine if the use of force was justified. A crucial element of such a process is that it should explicitly examine the contribution, if any, of systemic racism to the death or injury.

The criminal trial process deals only with strictly circumscribed issues in a strictly circumscribed manner. Thus expectations that the criminal trials will provide a forum for examination of systemic racism are unrealistic. Nevertheless, criminal prosecutions should continue to be invoked to enhance accountability for improper use of force.

Unlike a criminal trial, a coroner's inquest has a broader capacity to canvass the role of systemic racism in police killings of black civilians. The Commission recommends that legally trained persons serve as coroners for cases involving police shootings and that these coroners rely exclusively on independent investigators and special crown attorneys. The Commission also recommends that the Ontario Civilian Commission on Police Services be provided with adequate resources to investigate systemic racism in police shooting cases.

## **An Equality Strategy for Justice**

Specific reforms need the support of a framework for securing racial equality in the administration of justice. This framework has four key elements: anti-racism training of justice personnel; employment of racialized persons in the administration of justice; participation of racialized persons in the development of justice policies; and monitoring of practices for evidence of racial inequality. The Commission makes five broad recommendations to achieve these goals.

## **Looking Forward**

The elimination of systemic racism from Ontario's criminal justice system requires collective action from all of its members. Above all an aggressive commitment is needed to secure racial equality. This will require integrating principles of inclusion, responsiveness, and accountability into all aspects of the criminal justice system, together with an overriding commitment to restraint when invoking judicial sanctions. Only by working in partnership with the community can an accountable system reduce the risk of inadvertent acceptance of racial inequality.



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# Chapter 1

## Introduction

The Commission on Systemic Racism in the Ontario Criminal Justice System was established by the Government of Ontario, in October 1992, to inquire into and make recommendations about the extent to which criminal justice practices, procedures and policies reflect systemic racism. We were directed to concentrate on urban centres in Ontario, to “utilize anti-black racism as a focal point for ... analysis,” to recognize “the various experiences and vulnerabilities of all racial minority communities, including racial minority women” and to “pay particular attention to the impact of systemic racism on racial minority youth.”<sup>a</sup>

As required by the Terms of Reference, the Commission prepared an interim report, *Racism Behind Bars*, released in February, 1994, which dealt with some aspects of the treatment of racial minority adults and youths in Ontario prisons. Other terms direct the Commission to investigate: the exercise of discretion at important decision-making points, community policing policies and their implementation, systemic responses to allegedly criminal conduct by justice officials in relation to racial minority victims, preventing systemic racism through employment practices, policy-making and participation of racial minorities in reform processes, and access to justice services by racial minorities. This Report presents our findings and recommendations.

The appointment of the Commission was recommended by Stephen Lewis in his June 1992 report to the Premier of Ontario, which was a response to civil disturbances in Metropolitan Toronto during May 1992. His report on experiences of racism in this province reiterated what black and other racial minority Ontarians have been saying for many years.<sup>b</sup> They believe the criminal justice system treats them worse than white people.

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<sup>a</sup> See Appendix A.

<sup>b</sup> A 1983 federal government study concluded that perceptions of unfair treatment in the criminal justice system were widespread among visible minority Canadians. It stated, “Currently, one of the results of the latent and overt racism in Canada is a distrust on the part of visible minorities regarding the legal apparatus. Police, lawyers, judges and correctional staff are felt to be antagonistic towards visible minorities.” Canada, Minister of State Multiculturalism, *Race Relations and the Law* (Ottawa: Minister of Supply and Services Canada, 1983), p. 29.



## 2 Introduction

Over the past two decades, a lack of confidence in the Ontario criminal justice system has been articulated particularly strongly by members of black communities. Fears have been aroused by several police killings and woundings of black persons since 1978, and sustained by the apparent inability of the system to examine how far racism contributed to these tragedies. A sense of injustice has been intensified by the lack of any systemic response to repeated experiences of arbitrary and humiliating encounters with the police. Feelings of exclusion from the system have been reinforced by under-representation of black and other racial minority communities among justice officials. There are strongly held perceptions that black and other racial minority people are often unfairly charged, unjustly denied bail, unnecessarily prosecuted, wrongly convicted, harshly sentenced and mistreated in prisons.

In addition to expressing their fears and concerns, black Ontarians have worked for change. They have organized with members of other racial minority communities and social justice groups to build community pressure for reforms, especially to policing. These efforts have led to several major inquiries into police practices, the most recent of which have focused on improving police relationships with racial minority communities.<sup>1</sup> Until the establishment of this Commission, however, no public inquiry has investigated concerns about systemic racism throughout the criminal justice system in Ontario.

Similar developments have occurred in other jurisdictions, where an initial focus on police treatment of racial minority or indigenous peoples has gradually expanded to encompass practices in other parts of the complex criminal justice system. Canadian examples include the Donald Marshall Inquiry (Nova Scotia),<sup>2</sup> the Cawsey Inquiry (Alberta)<sup>3</sup> and the Aboriginal Justice Inquiry (Manitoba).<sup>4</sup> Internationally, the New Zealand government has investigated "institutional racism" in the criminal justice system in relation to Maori people<sup>5</sup> and government bodies in the United Kingdom have sponsored research into the treatment of ethnic minorities in its courts and prisons.<sup>6</sup> Over the last ten years, courts across the United States have established commissions to study racial and ethnic bias in their practices.<sup>7</sup>

A common feature of these inquiries is an emphasis on "systemic" or "institutional" racism as opposed to individual or overt racism. They have generally assumed that the vast majority of professionals in the criminal justice system under examination do not consciously intend to treat racial minority people worse than white people. Nevertheless they have recognized that even a criminal justice system staffed with well-intentioned professionals may operate in subtle and unfair ways that have adverse impacts on racial minority and indigenous peoples. These inquiries have therefore attempted to identify discriminatory practices with the object of eliminating them.

This Report takes the same approach. The Commission assumed that persons with explicitly hostile attitudes towards racial minority people would constitute no more

than a tiny minority of professionals within the criminal justice system. Any attempt to investigate them would not only fall outside our mandate, but also would fail to identify the underlying reasons why members of racial minority communities report lack of confidence in the administration of criminal justice.

As directed by the Terms of Reference we recognized that “throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society.” In so far as such patterns and practices cause racial minority people to experience worse treatment than white people a system may be said to reflect systemic racism. Thus the Commission’s task involves the identification of such patterns and practices and the development of recommendations to eliminate them.

Equality is a fundamental right in Canada, guaranteed by the constitution and protected by federal and provincial human rights codes. The *Canadian Charter of Rights and Freedoms* states that –

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race ....<sup>8</sup>

The *Ontario Human Rights Code* declares that –

Every person has a right to equal treatment ... without discrimination because of race....<sup>9</sup>

The right to equality places two key demands on the criminal justice system. First, it must not perpetuate bias against members of groups that “have experienced arbitrary exclusions or burdens based not on their actual individual capacities, but on stereotypical characteristics ascribed to them because they are attributed to the group of which the individuals are a member.”<sup>10</sup> Second, equality requires the criminal justice system to adapt to diversity within the community it serves. A system that provides only uniform treatment, in effect, treats people unequally by ignoring the needs of those who do not fit into its mould.

A system that claims equality as a fundamental value lacks credibility if the public is not convinced that the system is committed to achieving it. In democratic societies, justice systems depend heavily on public confidence that they demonstrate and affirm important social values. While lack of credibility does not prevent criminal sanctions from being administered, it may cause them to be perceived as no more than oppression. Identifying and responding to such perceptions should therefore be among the highest priorities of the criminal justice system.

The Commission consulted extensively, as required by our mandate. We spoke with representatives of every part of the criminal justice system and community



## 4 Introduction

organizations that deal with justice issues. We held focus groups and structured interviews on specific areas of concern with policy-makers, lawyers, justices of the peace, police officers, members of the private security industry, interpreters, community members, prisoners and correctional staff. We also conducted public hearings and invited submissions from across the province. These consultations were supplemented and enhanced by large-scale surveys of crown attorneys, defence counsel and judges, and smaller surveys of other representatives of the justice system. Residents of Metropolitan Toronto, Ontario's largest and most diverse city, were also surveyed.

The Commission conducted research to determine whether the criminal justice system produced different results for white and racial minority people. Our initial studies, such as the analysis of prison admissions, attempted to determine whether evidence consistent with differential treatment exists. Subsequent empirical studies, such as the major studies of bail and sentencing, made detailed comparisons of the exercise of discretion affecting black and white persons charged with the same offences. Additional research included systematic analysis of files, review of laws, policies and procedures, and research of Canadian and international literature related to the treatment of racial minorities in criminal justice systems.

This Report is divided into three parts. The first four chapters, "Setting the Scene," introduce the key issues that dominated the Commission's inquiry. We make no recommendations in this part, but simply present basic findings. Chapter 2 focuses on perceptions of racial inequality in the criminal justice system. It documents findings about the extent to which black, white and Chinese residents of Metropolitan Toronto believe judges treat people unequally. It also presents the responses from surveys of defence counsel, crown attorneys, general and provincial division judges about systemic racism in the administration of justice.

Chapter 3 attempts to establish a common understanding of systemic racism. The chapter spells out the elements of systemic racism, explores its historic roots and discusses different ways of recognizing it in social institutions.

Chapter 4 examines adult and youth admissions to Ontario prisons. Imprisonment, the harshest treatment that our criminal justice system imposes, is the major focus of our research into the exercise of discretion. The chapter documents white and racial minority representation in prison admissions and identifies recent and disturbing trends.

The second part of the Report, "Examining Practices," (chapters 5 to 9), analyzes existing practices at different stages of the process and presents specific recommendations. Chapter 5 concerns imprisonment before trial and the bail system. It presents a major Commission study comparing pre-trial detention for white and black persons charged with the same offences and findings from several smaller studies.



Chapter 6 deals with “Charge Management,” by which we mean the complex system of decision-making about laying and reviewing charges, diversion of charges away from court proceedings, “plea-bargaining,” and criminal justice services for accused persons and victim/witnesses. Chapter 7 reports on practices that cause people to perceive or experience racial injustice in Ontario criminal courts. Chapter 8 examines sentencing discretion and documents findings from a major study of sentences imposed on white and black persons charged with the same offences. Chapter 9 returns to the theme of the Commission’s *Interim Report*, the treatment of racial minority prisoners.

The third part of this Report, “Moving Forward,” focuses on broadly based, systemic policies and programs to address racial inequality in order to enhance confidence in the criminal justice system. Chapter 10 considers how a community policing system might respond effectively to public concerns about systemic racism in policing. Chapter 11 addresses community concerns about a series of police shootings of black civilians in recent years. Chapter 12 makes recommendations that apply to various phases of the administration of criminal justice.

The concluding chapter articulates a direction for the future. It sets out the four key principles of action that underpin equality in the criminal justice system: restraint in the use of the criminal law, inclusiveness, responsiveness and accountability.

## Endnotes

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- <sup>8.</sup> *Canadian Charter of Rights and Freedoms*, s. 15(1).
- <sup>9.</sup> R.S.O. 1990, c.H-19, s. (1).
- <sup>10.</sup> *R. v. C.M.* (1995) 98 C.C.C.(3d) 481 (Ont. C.A.) at 485 per Abella J.A.





# **PART I**

## **Setting the Scene**

**Chapter 2    Racism in Justice: Perceptions**

**Chapter 3    Racism in Justice: Understanding  
Systemic Racism**

**Chapter 4    Racism in Justice: Prison Admissions**





## Chapter 2

# Racism in Justice: Perceptions

*Our justice system can survive, only so long as it continues to have the confidence of the public it is designed to serve .... That confidence, however, must be earned and not assumed ...<sup>1</sup>*

*– The Honourable Charles L. Dubin, Chief Justice of Ontario*

Do Ontario residents think there is racism in the criminal justice system? The Commission conducted consultations and surveys to answer this question. At the most general level, we asked Ontarians to write or call us, and to share their views at public forums held in urban centres throughout the province. We also hosted or sponsored a large number of consultations with members of the public, lawyers, police officers, justices of the peace, probation officers, government policy-makers, prison workers and managers, members of Ontario's board of parole, academic experts, equity workers and representatives of community organizations involved in the criminal justice system.

These consultations produced rich and vital information about people's beliefs and experiences. They alerted us to the complexities of our task, highlighted important differences in perspectives and gave us a better understanding of problems and possible solutions.

At the same time we realized that these methods, when used to research inequality and discrimination, are often controversial. They may be criticized as too selective or biased. They are said to result in over-representation of the views of those most interested in the issues and under-representation of what the average person thinks. Critics frequently dismiss their findings as anecdotal and unscientific. We do not accept this dismissal of personal testimony, but we do recognize that this type of research has limits.<sup>2</sup>

To avoid fruitless debates about how many people really think racism is a problem in Ontario's criminal justice system, and because we recognize that it is useful to look at this question from different research perspectives, we conducted and commissioned several opinion surveys. Each deals with several themes, resulting in data that will appear in subsequent chapters. Here we present findings about what

people inside and outside the justice system think generally about racial and other forms of discrimination in Ontario's criminal justice system.

First, we describe the survey results of Metro Toronto residents' views on whether judges treat people equally. We focused on judges because of their special role in criminal justice. To many people, judges *are* the criminal justice system. They are taken to epitomize its values and to stand for the system's commitments to integrity and impartiality. People have high expectations of judges and want to think well of them:

The black accused sees the judge as standing between him and the oppressive power of the state. He ... expects the judge to be neutral and impartial .... [and] expects the trial judge to exercise discretion without fear or prejudice.<sup>3</sup>

Second, we present findings from the Commission's surveys of Ontario's trial judges and criminal lawyers. We asked these legal professionals about specific concerns that people had drawn to our attention, and also encouraged general comment on the issues raised by our inquiry.

After briefly describing the roles of the different legal professionals, we report the perceptions by those surveyed of differential treatment and systemic discrimination, illustrated by selections from their direct comments. In presenting these comments, our goals are to represent fairly what we were told and to provide opportunities for lawyers and judges to speak directly to those they may see as their critics, as well as to one another. Though we organize the comments under themes, the Commission makes no attempt, at this stage, to analyze individual remarks. Later in the Report we return to some of these perceptions in discussing specific aspects of the administration of criminal justice.

## Perceptions of racial inequality

In essence, our surveys of the general population and legal professionals show –

- widespread perceptions among black, Chinese and white Torontonians that judges do not treat people equally.
- widespread perceptions among black, Chinese and white Torontonians that judges discriminate on the basis of race.
- much more widespread perceptions among black than among white or Chinese Torontonians that judges discriminate on a variety of grounds, and specifically because of race.
- substantial variation among justice professionals in their perceptions of racial discrimination in Ontario's courts.
- strong resistance by some judges and lawyers to any suggestion of racial discrimination in Ontario's criminal courts.



## *Metro Toronto residents' perceptions*

To find out what members of the general public think about discrimination in Ontario's justice system, the Commission asked an independent research body, York University's Institute for Social Research, to survey adults from three significant groups in Metro Toronto. In addition to perceptions, the survey asked respondents about their experiences with some aspects of the criminal justice system. Reference will be made to these in subsequent chapters. The survey was carried out by telephone interviews, in English or Chinese, with randomly selected individuals who identified themselves as black, Chinese or white.\*

The survey focuses on Metro Toronto rather than all of Ontario because of the high concentration of racial minority people living there. Canadian census estimates for 1991 indicate that racial minority communities now comprise 29% of the population of Metro Toronto, as compared to 14% of the population of Ontario as a whole. Moreover, over half of Ontario's black (54%) and Chinese (61%) populations live within Metro Toronto.<sup>4</sup>

Black residents were selected because our Terms of Reference direct the Commission to focus on anti-black racism and because black people are the largest racial minority group in Ontario. Chinese residents were selected because they make up the second-largest racial minority group in Ontario. White residents were selected to provide a comparison of their opinions and experiences with those of members of racial minority groups.

Ideally, the Commission would have surveyed opinion among all racial minority populations in Toronto, but resource limitations prevented us from pursuing a more comprehensive project. In order to make statistically accurate generalizations, we needed a minimum of 400 respondents from each group surveyed.<sup>†</sup> Confronted with the cost estimates of finding a sufficient number of respondents from smaller racial minority communities, the Commission decided to restrict our study to three groups.

Interviews were completed with 417 black, 405 Chinese and 435 white residents (all self-identified), for a total of 1,257 people. General demographic characteristics of people in the sample – such as income, age and education – are consistent with the most recent census data, which indicates that the sample is representative of black, Chinese and white Metro Toronto residents. Since the survey randomly sampled more than 400 people in each of the selected racial groups, the findings or estimates for each group are said to be accurate, plus or minus five percent, 95 times in 100.

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\* Random digit dialling was used to select the households, so that all members of the black, Chinese and white communities in Metro Toronto had an equal chance of being chosen for interview.

† Using data from the 1991 Canadian census, we estimated that it would take approximately 5,700 random telephone calls to find 400 black people, and 5,000 calls to find 400 Chinese people. Locating the same number of South Asian people would have required 6,700 calls, and identifying 400 Vietnamese respondents would have required 50,000 calls.



In this chapter we present findings about perceptions of unequal treatment by judges. This aspect of the survey addresses three general questions:

- How extensive are perceptions of unequal treatment in Ontario's criminal justice system?
- Do these perceptions vary amongst racial minority and white communities?
- Are some racial minority communities perceived as more likely to receive discriminatory treatment than others?

Although racism is the key subject of this Report, our Terms of Reference also direct us to pay special attention to women and youth. Therefore, we also asked about perceptions of differential treatment by judges because of age and gender. In addition, because many judges and lawyers had suggested that income is the real explanation for what might appear to be racial discrimination in the criminal justice system, we asked about perceptions of differential treatment due to income.

### **What Metro Toronto residents think about judges**

We asked the residents surveyed if they think, in general, that judges treat people in the different comparison groups the same. Those who responded negatively were then asked if they think one group is treated better or worse than another, and how frequently they think differential treatment occurs. *As a whole, our findings show that a large proportion of the Metro Toronto population think Ontario's criminal court judges do not treat everyone the same.* For each comparison, at least one-quarter of the people in the sample perceive differential treatment.

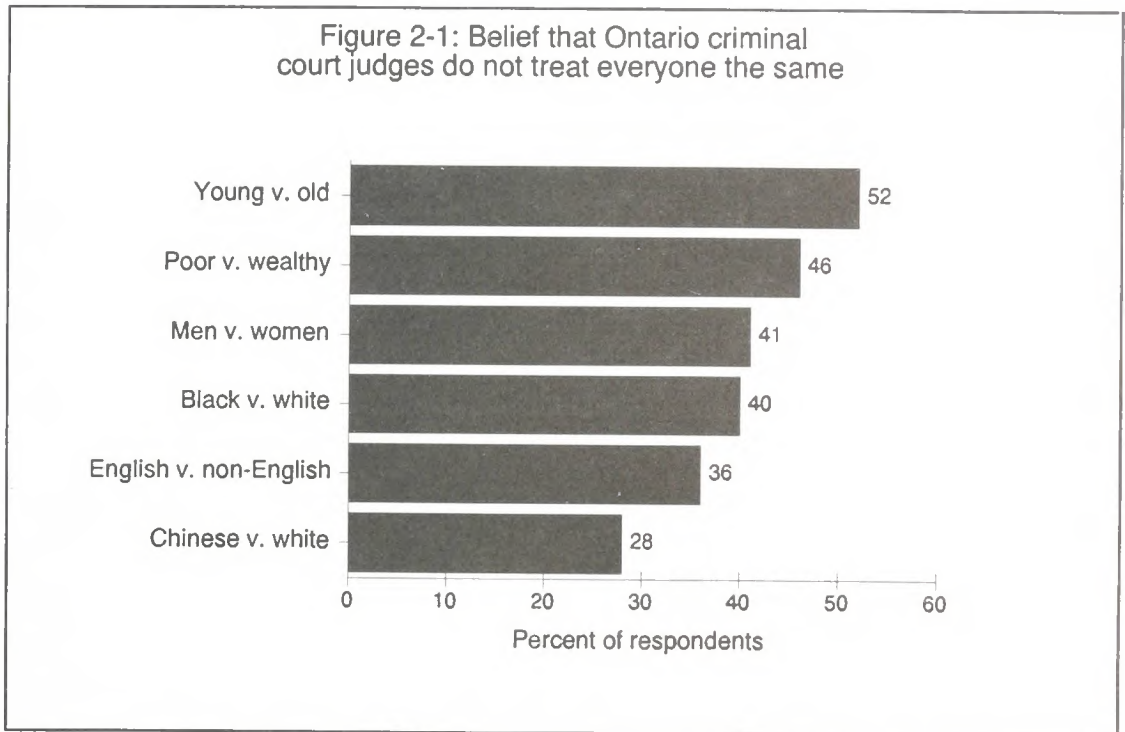
#### **People who think judges do not treat people equally believe –**

- Young people are treated worse than older people.
- Poor people are treated worse than wealthy people.
- Men are treated worse than women.
- Black people are treated worse than white people.
- Chinese people are treated worse than white people.
- People who do not speak English are treated worse than people who do speak English.

#### **When comparing judges' treatment of black people and white people –**

- More than five in ten (52%) black respondents, three in ten (31%) Chinese respondents and more than three in ten (36%) white respondents believe judges do not treat black people the same as white people.
- Among those in each group who perceive differential treatment of black and white people, at least eight in ten – 87% of black, 85% of Chinese and 80% of

white respondents – believe judges treat black people worse or much worse than white people.



**When those who believe judges do not treat white and black people the same were asked how frequently they think differential treatment occurs –**

- 58% of black, 36% of Chinese and 43% of white respondents think judges “often” treat black people differently than white people.
- Another 30% of black, 25% of Chinese and 28% of white respondents think differential treatment of white and black people occurs “about half the time.”
- 10% of black, 31% of Chinese and 26% of white respondents think differential treatment of white and black people is rare (occurring “once in a while” or “almost never”).

**When comparing judges’ treatment of Chinese people and white people –**

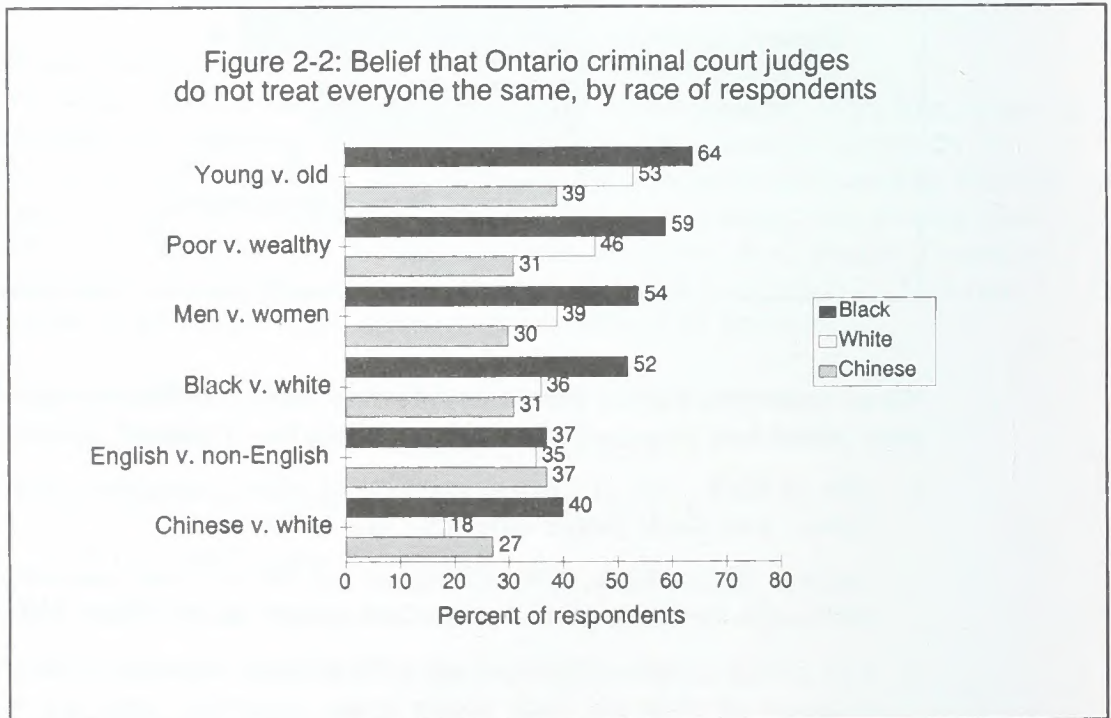
- Four in ten (40%) black respondents, close to three in ten (27%) Chinese respondents and about two in ten (18%) white respondents believe judges do not treat Chinese people the same as white people.
- Among those in each group who perceive differential treatment of Chinese and white people, eight in ten – 81% of black, 80% of Chinese and 79% of white



respondents – believe judges treat Chinese people worse or much worse than white people.

**When those who believe judges do not treat white and Chinese people the same were asked how frequently they think differential treatment occurs –**

- 35% of black, 29% of Chinese and 28% of white respondents think judges “often” treat Chinese people differently than white people.
- Another 39% of black, 31% of Chinese and 37% of white respondents think differential treatment of white and Chinese people occurs “about half the time.”
- 23% of black, 35% of Chinese and 33% of white respondents think differential treatment of white and Chinese people is rare (occurring “once in a while” or “almost never”).



Of the three groups in our sample, black residents are consistently more likely to perceive differential treatment than either white or Chinese residents. As Figure 2-2 indicates, black residents are more likely than white or Chinese residents to perceive discrimination because of age, sex, wealth and language.

Black residents are also more likely than white or Chinese residents to think discrimination occurs frequently and results in a substantial difference in treatment.



For example, 59% of black respondents, compared with 31% of Chinese and 46% of white respondents, think judges do not treat poor people the same as wealthy people. Of those who think judges do not treat wealthy and poor people the same, 51% of black respondents, compared with 26% of Chinese and 30% of white respondents, think discrimination occurs "often"; 30% of black respondents but only 7% of Chinese and 13% of white respondents said judges treat poor people "much worse" than rich people.

### Summary of the Metro Toronto residents survey

What should we make of these perceptions of inequality in the criminal justice system? Generally, the survey shows that a significant proportion of Metro Toronto residents do not believe the justice system in practice treats everyone equally. Beliefs that judges discriminate on the basis of race are strongest among black respondents, but significant proportions of the city's white and Chinese communities share this view.

Second, the survey shows that respondents of all three groups are more likely to perceive discrimination against black people than against Chinese people. This finding suggests people perceive a hierarchy of discrimination.\*

Third, the extent to which black Metro residents perceive bias based on age, wealth, gender and language – as well as race – indicates a widespread lack of confidence in the fairness of the criminal justice system within this community. These data clearly show that a majority of black residents perceive racial bias in the criminal justice system,† and many members of Metro Toronto's black communities are also convinced that other forms of bias exist.

Since these findings deal with perceptions, they do not measure racial differences in the daily practices of the criminal justice system and their consequences. But findings of opinion are no less important than data about differential outcomes. What people think about the criminal justice system matters because the justice system, more than many other institutions, depends on the confidence of the community. This evidence, that many people lack confidence in the justice system, is a reason for grave concern and a call for action.

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\* This hierarchy is similar to the hierarchy of prejudice documented by many researchers. Studies in both Canada and the United States show that white people generally view black people as less "acceptable" than members of other ethnic groups. See, for example, Jeffrey G. Reitz, *The Illusion of Difference: Realities of Ethnicity in Canada and the United States* (Toronto: C.D Howe Institute, 1994).

† The study confirms findings reported in Stephen Lewis' report to the Premier of Ontario (June 9, 1992), p.3, and implied in *The Report of the Race Relations and Policing Task Force*, Clare Lewis, chair (1989), pp. 12-14.

## *Judges' and lawyers' perceptions*

We separately surveyed crown attorneys, defence counsel and judges concerning several issues, producing data that we present throughout the report. Here we focus on what judges and lawyers think about racial discrimination in the criminal justice system.

Judges and lawyers have strong personal and professional interests in the Commission's work. As actors in the system, they may feel that any problems we find reflect on them personally. Few people enjoy public criticism of an institution they identify with, however constructively such criticism is intended. Criticism that centres on racism is particularly hard to accept. Atrocities such as the European enslavement of African people, the Holocaust against European Jews, South Africa's former policy of apartheid, the destruction of Aboriginal societies throughout the world, and activities of groups such as the Ku Klux Klan commonly come to mind when people think of racism.

*The Commission's inquiry focuses on different expressions of racism – those that may be unintended and that are implicit in practices rather than explicit in motives (see Chapter 3). Even so, it would not be surprising if judges and lawyers find it hard to accept that the criminal justice system may reflect systemic racism. In a British context, Mr. Justice Henry Brooke made the point effectively when he said,*

... [F]air-minded people are so very easily offended at the very slightest suggestion that they have behaved in a way which other equally fair-minded people might describe as racist.<sup>5</sup>

In addition, judges and lawyers have a strong interest in maintaining public confidence in the system. That people believe the justice system to be fair and impartial is essential to its integrity. As the recent report of the Martin Committee notes, "without integrity, no system of justice, no matter how ingeniously designed and lavishly funded, can function."<sup>6</sup> Perceptions of discrimination and other forms of unfairness, no less than racist practices – however unintended – are simply incompatible with this notion of integrity. As a senior police official told the Commission,

"While the justice system is wrapped up in procedure, substantive law and a valued history of independence, the only true test of its integrity is its *credibility within the community it serves.*" (emphasis in original)

Judges and lawyers also have a particular interest in the Commission's work because they will be held responsible for many of the problems we have found, and will be expected to implement changes that may flow from our recommendations. Finally, as people whose professional lives are spent in Ontario's courts, judges and lawyers are well placed to identify some types of subtle practices that may be less visible to those outside the system. By encouraging them to respond to our questions frankly, privately and anonymously, we hoped to gain access to this rich source of information.



For all these reasons the Commission felt it was important to understand how judges and lawyers see the problems, to learn of any insights they might have about these issues, and to find out how open to change they are.

### What crown attorneys think

Crown attorneys are lawyers who act for the state in the criminal justice process. Through the Ministry of the Attorney General, the Province of Ontario employs more than 500 full-time crown attorneys and sometimes hires additional lawyers in private practice to do this work for a daily fee. Ontario's full-time and part-time crown attorneys deal with *Criminal Code* offences, while lawyers hired by the federal government are responsible for the prosecution of drug charges and other offences contained in federal laws apart from the *Criminal Code*.

As lawyers for the state, crown attorneys "are granted a broad and generous area of unfettered discretion,"<sup>7</sup> which they exercise within a framework of legal rules and Ministry policy. This discretion influences many aspects of the criminal prosecution process. Crown attorneys may, for example, screen charges to decide which should proceed to trial, seek to have an accused detained before trial or establish conditions for release, discuss with defence counsel the pleas, facts and sentences to be jointly presented in court, and suggest appropriate sentences for convicted persons.

When exercising their many discretionary powers, crown attorneys face complex and conflicting demands. As "effective advocates" for "the active denunciation of criminal wrongdoing,"<sup>8</sup> they must "prosecute vigorously those accused of crime"<sup>9</sup> and "discharge [their] duties with industry, skill and vigour."<sup>10</sup> By contrast, as "public officer[s] engaged in the administration of justice,"<sup>11</sup> their role "excludes any notion of winning and losing."<sup>12</sup> A crown attorney's duty "is not so much to obtain a conviction as to assist the judge and the jury in ensuring that the fullest possible justice is done. His [or her] conduct before the court must always be characterized by moderation and impartiality."<sup>13</sup> It is difficult – some have suggested almost impossible – for crown attorneys to fulfil both of these roles simultaneously.<sup>14</sup> Vigorous advocacy appears to conflict with impartiality. Though the expectations are stated clearly, the implications for practice are professionally challenging.

We asked crown attorneys if they think that, "in general, racial minorities are treated the same as white people" in Ontario's criminal court system.

- The vast majority – three in four (74%) – agree, or strongly agree, that the courts generally treat white and racial minority people the same.
- Only one in eight (13%) disagrees.

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\* Survey questionnaires were mailed to 483 provincial crown attorneys. After extracting one incomplete response, a sample size of 193 was left, a 40 percent response rate. Our Technical Volume contains further details and a copy of the questionnaire. See Appendix B.



We also asked crown attorneys about the extent of such discrimination.

- Most – three in five (61%) – think “discrimination exists, but only in a few areas and only with certain individuals.”
- A minority – about one in five (18%) – think “there is no discrimination against racial minorities in the Ontario criminal court system.”
- Fewer than one in ten (7%) think “discrimination against racial minorities is widespread, but subtle and hard to detect.”
- Only 1% think “discrimination against racial minorities is widespread and easy to observe.”

Many crown attorneys responded to our invitation to offer their personal comments on racism in the criminal justice system. As might be expected from the answers summarized above, most said that, in general, racism is not a problem in Ontario’s courts. These crown attorneys wrote about –

- **the good faith, education and professionalism of individuals who work for justice:**

“Duty and honour are two concepts I sincerely believe are not foreign to the performance of one’s function as a professional involved in our criminal justice system, whether you are a judge, counsel, support staff or police officer. Each of these positions are populated in the 1990s by the best-educated people ever. Therefore I find it hard to believe that while incidents of racism may occur ... they are anything more than rare.”

“My impression of the criminal justice system is that it is not systemically racist, based upon my understanding of the term. Neither is the justice system rife with racists. By and large, it would appear that most of the participants in the criminal justice system are individuals committed to the fair and impartial application of the criminal law.”

“Racism in the justice system is far less than in the general population. This is perhaps attributable to the fact that by and large the system is populated by intelligent and well-educated individuals. I am not aware of a single situation [in which] a minority accused was dealt with unfairly by the system simply because he/she was a member of that minority group.”

“While I think it is a given that most people in society and therefore in the criminal justice system have certain biases, I think that only in a fraction of those cases are those biases actually reflected in the treatment of individuals. In fact, I think most officers of the courts probably bend over backwards not to let any biases they may have negatively influence their conduct, and are conscious that it appear that justice is being done.”

“While some individuals in the criminal justice system no doubt harbour racist views to some extent, I have never seen an accused, witness or complainant

receive less courteous treatment or a less fair hearing solely because he or she is a member of a racial minority.”

“There are very few racists in the justice system. Most judges, crowns and defence lawyers work very hard to do a good job. The level of dedication is extraordinarily high [among] all involved. Mistakes are made, but for the most part all persons involved in the system are remarkably decent, caring people.”

- **the lack of opportunity for racism to influence key decisions in the treatment of accused persons:**

“Many plea negotiations take place without the crown being aware of the accused’s race or place of origin. Such issues are irrelevant. Crowns making these decisions will often never ... see the accused.”

“When decisions are made in the bail court, there is simply no time at all to consider anything other than the offence and the offender’s antecedents. The colour of a person’s skin is never a factor.”

“Prosecutorial decisions are almost exclusively based on ‘paper’ that reveals no racial make-up.”

- **the influence of factors other than race itself, particularly class or poverty, on the treatment of accused persons:**

“Criminal activity is strongly correlated to class, and visible minorities, particularly first-generation blacks, are largely poor in relation to the rest of the population. They are accordingly over-represented in the criminal courts. Before concluding that there is racism in the court system, it is very important to compare your minority group stat[istics] with a similarly situated white group in terms of all socio-economic data, family background and criminal antecedents.”

“Generally, persons of low socio-economic background have greater problems in the system than those of higher socio-economic background. People who have been in Canada longer, speak English better, have family, jobs [or] property are all treated better than those who do not. However, new Canadians with family and community supports and jobs are also well treated .... New immigrants who commit criminal offences are not well looked-upon. White and other long-term welfare recipients with [criminal] records are also not well treated. There is bias in the system. It is not always racially motivated.”

“While I do not have the benefit of statistical data, and my observation and views are based upon my own experience and information obtained from others, it would appear that racial minority accused are not discriminated against on the basis of race but because they are disadvantaged, as whites are, when it comes to issues like bail by the fact that they perhaps more frequently lack family support, strong community ties and stable employment. These disadvantages would appear not to be race-based, but rather a function of the length of time the accused has been resident in the community and his or her employability.”



“Race has rarely if ever been an issue in courtrooms .... The true difficulties our middle-class courts have are in dealing with or understanding poverty and non-Canadian cultures. The colour of skin is not an issue, or this misdefines the issue.”

Some crown attorneys who think there is no racism in the justice system expressed strong disagreement with the Commission’s mandate and work. They maintained that people who believe there is systemic racism in the criminal justice process –

- **do not understand the justice system:**

“The idea that there is widespread racism in the administration of justice is patently false. These ideas result from an ill-informed, politically correct minority who, I believe, have no experience in the criminal justice system.”

“Whining about supposed discrimination is a waste of time. The suggestion of discrimination is unfounded.”

- **are making “excuses”:**

“Since time immemorial, persons accused of crime have utilized whatever means necessary to divert attention from the charges they are facing, and in these days of ‘political correctness,’ bureaucrats have allowed, nay encouraged, the view of the forest to be artificially obscured by the trees.”

“The accusation of ‘racism’ is often used as the last refuge of the scoundrel.”

“It is far too easy in our society to cry ‘racism’ and not address the real reason for which one is in trouble with the law.”

- **are following a misguided or illegitimate political agenda:**

“You are creating racism by falsely accusing people of being racist. Racial minorities should receive training in Canadianism. You are creating expectations that people who come to Canada have a right to their own piece of their old country in Canada. This creates and perpetuates racism.”

“From what I have observed, I do not see that racism is as great a problem in the justice system as [do] the media and some individuals and self-serving interest groups.”

“Those who are the most vocal in the criticism of the judicial system are the ones most likely to ensure that what racism there is will continue and perhaps increase. These are the persons whose living and standing in the community are dependent on finding racism everywhere, for without this spotlight they are nothing.”

- **have so intimidated judges that the more serious problem today is discrimination against white persons:**



“In our jurisdiction there is ‘reverse’ discrimination ... A white person will get a jail sentence for an offence and a racial minority will not, because the court is afraid if the person is jailed the court will appear racist.”

Other crown attorneys, however, are convinced that racism is a genuine problem in the justice system. They talked about –

- **the subtlety of racism:**

“Overt examples of racism in the criminal justice system are rare. It is the subtle examples that are rampant.”

“With respect to the trial process itself, I have found that racist elements tend to be very subtle.”

“The only large group of racial minority clients we have here is [from] an Indian Reserve. The witnesses are not abused, but they are treated with condescension – they are on average less likely to be believed.”

“There are racist comments by police officers ... [but these are] not in my experience limited to race. Comments about women or gay people also come up ... The defence, crowns and court personnel are too aware to voice similar views, but give messages more subtly.”

- **the individuals and officials responsible for racism in the justice system:**

“Regional directors of crown attorneys set the tone for the office. Where they fail to establish that racism in whatever form (comments, behaviour, exercise of discretion) will not be tolerated, you see an increase in an atmosphere of intolerance.”

“Judicial conduct needs to be better scrutinized. Where judges or [justices of the peace] make inappropriate comments, etc., the matter should be dealt with. At present, although certain individuals are notorious, nothing is done by the system. By tolerating their behaviour it is condoned, continues and increases.”

“The legal profession and the criminal justice system take their lead from the judges, who rule the courtroom. At both the provincial and general division levels, but particularly the provincial division, the bench is saturated with elitist, racist and sexist individuals .... Accused persons, victims and witnesses are daily subjected to humiliation and degradation at the hands of such judges .... Until the courtroom becomes an impartial arena, no amount of education or infringement of crown discretion will address the existing racist and sexist biases within the system.”

“As a woman and a member of a religious minority ... I have experienced some very glaring examples of overt racism and sexism from judges .... But these individuals are the minority – most people are very aware of the special needs of minority persons and are not racist. In particular, I have found that the police

go out of their way to treat [minority] accused persons fairly in most cases. Most racist behaviour, unfortunately, stems from the bench.”

“It is my general impression that the alleged racist bias of police officers is in fact exaggerated. It is my general impression that the alleged racist bias of certain defence counsel is underrated. By far the most likely of all court ‘people’ to utter racist comments are a minority of vocal defence counsel. The Law Society should be sensitized to this problem.”

“I have heard defence counsel go on in an extremely racist fashion, and it disgusts me because these people are their clients.”

### What defence counsel think

Defence counsel are independent professionals who act for persons charged with criminal offences. Their main discretionary powers include negotiations with crown attorneys about pleas, facts and sentences; development of trial strategy; and gathering and presenting information about the accused that might influence sentencing.

In exercising these discretions, defence counsel are guided by the law and practice, clients’ wishes, and their professional obligations to serve the client and the court simultaneously. Their duty to the client is –

to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client’s case; and to endeavour to obtain for the client the benefit of every remedy and defence authorized by the law.<sup>15</sup>

As these words suggest, defence counsel are largely free, and expected, to advocate vigorously on behalf of their clients. But as lawyers, they are also “officers of the court concerned with the administration of justice.” In this role, the lawyer is said to have –

... an overriding duty to the court, to the standards of [the] profession and to the public, which may and often does conflict with [the] client’s wishes or with what the client thinks are his [or her] personal interests.<sup>16</sup>

We asked defence counsel if they think that, “in general, Black and other Racial minorities are treated the same as White people [in] the court system in Ontario.”\*

- Five in ten (50%) defence counsel agree that black and other racial minorities are treated the same as white people;
- Four in ten (40%) defence counsel disagree.

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\* We reached defence counsel through the Criminal Lawyers Association, a voluntary association of defence lawyers. At our request the Association labelled envelopes and mailed questionnaires to 800 lawyers on its membership list. Extracting five incomplete responses left a sample size of 343, a response rate of about 43 percent. See our Technical Volume for further details and a copy of the questionnaire.

This question, like many others, prompted different patterns of responses from lawyers with substantial racial minority clientele (40 percent or more of their clients) compared with those from lawyers with a smaller proportion of racial minority clients.

- Five in ten (52%) lawyers with larger racial minority clientele think that black and other racial minority people are not treated the same as white people, compared with three in ten (34%) defence counsel with smaller racial minority clientele.
- Four in ten (38%) lawyers with larger racial minority clientele think black and other racial minority people are treated the same as white people, compared with six in ten (56%) defence counsel with smaller racial minority clientele.

Like the crown attorneys who responded, many defence counsel used the survey as an opportunity to offer written comments. Drawing on their experience of the administration of criminal justice, some said they **do not see any racism in Ontario's courts:**

"I have never witnessed any racially motivated differences in how discretion is exercised. All have depended on the facts and passed [sic] records – not the individual."

"In 17 years of practice representing members of both the majority and ... minorities as you have defined them, I have never once seen any racially motivated exercise of discretion by either the crown's office or court personnel."

"My experience has been that accused persons regardless of the[ir] race, ethnic origin or background are treated fairly and equally by all in the administration of justice."

"Complaints of racial minorities that they have received discriminatory treatment, in my personal experience, have inevitably been the product of dissatisfaction with being caught and suffering the penalty – just another reason to use to cause the justice system to 'back off' their case a touch or completely ..."

"The courts today are sensitive to the needs of all accused and particularly to the perceptions the minorities have of their treatment. I ... see little evidence to indicate minorities are subjected to prejudice, bias or slurs of any kind. The system ought to be proud of this general appearance of fairness and respect for all who come before the courts."

"So far as judicial proceedings are concerned, I believe there is no evidence of systemic racism in the Ontario criminal justice system."

"This Commission is virtually a waste of time and money, as I perceive there to be no racism ethnically in the judicial process. The only obvious prejudice that exists is against white Anglo-Saxon males."



“My observation: you are investigating a non-existent problem. My prediction: you will recommend an elaborate set of measures to deal with the [non-existent] problem.”

Other lawyers clearly had different experiences with the administration of criminal justice. They talked about –

- **subtle biases against racial minority clients:**

“The system – from police through to crowns – has targeted minorities with a broad brush. More difficulty arises for defence counsel in presenting the ‘human being’ to them when the client is a member of a racial minority.”

“One never discusses racism but it is clear that issues such as credibility, guilt beyond a reasonable doubt, and innocent till proven guilty become unclear if your client is black or yellow. The problem is not only police- and crown-related.”

“The problem is not that judges are overtly discourteous to non-white participants. The problem is that they are less likely to believe them. Again the relevant factors are intangible: the empathy and identification factors are lacking.”

“Very little of the real racism is blatant. Racial minorities know they are treated unfairly. But the unfair treatment is not consistent throughout the province.”

- **the exercise of discretion:**

“The ubiquitous exercise of so many discretions – which permeate the system from arrest through incarceration – permit the free play of racial stereotyping and prejudice in so subtle a manner as to make it elusive .... Ontarians must be persuaded of the subtle forms of racism as opposed to thinking of racism as gross and exaggerated displays by extremists.”

“There is a bias with some judges against racial minorities when it comes to judicial interim release [bail]. They take that long look at the accused in the dock and, in the final analysis, it comes down to an [exercise] of discretion based on submissions and intuition. Too often, I feel, intuition is a cover for institutionalized discrimination. I have even heard judges give voice to that discrimination in a way which was supposed to be humorous.”

“Assumptions are made by police, crowns and judges that certain racial minorities are more likely to be guilty of certain categories of offences, and discretion is exercised or restricted accordingly.”

- **stereotyping of persons from racial and ethnic minority communities:**

“Comments often flow from crowns and police officers re various communities and stereotypes – e.g., Jamaicans, Portuguese.”

“Judges are more likely to stereotype minority accused in the questions, comments and findings of fact than to make overt comments, although they do that as well.”

- **racist conduct behind closed doors:**

“Pressure placed on defence counsel in back-room dealings provides cover for racist attitudes of the judiciary. If more were done in open court, either a judge would have less opportunity to give effect to the racism or it would become apparent on the record.”

“I am often appalled that judges, crowns, police officers and even defence counsel assume they are speaking to someone who agrees with their racist point of view.”

“Police attitudes are the worst. Many officers with racist attitudes have learned over the last few years to ‘conceal’ this unless among people they consider to share similar views. It’s very instructive to share a coffee with a few officers and to pretend to be ‘one of the boys’ and then listen to the racial invectives spewing forth. It’s harder to detect now, but the mindset has changed very little.”

- **the responsibilities of police officers, judges and to a lesser extent crown attorneys and defence counsel for racism in the criminal justice system:**

“In many cases I have had, I am sure the police would not have charged the person if the person was white. It seems to me that the police are more willing to resolve disputes (assaults, theft, threatening) [without] charges being laid if the person is white. I often think my clients should enter a guilty plea to being black, as that is really why they are in court. To me, it is the racism of the police in exercising their discretion which must be examined. Giving blacks criminal records seems to be the goal of too many police officers.”

“The biggest problem with racial discrimination in the criminal justice system lies in the original laying of the charge – i.e., the police. They seem to pride themselves on being experts about the ‘way of life’ of particular races and areas of the city. They typically do not use discretion in laying charges, particularly with Jamaicans, Afro-Americans and Portuguese.”

“Any racism that exists in the courts is, in my view, mostly related to the manner in which police investigate and arrest members of the community, the charges they lay and the police recommendations for the detention of the accused and/or bail conditions to be requested if accused is released. More and more racial minority accused advise counsel they have been hassled and at times abused for no reason, they have been searched illegally, [or] they have been

denied their rights to retain and instruct counsel without delay; and a sizeable number insist that the police have planted drugs on them. I realize that some allegations of maltreatment by police could well be fabricated, but the allegations occur in patterns with the same officers, and [are] so similar in detail that it is difficult to discount the majority of these claims.”

“In general the police treat my minority clients differently. The police single out minority accused. The police lay charges. The police suggest conditions upon release that are impossible for an accused to meet, or [recommend] no release. The police fabricate circumstances on the synopsis\* to aggravate a possible release situation. The police show up at more minority bail hearings to give ‘valuable’ evidence. The same officers attend at pre-trials and often hinder possible resolution. More of my visible minority clients are beaten by the police. A large number of my visible minority young offenders and their families are less educated and less aware of their rights. The police take advantage of this ignorance.”

“If there is significant discrimination against minorities, it is worst against blacks. Police have a perception of the black community as a criminal sub-culture ... Mercenary, high-volume legal aid defence counsel are even less likely to be concerned for the rights of black clients if those rights get in the way of expediency and a fast buck.”

“Judges seem to me the worst offenders. Perhaps part of it is that, burdened with a multi-trial list, they have no patience or courtesy to spare for those who have difficulty making themselves understood. While many (crowns and judges) are pretty even-handed with respect to complainants, there is less tolerance for minority defence (as opposed to crown) witnesses and far less for minority accused. Maybe this is just part of the general contempt for the accused and his/her witness that I find almost commonplace in the courtroom .... (regardless of race).”

“Most judges do not see colour, but some do. Get rid of the bigots! Better appointments, based on merit not race, etc., is the way to go. Good judges treat each person the same.”

“Generally speaking, I do not see any racist behaviours by judges and court staff. On the other hand, I do see racist attitudes and behaviour by police on a routine basis. Judges often become irritated with West Indian witnesses because the judges are unable to understand the accent. It would be a good idea to introduce programs to educate justice system personnel to West Indian culture ... Police probably reflect racist attitudes in society .... The police seem to be the main problem with racist behaviour and attitudes.”

Several defence lawyers perceived systemic biases in the justice system and the vulnerability of racial minority accused to these biases, but said **disadvantageous treatment is mostly or really due to reasons other than race:**

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\* The synopsis is a written summary of the case and the background of the accused, prepared by the police immediately after arrest. It is intended to assist the crown attorney who will conduct the bail hearing.



"I think racism plays only a small part ... The greater problem is class. Those on welfare, [the] unemployed, [the] underemployed or [those] on government benefits fare poorly."

"Discretion seems largely to depend on economic factors – poor accused, whether or not they are minorities, seem to be treated alike – increased police suspicion and surveillance, more charges, less discretion. Middle-class or high-income minorities tend to be treated as well as middle-class whites. Discretion and much of the other aspects correlate more closely with economic factors than race, although some may confuse hostility towards the former for hostility to the latter."

"The differences seem to me very much 'systemic' – that white accused are able to show more often than racial minorities those things (wealth, employment, drug rehabilitation, family support, community support, etc.) which impel crowns, police and judges to extend bail or sentencing leniency. Class biases overlap with racial biases."

"I do not think the issue is the bias of the individuals who work in the system. The bias [is] in the system .... In other words, a white or black from the 'projects' gets a bad shake in court, not because he is white or black, but because he is from the projects."

"There is a strong tendency for crowns and police to develop racial/ethnic animosities. I suppose the nature of the job attracts certain authority types and that the pressure leads to frustration. The end result is that lower S.E.S. [socio-economic status] groups are condescended towards. Wealthy, white anglos are better treated. Poor, uneducated immigrants are at the lowest end. I think race is not as big a factor as income level and language skills."

"Poor people are ... disproportionately black, and poor people are often before the criminal courts. The reasons involve cultural issues as well as some level of systemic racism, both in our society and in the police. I see systemic racism less in our courts than elsewhere in our society."

"Class and income play a part in determining who comes before the courts. That should be the subject of consideration. One cannot point to a percentage of 'minority' accused and say this is racism. The issue is more complex. Social structure must be addressed."

## What judges think

Ontario's criminal trial judges are former lawyers called to a provincial bar for at least ten years before their appointments. As judges they may be members of the General Division or the Provincial Division of the Ontario Court of Justice. Judges who sit in the General Division are federally appointed, while appointments to the Provincial Division are Ontario's responsibility.

Judges may participate in pre-trial meetings with crown attorneys and defence lawyers at which agreements are sometimes made about which issues will be contested in court. They are responsible for ensuring that trials are fair, for

convicting or acquitting accused persons, and sentencing people convicted of criminal offences. In fulfilling these roles they exercise discretion.

Although these general functions are the same for all trial judges, there are important differences in the roles of general and provincial division judges in Ontario's criminal justice system. For example, only provincial division judges conduct preliminary inquiries. They also conduct trials without juries, while general division judges may conduct trials with or without juries. In addition, provincial division judges conduct trials of youths aged 12 to 17 charged with any criminal offence. By contrast, general division judges try only youths aged over 14 charged with very serious offences, and only if a judge has decided that the accused should be tried as an adult.

We asked judges if they think "in general racial minorities are treated the same as white people in Ontario's court system."

- The majority of provincial division judges – about three in five (64%) – and general division judges – three in four (72%) – agree that the courts generally treat white and racial minority people the same.
- One in five (19%) provincial division judges and one in ten (10%) general division judges disagree.

We also asked judges if they think "systemic discrimination is a serious problem in [Ontario's] criminal justice system."

- One in four (25%) provincial division judges, but fewer than one in ten (7%) general division judges, agree that systemic discrimination is a serious problem in the criminal justice system.
- About five in ten (45%) provincial division judges and three in four (76%) general division judges disagree.

These questions, like many others in the survey, prompted different patterns of responses from provincial division judges appointed before and after important changes were made to the appointment procedures. The new process, intended to eliminate any suggestion of patronage:<sup>17</sup> includes people who are not lawyers, judges or politicians in selecting new judges; affirms the merit principle as the main qualification for appointment; introduces clear, public criteria for evaluating candidates; and considers diversity as a factor. Using as our dividing point 1989, the year in which the changes were introduced, we found –

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<sup>17</sup> The survey was mailed to every general division judge on a mailing list given to the Commission by the office of the Chief Justice – 253 names in total. Responses were received from 137, a response rate of 54 percent. Of the 265 surveys mailed to provincial division judges, on a mailing list given to the Commission by the office of the Chief Justice, 121 were returned – about 46 percent. Our Technical Volume contains further details and a copy of the questionnaire. See Appendix B.



- Judges appointed under the new system are much more likely than their longer-serving colleagues to think there are racial differences in how people are treated in the courts. One in three (33%) of the more recent appointments, compared with one in ten (10%) of the longer-serving judges, disagree that white and racial minority people are treated the same.
- Judges appointed under the new system are much more likely to think there is systemic racism in the criminal justice system than their longer-serving colleagues. Close to two in five (37%) recently appointed judges, but fewer than one in five (16%) longer-serving judges, agree that “systemic discrimination is a serious problem in the criminal justice system.”

Judges’ comments raise similar themes to those of crown attorneys and defence counsel. The dominant view, especially among general division judges, is that concerns about racism or any other form of discrimination in Ontario’s courts have no basis in fact. Judges said –

- **there is no evidence of discrimination in the courts:**

“Counsel, prosecutors [and] court personnel tend to treat users of the justice system alike. I have seen no evidence of unequal treatment over a 33-year career as a lawyer and a judge.”

“I strongly disagree with those who allege there is systemic discrimination and racism in the court system in Ontario. There will always be anecdotal statements to this effect, but the hard evidence is exactly to the contrary. My extensive experience is that judges, lawyers and court personnel treat all people coming into conflict with the law in the same way.”

“My experience is that the court is colour-blind. For the most part I can honestly say that minority parties have been treated no differently than any other by judges, juries, courts staff, lawyers, etc.”

“In 21 years as a judge, I have seen no racial discrimination in the courts nor in the verdict[s] of juries .... My experience, and that of judges I have talked to, is that racial discrimination does not exist in the courts.”

“I have seen absolutely no evidence of any distinction between the way in which what you call ‘racial minority’ persons are treated, and the treatment given to what you call ‘whites’.”

- **racial minority individuals tend to receive better treatment than white individuals in Ontario’s courts:**

“99% of judges, counsel and court staff bend over backwards to be fair and not to appear racist. [They] often give non-whites more courtesy and consideration than whites.”



“The fact is that certain racial minorities are given consideration that takes into account, in a way beneficial to the [racial minority] accused, the disadvantage generally experienced by that group.”

“The individual needs of individuals are being addressed, and frequently I see greater efforts by court staff and crowns to accommodate the needs of those who don’t appear to understand the process than would be made for an ‘average’ person. This means frequently that poorer or less-skilled or more recently arrived persons get better treatment, and frequently the beneficiaries are members of a ‘racial minority.’ If it didn’t work that way in my Court, I’d make it work that way!”

“My general experience is that ... both judges and juries give members of racial minorities leniency as opposed to similarly placed accused from non-racial minority segments of the population. In effect they over-compensate for the perception that they may be prejudiced.”

“Most courts now are trying to be very careful not to be biased – possibly even leaning over the other way, which is equally unfair.”

“In the area where I preside, it is relatively rare to see an Oriental or black person in court. When they are present, the court staff and counsel appear to me to be more accommodating to them than to white persons.”

- **allegations of racism are excuses for criminality:**

“Too many ethnic groups cry racism! And totally ignore the fact that their particular group is in fact committing a disproportionate number of serious crimes in a particular area.”

“The perception of unfair or unequal treatment of racial minorities is due to the disproportionate numbers who are brought into the system. The factors which bring them before the system are economic, social and cultural. Deal with the root causes and stop pointing the finger of blame at the people who are seriously trying to enforce the law .... Our courts attempt to serve with scrupulous fairness.”

- **allegations of racism – and the work of this Commission – reflect a misguided political agenda, rather than a genuine problem in Ontario’s justice system:**

“I do not agree that minority persons are badly treated in the provincial courts. As part of their defence ‘posture,’ minority persons frequently attempt to skew the case into racial lines. The socialist government has unfortunately encouraged this stratagem. The fault is not so much with the minority witnesses so much as it is in [members of] the left-liberal establishment [who] to perpetuate their own importance as ‘activists’ encourage the very idea of racial inequality in the courtroom. The vast majority of players in the system bend over backwards to be fair and just to minorities as a matter of patriotism and personal decency.”

“This entire exercise is driven by an overreaction to a small segment of the population who would complain about the conditions in heaven. Not to say we should be complacent or over self-congratulatory; but come on – is it [so] bad that we should throw so much tax money away on yet another commission, study and survey? Wake up and smell the coffee!”

“The very existence of this Commission, its mandate and terms of reference, promotes rather than discourages racism .... Any recommendations which require us to look at and deal with apparent difference[s] will further promote racism.”

“I anticipate that the Commission, driven by the force of political correctness, will find that racism is rampant in the justice system .... a conclusion that will not be based on hard evidence but, like Stephen Lewis’ letter, on anecdote and unsubstantiated complaint. Failing all else the Commission will find invisible racism – visible only to the Commissioners.”

By contrast, some judges said racism and other forms of discrimination are a reality in the administration of justice:

“If it’s not discrimination against colour, it’s discrimination against the poor, the underprivileged and the weak. We go to great lengths to try to justify our positions, yet we all suffer from the same common denominator – prejudice – and we’re not prepared, as a society, to do anything about it.”

“I am of the view that there exists systemic racism in the Ontario court system. While many might disagree, awareness programs for those involved in the administration of justice would likely help eliminate the unconscious discrimination. I’m sure many of us, from court personnel to judge, discriminate without being aware of it. Stereotyping is a strong influence we surely suffer without knowing. To a certain extent the more we are exposed to these minorities, the more we can understand.”

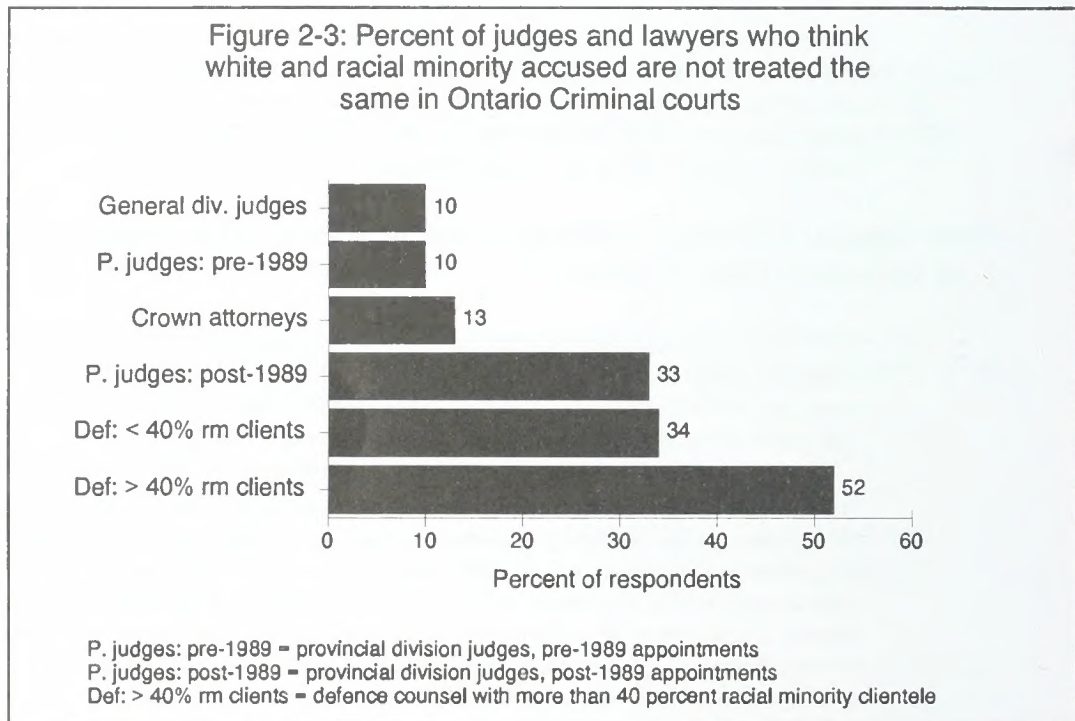
“My experience has been that we are all – whites, blacks, Oriental, etc. – racist to some degree. We are all more comfortable, other things being equal, with people who are like ourselves. I witnessed black and Oriental (Asian) racism when I worked in an African country when I was younger. I have certainly seen white racism in its more negative forms. Consequently any training which helps to sensitize us to the ‘other’ and his or her fear and biases or perceived biases cannot but help us to avoid misconceptions and problems in dealing with races different from our own. Talking about these problems is a good thing even if it is sometimes unpleasant.”

“If most of the faces you see are black, there is a temptation to think there is a problem with that community. This would explain the attitude of some judges and crowns. The problem is the police. The police are homogeneous, closed [and] resistant to change ... Not all police are racist but a substantial portion are. There are lots of influences on judges and prosecutors to reduce racist attitudes ....”



### Summary of judges' and lawyers' perceptions

These findings make two important points. First, there is substantial variation among justice professionals in their perceptions of racial discrimination in Ontario's criminal courts. Significant proportions of defence lawyers and recently appointed judges of the provincial division think the criminal justice system does not treat white and racial minority accused the same. However, only about one in ten crown attorneys, general division judges and provincial division judges appointed before 1989 share this view.



That judges and lawyers by no means speak with one voice shows that these justice professionals are not a homogeneous group. Though they may have a common interest in how the justice system is perceived, they have different views about the extent to which racial discrimination permeates Ontario's criminal justice system today.

Second, as the quotations from the surveys illustrate, many justice professionals reject – some flatly – even the possibility that systemic racism might be a genuine problem in Ontario's criminal courts. For some, the rejection of racial bias is but a part of their belief that the criminal justice system treats everyone the same. Others, however, acknowledge differential treatment based on class or poverty even as they reject the suggestion of racial discrimination.



Many of the survey comments suggest that class or income bias, though it may be regretted, is inherent in Canadian society and may be transmitted into the court system through the workings of other social institutions, such as the education system and labour markets. Class or income bias is not perceived to be caused by or the fault of justice professionals, nor is it necessarily influenced by dislike of poor people. Since the existence of class or income bias is not thought to reflect badly on individual judges or lawyers, it may be easier for justice professionals to acknowledge this problem without feeling personally responsible for it.

By contrast, many of the survey comments tend to treat any suggestion of racial bias in the court system as an attack on the personal integrity of the respondents. This response suggests that racial bias is understood to mean deliberately unfair decisions, made by specific individuals and motivated by negative judgments about races. There seems to be an attitude that somehow the legal system is immune from the consequences of racial inequality in Canadian society. Even when judges and lawyers are confident that their own conduct in the daily administration of criminal justice is beyond reproach, they seem to feel implicated when the integrity of the justice process is challenged. This narrow view – that any racial bias in the courts must reflect deliberate wrongdoing – has led to indignant denials of a general social or cultural problem that is endemic in Canadian society.

It is important to understand adverse consequences of racism even when they do not result from unfair motives. These more subtle forms of racism require greater effort to identify and eliminate. Co-operation and initiative from those most directly involved in the criminal justice system will be crucial to achieving the perception as well as the reality of true equality in Ontario's criminal justice system.

## Conclusion

The Commission's findings show the importance of restoring public confidence in the criminal justice system's commitment to equality. We must not rest content that many residents of Ontario's largest and most racially diverse city appear to agree with a participant at one of the Commission's public forums who said:

“We have two systems of justice within the criminal justice system. One is for the majority group in our society – people who have money, connections, etc. – and the other is for the racial minorities.”

Much criticism has been levelled against some members of Ontario's black communities for articulating concerns about racism within the system. These individuals have been dismissed as unrepresentative and described as speaking only for themselves. The Commission's findings show that a large proportion of black Torontonians – who comprise just over half of all black Ontarians – appear to have little confidence that the criminal justice system delivers justice equally. Many white and Chinese Torontonians share this view.

The Commission's findings also show that justice system officials are divided over whether the criminal justice system delivers equal justice to residents of Ontario. The findings suggest that a substantial proportion of all respondents feel that discrimination is common.

These findings should not be dismissed as attacks on the criminal justice system by those who do not understand it. They are a call to respond to the concerns raised, and to use available resources to improve and deliver what is now seen as only a promise of equality.

## Endnotes

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## Chapter 3

# Racism in Justice: Understanding Systemic Racism

This chapter introduces the understanding of systemic racism on which the Commission bases its Report. We spell out the elements of systemic racism in some detail because our consultations and submissions revealed widespread confusion among Ontarians about this fundamental aspect of our mandate, and also because of the denial and defensiveness evident in some responses to Commission surveys (see Chapter 2). Our definition of systemic racism attempts to establish a common understanding of the nature of the issues being addressed.

In order to do justice to the complexities of systemic racism, our definition relies on terms that may be unfamiliar to many people. We use these terms because they allow us to describe systemic racism in a comprehensive and precise manner.

*By systemic racism we mean the social production of racial inequality in decisions about people and in the treatment they receive.* Racial inequality is neither natural nor inherent in humanity. On the contrary, it is the result of a society's arrangement of economic, cultural and political life. It is produced by the combination of:

- social constructions of races as real, different and unequal (racialization);
- the norms, processes and service delivery of a social system (structure); and
- the actions and decisions of people who work for social systems (personnel).

The discussion begins with racialization, the driving force of racial inequality. Next we show how the elements of operating norms, decision-making processes and ways of delivering services may incorporate racialization in systemic practices and may support, transmit or tolerate it. We also examine the role of the personnel within this structure and how they affect its processes. Finally, we briefly describe some ways of recognizing systemic racism.

## Racialization: the driving force of racial inequality

*Racialization is the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life.*<sup>1</sup> It involves –

- selecting some human characteristics as meaningful signs of racial difference;
- sorting people into races on the basis of variations in these characteristics;
- attributing personality traits, behaviours and social characteristics to people classified as members of particular races; and
- acting as if race indicates socially significant differences among people.

Through these processes of selection, sorting, attribution and action, racialization creates, sustains and promotes the idea of race – humanity’s “most dangerous myth.”<sup>2</sup> Races are a product of, or created by, racialization. Without racialization they would not exist.

Race is a myth because it is impossible to sort humanity into distinct racial groups using any scientific standard.<sup>3</sup> Variations among human beings do not form regular patterns that allow objective classification of people into different races. Whatever criteria are used to assign people to a racial category – such as skin colour, hair form, nose shape or height – the evidence shows, conclusively, that similarities among many people placed in different racial groups are greater than among members of the same groups. Moreover, supposed indications of race neither cause a person to behave in predictable ways, nor do they reveal anything about the person’s character. The very idea of race is a myth, both because racial categories have no basis in fact and because these socially constructed categories do not explain skills, talents, personalities or behaviours of individuals.

To recognize that race is a myth is not to deny the power of racialization. Even though science cannot offer any coherent basis for dividing humanity into races, the systems adopted by societies may reflect or incorporate racialized judgments. Sometimes racialization is explicit, official and supported by law. The former apartheid regime in South Africa, the regulation of Aboriginal peoples by Canada’s

*Indian Act*, the laws of Nazi Germany, the wartime internment of Japanese Canadians, and the denial of civil rights to black Americans in the southern United States are all examples in recent history of openly racialized systems.

Racialization also can be active where it is not part of the law and even where laws attempt to

This minute from a 1951 meeting of a committee responsible for approving immigration applications to Canada shows how officials may make fine distinctions based on inherited physical characteristics:

[T]he Committee noted that while from her photograph ... [she] has characteristics of the negroid group, available evidence indicates her negro origin stems solely from her great-grandmother. The Committee approved ... admission.

(Departmental Advisory Committee on Immigration, *Minutes*, 36th meeting, Aug. 20, 1951, cited in Satzewich, *Racism and Foreign Labour* (note 1).)



The following quotations illustrate how Canadians in the 19th century used place of origin to label some Europeans as undesirable:

The United States are welcome to the Hungarians, Poles, Italians and others of that class: they are, as a rule, wretchedly poor, make very poor settlers and bring with them many of the vices and socialistic tendencies which have caused such trouble to their hosts already. Renewed efforts should ... be made by our government to induce more of the hardy German and Norwegian races to remain here.

(cited in Berger, *The Sense of Power*: (note 18) p. 147.)

... [T]he Irish papists come in swarms on the whole to do us evil... [The Irish] increase taxation for the poor. They render necessary a strong police.

(George Brown, editor, *The Globe*, 1856, cited in Robert F. Harney, ed., *Gathering Place: Peoples and Neighbourhoods of Toronto, 1834-1945* (Toronto: Multicultural History Society of Ontario, 1985).)

prohibit it. Racialization can still have powerful effects where it is only an implicit and unofficial feature of the system.<sup>4</sup>

Where racialization is implicit and unofficial, it is revealed by what people do and how institutions function. Routine decisions and actions may indicate that people perceive races as real and take racial labels seriously. Their conduct may reveal assumptions that people they place in the same racial category share experiences, attributes and characteristics. They may treat race as a meaningful sign of difference, a reason for their decisions or an explanation of inequalities in their world. *Racialization is active in any*

*social system in which people act and institutions operate as if race represents real and significant differences among some human beings.*

### ***Signs of racial difference***

Racialization, like any other process that relies on classification, needs a sign of difference to sort people into categories. Notions of "origin" do this work, setting the boundaries between different races and defining group membership. Signs of origin indicate who should be categorized into which racial group.

Inherited physical characteristics are the main signs of origin used to determine racial group membership. But some aspects of physical appearance are not used. Hair texture is relevant, but foot size is not. Skin colour matters, but not eye colour. The shape of the nose counts, but not the size of the ears.<sup>5</sup>

Inherited physical characteristics are not the only signs of origin. Ethnicity, culture and place of birth are also used to create racial groups. Traditionally, these signs of origin have been used to racialize people of European origins or appearance. But such judgments about which ethnicities, cultures and places of birth count as signs of racial difference and which ones indicate sameness have varied over time and in different regions. While some of these racial categories remain socially significant, others are at present inconsequential.

Ethnicity, culture and place of birth are taking on new roles in modern racialization processes. Pseudo-scientific and racist theories that claim inherited physical characteristics account for character, capacity and behaviour have been completely discredited;<sup>6</sup> accordingly, racialization by appearance is much less acceptable in

public or in polite society than before. This shift in what people feel able to say does not stop them racializing others, but it does affect their vocabulary. Hence, less is said about skin colour, hair texture and shape of noses, but more is said about ethnicity, place of birth and culture as signs of origin.

[A Canadian immigration official says] Canadians uncompromisingly reject a race-based immigration policy, but are clearly uncomfortable with the shift from European to Third World source countries .... A belief that Canada is accepting too many immigrants from ethnic minorities appears to be hardening.<sup>7</sup>

All racialized societies use signs of origin to indicate racial difference, but they do not always formally classify everyone into racial groups. The "Negro schools laws" of Ontario and Nova Scotia, for example, created separate education systems for black children.<sup>8</sup> But the laws did not refer to the signs of origin of other children or attempt to classify them into distinct racial groups. From the perspective of these laws, other Canadian children were not racialized.

Such uneven uses of signs of origin are particularly common in societies where racialization is mainly implicit and unofficial. In these societies the cultural traditions of the dominant group set the standards from which other racial categories are distinguished. Members of the dominant group often do not think of themselves in racial terms; they apply racial labels only to people who are "different."<sup>9</sup> For example, many white Canadians do not ordinarily think of themselves as members of the white race, but they identify black, Asian, South Asian and Aboriginal Canadians as racially different from an unstated norm. In other words, whiteness is invisible but the signs of origin of other races are not.

### ***Meanings of racial difference***

Why are racial differences significant? Racialization attaches meanings to racial differences stemming from the historical origins of the racialization and the purposes for which it is used. These meanings of racial difference, like the signs of racial difference, may change over time and vary from place to place. But the judgments and assumptions tend to take the same form whatever the era or place, and much of their historical content lives on in contemporary social systems.

Judgments and assumptions about racial differences generally take the form of hierarchical or graded comparisons. In Canada these meanings are based on perceived relationships between the skills, characters and capacities of white people and those of people defined as racially different. Sometimes the comparison is explicit. For example, a 1989 study found that one in six of "elite" Canadians and almost two in six Canadians in general believe that "races are naturally unequal."<sup>10</sup> Clearly, this question required respondents to compare racial groups and at least implicitly suggested ranking them according to the perceived capacities of their members.



Often, however, the comparison is unstated. But even then, the meaning of racial difference involves judgments about the characteristics or qualities of differing groups. Thus white people who do not think of themselves as belonging to a racial group may judge others as different by reference to a standard that is implicitly white.

The dominant meanings of racial differences in Canada arise from two important systems: imperialism and immigration. In both systems these meanings have functioned to rationalize unequal treatment of human beings.

European empires of the 16th and 17th centuries used racial difference to justify exploitation of the people, lands and resources of other societies.\* In this process the elites of England, France, Spain, Portugal and the Netherlands defined members of the societies they exploited as inferior, savage and strange, and themselves as superior, civilized and normal. They made these meanings socially significant by organizing societies they colonized on the basis of these meanings. The imperial powers also used these meanings to justify enslaving African peoples and transporting them to the Americas.

As well as justifying economic exploitation, these meanings of racial difference were incorporated into European imperial societies through religion (predominantly Christianity), education, culture and politics. By imposing elements of their domestic systems on the societies they colonized, the European imperial powers spread the meanings of racial difference.

Today, these meanings are well established in many societies, including Canada. They may result in racial inequality in social systems and be expressed in racist incidents. As recently as 1989 a federal government report concluded that "racism and racial discrimination are facts of life in Canada," after finding –

... clear evidence that a significant number of Canadians have racist attitudes or, as one poll concluded, "are racist in their hearts." Such attitudes have resulted in actions ranging from name-calling and threatening gestures to writing hate propaganda directed at a specific racial group, damaging property or physical violence.<sup>11</sup>

In 1993 the Ontario Court of Appeal, after an extensive review of the evidence, concluded that "racism, and in particular, anti-black racism is a part of our community's psyche."<sup>12</sup>

First Nations people of Canada experienced the full force of imperial colonization. The elites of Britain and France seized their lands, defined them as inferior and made them adapt what were called their "uncivilized" cultural practices and

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\* Other imperial traditions have also constructed people as different to justify exploitation, but the European imperial tradition is the most relevant to the meanings of racial differences in Canada.



“inefficient” economic arrangements to European standards.<sup>13</sup>

Britain and France also brought African slaves to Canada (but slavery was never practiced on a large scale in this country, for economic reasons).<sup>14</sup> Some white Canadians protested against slavery, campaigned vigorously for its abolition and assisted American slaves who escaped from the United States.<sup>15</sup> However, many others believed that African people were inferior to European people.<sup>16</sup> This belief continued to be expressed publicly after the United States officially ended slavery, by Canadians who thought black Americans caused problems for white Americans and who were determined that Canada should be a white country. For example, a 1906 editorial in *Saturday Night* magazine said –

This will only be a white man's country if we make it so. It was once ranged by red men, but we took it from them, and it is ours, if we can keep it .... The Chinese ... are an inferior race of men like the Africans who were brought over in thousands to the southern states and now constitute a serious and permanent danger to the neighbouring republic.<sup>17</sup>

Comparing Canada to the United States, Sir George Robert Parkin, the author of school texts and principal of Upper Canada College in the early 20th century, stated, more simply: “What a mercy it is to be free from this frightful black problem.”<sup>18</sup>

Immigration systems, like imperial systems, may judge racial groups as inferior or superior, normal or strange, civilized or savage. The *Saturday Night* editorial quoted above, for example, was mostly a forthright response to a proposal to increase the

These comments illustrate Canadian judgments of some racialized people as incompatible with Canadian society:

[T]he native of India is not a person suited to this country ... accustomed as many of them are to the conditions of a tropical climate, and possessing manners and customs so unlike our own people, their inability to readily adapt themselves to surroundings entirely different could not do other than entail an amount of privation and suffering which renders a discontinuance of such immigration most desirable in the interests of the Indians themselves.

(Mackenzie King, House of Commons, Sessional Paper No. 360, 1908:7-8, cited in Bolaria and Li, *Racial Oppression in Canada* (note 13), p. 171.)

As long as immigration from the Orient was confined to a few odd Chinamen a year, who were content to do work distasteful to a white man, no particular objections were raised. It was when the Japanese and Hindus started pouring in ... by the thousands that the trouble arose .... The Orientals cannot be assimilated.

(J.S. Woodsworth, social reformer, leader of the Co-operative Commonwealth Federation [predecessor of the New Democratic Party] and author in *Strangers Within Our Gates* (1909; Toronto: University of Toronto Press, 1972), pp. 142-155.)

It has been our longstanding practice to deal favourably with British subjects of the white race from the British West Indies .... On the other hand, apart from limited domestic movement, no encouragement is given to persons of coloured race ...

(‘Memo’ from the Director, Immigration Branch, to Deputy Minister, Department of Citizenship and Immigration, March 10, 1958, cited in Satzewich, *Racism and Foreign Labour* (note 1), p. 126.)

[Canadians] ... are telling the Commons immigration committee ... that if there have to be immigrants, they should be trained immigrants from Europe. That's not racism. Mr. Ostrom said. Rather, Canadians are merely seeking 'people who can adjust to this climate.'

(“Phone-Ins, Polls Bristle With Anti-Immigrant Feelings,” *The Globe and Mail*, Toronto, March 6, 1987, quoting John Ostrom, a Progressive Conservative member of the House of Commons)

number of Chinese men immigrating. As well as describing Chinese people as “an inferior race,” the magazine said, “We can get Chinese labour (but) these people will not possess value as citizens, and when once fastened to the country will retard its development.”

These immigration systems use race to measure compatibility and fit with the receiving society. Thus an important meaning of racial difference in these systems is the perceived capacity to belong.

This meaning of racial difference is important in Canada. Since the middle of the 19th century, it has shaped the recruitment of labour from other countries that Canada has needed to grow and prosper. Some racialized people have been excluded because of their origins and others permitted entry only if they took undesirable and low-paid jobs.<sup>19</sup>

Emphasis on compatibility with (white) Canadian identity for the purposes of immigration has in turn influenced the meanings attached to racial differences among residents of Canada. Many white-skinned people are not racialized as white or ethnic, or as members of a different culture. Their signs of origin are invisible because they are defined by their skin colour as “Canadian.” These Canadians have the comfort of leading their everyday lives without being faced with expressed or implicit questions about their origins or whether they belong in this country.

By contrast, constructions of other Canadians as “foreign” and judgments that they are incompatible persist long after migration to this country. Descendants of early black, Asian and South Asian settlers, whose only home is Canada, may find they are considered as outsiders, treated as strangers and presumed not to understand “Canadian ways.”\*

## How racialization produces racial inequality

Racialization may produce racial inequality in social systems, which are organized processes for delivering services. Institutions such as the police, courts and prisons are systems, as are community organizations, governments and corporations. These systems may be divided into smaller systems and they may combine to form larger ones. Each Ontario prison, for example, is a sub-system of the entire prison system, which in turn is part of the criminal justice system. From a broader perspective, every organized process in a society is a sub-system of the societal system and may also be part of a global system.

Systems consist of people, their attitudes and beliefs (personnel); values, procedures, policies and informal rules (operating norms); ways of making decisions; and methods of delivering services. These elements continually affect one another over

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\* See Chapter 7 for examples in the criminal courts.



time and together comprise a perceived whole. The totality of a system's norms and processes and the actions of its personnel comprises its systemic practices.

Racialization in any element of a system or sub-system has the capacity to instill racialization into systemic practices, that is, to support or transmit racialization within the system. Unless constant vigilance is maintained, elements of a system may also spread unnoticed racialization into its practices. Furthermore, racialization in any system or sub-system may be transmitted to any others that are related.

### ***How people instill racialization into systems***

People instill racialization into social systems when they act as if races are real, different and unequal. They may act in this way because they are personally hostile towards members of racialized groups and the system does not stop them from expressing this hostility. Manifestations of such hostility are commonly described as overt racism.

People who are not personally hostile to racialized people may also act as if races are real, different and unequal. They may do so because such conduct brings rewards, makes life easier, helps them fit in with their colleagues, or is expedient. They also may be simply unaware that they are acting in this manner. If their conduct explicitly relies on racial categories, it may also be called overt racism. If not, it may be known as covert, subtle or implicit racism. While these categories may be confusing, identifying the underlying basis for racist conduct is necessary to be able to select appropriate remedies.

Findings presented in the Commission's Interim Report<sup>20</sup> illustrate different underlying reasons for the same racist conduct. We found that many correctional officers routinely use racist language in dealing with black or other racialized prisoners and colleagues. For some officers, this abusive language clearly manifests intense hostility toward black or other racialized people.

Other correctional workers who use racist language in dealing with black or other racialized prisoners do not appear to be driven by personal hostility. Some of them told the Commission about their own conduct and that of their colleagues, and were troubled by it. Yet they continued to act in this way. Why?

It appears that some correctional officers use racially abusive language because "everyone else does it," or to prove themselves. For others, racially abusing prisoners is a means of demonstrating contempt for criminals. Finally, officers may use racial abuse to intimidate and control; in effect, to demonstrate their power over prisoners.

Some people deny that these uses of racially abusive language are racist. They say that the abusive language is not motivated by hatred or animosity toward black or other racialized people; or that correctional officers sometimes also insult white prisoners, using general terms of abuse or by referring to personal characteristics of



these prisoners. Lack of racist motive and an apparent “equality of insults” are thus taken to prove the absence of racism.

But these arguments prove nothing of the sort. First, as the Supreme Court of Canada has stated, impact – not motive or intent – is the proper test of unequal treatment. Speaking specifically of discrimination prohibited by the *Ontario Human Rights Code*, Mr. Justice William McIntyre explained why the test for unequal treatment should not be intent or motive:

... [To] hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create ... injustice and discrimination ...<sup>21</sup>

Second, insulting white prisoners to show toughness, because they are criminals or to demonstrate power may indicate that some correctional officers are equally unprofessional to all under their control. But it does not mean that racially abusive language used for these purposes is the same as the insults directed at non-racialized prisoners. Racially abusive language adds another dimension, arising from the history and contemporary reality of racialization. When white people in positions of power insult black or other racialized individuals in racially abusive terms, their words reflect society’s judgments about the superiority of white people and inferiority of others. Racist language has this effect whether or not it is intended, because these judgments are built into the meaning of the words. Consequently, racial abuse both insults the targeted prisoner and expresses a history of general contempt for the prisoner’s racial group.

Correctional officers who use racially abusive language obviously transmit racialization into prison systems, resulting in overtly racist incidents. As we have shown, however, these incidents may have a variety of causes. Personal hostility towards black or other racialized people may be one factor, lack of professionalism another, and desire for control a third. Each results in racialization in a system, recognizable by explicitly racist incidents.

However, identifying the different factors at work is critical to finding appropriate remedies. If, for example, correctional officers use racially abusive language because they lack professionalism or specific skills for managing prisoners, then teaching them about other cultures or that racist language is wrong is unlikely to change their behaviour. They may already know it is wrong. More promising remedies would be careful monitoring of officers’ conduct, rewards for those who speak out against racial abuse, and skills development among officers who engage in it. By contrast, officers who use abusive language because “everyone else does it” may well benefit from anti-racism training that demonstrates the harm such behaviour causes.

Officers who feel strong animosity toward black or other racialized people may or may not be capable of changing their behaviour. Officers capable of changing would likely benefit from remedial training, but the content and structure of an anti-racism program effective for them is likely quite different from one intended for the thoughtlessly unprofessional.

In some cases people may transmit racialization into a system because they are uninformed or thoughtless, or have consciously learned or subconsciously absorbed stereotypes of racial difference. A black justice of the peace reported a shocking example of such a stereotypical judgment by his mentor, a white justice of the peace:

We worked together pretty well and he was a fine teacher. One day, we were having lunch and he told me I was the first Black person he had ever worked with .... [H]e learned a lot from me, he said, because before he got to know me, he always thought that all Blacks were no good and now he knows better and is more careful. "I don't assume they are all criminals now," [he told me].<sup>22</sup>

Mr. Justice Henry Brooke of Britain calls the injustices that may result from lack of awareness, thoughtlessness and stereotypical assumptions the "three great risks of ignorance":

The risk of creating offence and hurt through ignorance of important things which are very personal to people. The risk of doing injustice, of getting things badly wrong, through ignorance of important things about people's cultures, or about body language, or about the danger of other communications breakdowns. And the risk of doing injustice through ignorance of the potency of sub-conscious discrimination.<sup>23</sup>

An incident during a 1993 trial of a well-known member of Toronto's black communities illustrates these risks of ignorance. Among many black people attending the trial, some wore head coverings according to their cultural and spiritual traditions. Immediately after entering the courtroom, the trial judge directed a black man and a black woman sitting in the audience to remove their head coverings or leave the courtroom. He refused to hear submissions from them or from counsel in relation to the religious nature of the head coverings. Neither the crown attorney nor defence counsel had suggested that the head coverings would interfere with the fairness of the trial. Nor did anyone suggest that these spectators had been or would be disruptive. The two spectators left the courtroom, deeply insulted by the judge's behaviour.\*

A few days later, without hearing any evidence on the cultural or religious significance of the head coverings, and without allowing the excluded spectators to make submissions, the judge released written reasons for his order.<sup>24</sup> He said:

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\* The two spectators visited the Commission immediately after leaving the courtroom and told us of the anger and distress the judge's actions had caused them.



Body clothing must not, in the view of the judge, be likely to attract attention away from proceedings. Nor should head coverings ....

In the British, European, Chinese, Japanese and many other Asian cultures and probably other group traditions, uncovering one's head is a particular mark of respect .... It is not necessarily religious.

Flamboyance is often a hallmark of those who insist on their right to avoid this tradition. That is, by definition, intrusive.

Some head coverings, by their shape, colour and design, are obvious and easily recognizable as signalling to the eye an adherent of a well-established and recognizable race, culture, national or religious community; one of those communities which are clearly within the purview of the Charter ....

There are, as well, many self-proclaimed and unrecognized forms of religion or cults claiming to be religious which have occurred ... throughout history. They come and go. Often, to attract attention and new adherents, bizarre, intrusive or simply impolite attire is worn. These religions may exist ... but the Charter does not guarantee some right to enter and remain in a courtroom where the result is disruptive. A public trial does not include offensive or intrusive costumes.

These reasons suggest that the judge neither understood nor respected the cultural and religious traditions of the two spectators. This ignorance of something important and personal to the black spectators caused offence, hurt and embarrassment. It also resulted in unequal treatment because these spectators were excluded from the courtroom unless they removed their head coverings, while the judge indicated that other people wearing head coverings would be allowed to remain in court.

The judge might well have made the same order and said similar things about white spectators. But for a white judge to characterize the clothing of white spectators as "offensive or intrusive costumes" and as "bizarre, intrusive or simply impolite attire" does not have the same effect as so characterizing clothing reflecting cultural traditions of black spectators. When white authority figures make such remarks about an expression of black persons' traditions, it suggests the system they represent lacks respect for those traditions or is ignorant of them. Because ignorance and disrespect are common features of historical and contemporary racialization, such remarks are understood as judgments about the strangeness and inferiority of the black persons' "self-proclaimed and unrecognized" culture.

In addition to illustrating the risks of ignorance, this example shows how people may transmit racialization into systems in very specific ways. This judge clearly did not consider all racialized people as different from, and unworthy of the same respect as, white people. Indeed, he notes that "Chinese, Japanese and many other Asian cultures" have the same tradition as what he calls "British" and "European" cultures. Thus, on this issue, Asian people are not constructed as racially different. (Though the judge does not mention those black cultures that treat uncovering one's head as a "mark of respect," he would presumably also view them as normal and



reasonable.) All cultures in which the wearing of head coverings is a mark of respect are constructed as different, but only some are judged unacceptable or bizarre. By treating the black spectators' head coverings as examples of strangeness, the judge introduced a highly specific form of racialization into the system he represents.

### ***How decision-making inserts racialization into systems***

Decision-making inserts racialization into systems when the standards or criteria for making decisions reflect or permit bias against racialized people. Standards and criteria are part of a system's operating norms and may be formal and explicit in laws, policies and procedures. Or they may be informal, arising from accepted ways of doing things. Informal standards are particularly significant to decision-makers when the formal norms grant them considerable discretion.

Racialized bias in decision-making results in racial inequality in treatment and outcomes. These inequalities may in turn promote racialization in the system where bias occurs and in related systems. This occurs when people see the disparities as proof that races are real, different and unequal – rather than as a product of the system's decision-making.

### **Inherent bias in standards**

Standards may be inherently biased against racialized people. This direct bias exists where standards treat something explicitly linked to a person's origin as relevant to the decision. It may be inherent in formal operating norms, for example, when immigration systems demand higher skills of black or other racialized people who apply for entry than of non-racialized people.<sup>25</sup> Bias may also be inherent in informal criteria. For example, the law gives judges broad discretion over what happens in court. In the incident described above, the judge applied an informal standard that the head coverings of some cultural traditions, but not those of others, are permitted in courtrooms.

Standards may also be inherently biased if they use apparently neutral criteria that penalize racialized people. The discrimination that results from such standards is generally called indirect. A good example is the height and weight standards once used in selecting police officers. Until the 1980s these standards prevented many people of Asian origin – and most women of any origin – from working as police officers. Racial origin or sex was not specified in the employment qualifications, but the standard excluded large numbers of people who were otherwise qualified.

Another example, presented in more detail in Chapter 5, is the use of employment status as a factor in bail decisions. Black accused in the Commission's study were more likely than white accused to be unemployed,\* and more likely to be imprisoned

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\* This is not surprising. There is considerable evidence of anti-black discrimination in labour systems, and census data for 1991 show generally that black people are more likely to be unemployed than people of British or French origins.

before trial. The data indicate that some of the racial disparity in pre-trial imprisonment is due to judges and justices of the peace using employment status when making bail decisions.

### **Transmitted bias in decision-making**

Social systems use sequential or complex processes to make decisions. By this we mean that accomplishing the system's purposes requires several decisions made at different stages by different system personnel. Choices or decisions made at one stage of the process affect other decisions made in the system. Consequently, racialization in one part of the system is highly likely, unless precautions are taken, to be transmitted into others.

This type of bias is a serious risk in the criminal justice system, which is complex and involves sequential decisions. Each stage of the process depends on choices made in other parts of the system. Judges, for example, can impose penalties only on people who come before them for sentencing. People who appear before judges are neither a comprehensive sample of Canadians who commit crimes, nor a random sample of offenders. Who appears before a judge for sentencing depends on earlier decisions of members of the public, police officers, lawyers, justices of the peace, and sometimes other judges.

Racialization in these earlier decisions may affect the racial composition of those who appear before judges for sentencing. Racialization may also influence how justice officials present information to judges about offenders and offences. For example, for many offences crown attorneys can choose whether to prosecute summarily or by indictment. This decision, known as "crown election," has important consequences throughout the criminal justice process, and may influence the sentence imposed. Charges prosecuted by indictment are treated as more serious than those on which the crown proceeds summarily, a difference reflected in much higher maximum sentences.

Crown attorneys consider many factors when deciding how to proceed. Though race is not obviously relevant, one of the Commission's major studies found a difference in crown elections for black and white males charged with the same offences that we could not explain by any legally relevant factor (see Chapter 6). One important consequence of this difference is that judges are more likely to have a harsher range of sentences available upon conviction, and to impose stiffer terms, when sentencing black males than white males. Thus even judges who apply fair and reasonable standards – and who do not believe races are real, different and unequal – may find that their judgments reflect bias transmitted from racialized decisions made by crown attorneys.

Transmitted biases pose challenging problems for those whose role is affected by decisions made elsewhere in the system. However, these decision-makers can often minimize if not entirely neutralize transmitted bias. Active, visible and continuous commitment by judges to restraint in sentencing, for example, could reduce the risk



that a racialized offender is sentenced to prison while a white person convicted of the same offence and with a similar criminal record is not (see Chapter 8).

More generally, judges could block transmission of bias into their sentencing decisions by vigilance. They could learn to watch for subtle instances of racialization in submissions of lawyers and evidence of witnesses. Justice Brooke has described how a young English judge changed his sentencing practices: "He told me that he is now so well aware of the risks ... that before he passes sentence on a black defendant he always carries out the mental check of asking himself whether he would have passed the same sentence on a white defendant."<sup>26</sup>

### ***How service delivery may support racialization***

Whether a social system supports racialization or does not accept that racialized people are equal to white people may be revealed in the organization or delivery of its services. Any apparent acceptance of racialization may significantly diminish public confidence that the system treats people equally. Nearly always, systems used by substantial numbers of black or other racialized people but staffed almost exclusively by white people give the appearance of supporting racialization.

In the criminal courts of Metro Toronto and other major urban centres, most lawyers and judges are white, but large proportions of accused persons and other court users are from Aboriginal, black or other racialized communities. In Northern Ontario, mainly white lawyers and judges administer criminal justice to Aboriginal people. This contrast between users and officials presents a stark image, which is perceived as white justice imposed on Aboriginal, black and other racialized people.

The criminal justice system may be able to show that it does not explicitly exclude Aboriginal, black or other racialized people from employment, and that it maintains no obvious barriers to hiring them. But this would not be enough to reassure users that the criminal justice system repudiates racialization. A system that is unable to persuade its users that it rejects racialization, risks being perceived as endorsing it.

A senior police officer, speaking at a public forum in Ottawa, gave the Commission a subtle example of how service delivery can contribute to perceptions that a system supports racialization:

"In the recent prosecution of a police officer accused of shooting a black person, the judge ordered the doors of the courtroom locked during the jury address by both counsel. The result was that 14 black persons – interested enough in the proceedings to come to court in mid-week – were left outside, shut out of the trial but also shut out of a system which decides its own convenience is paramount to the legitimate rights of the community members. Obviously, the concentration of the jury is important, but so too are the legitimate needs of the community ... Even if the action is supportable, the lack of explanation and complete absence of concern for the impact is deplorable."



This incident involved a routine decision during jury trials. Judges normally order the doors locked during their own addresses to juries in order to avoid interruptions that might diminish the concentration of jury members. They generally extend the order to cover lawyers' final statements to the jury, if a crown attorney or defence counsel requests it.\* As far as the criminal justice system is concerned, the judge's decision did not suggest a conscious intention to exclude black people. Nor did it suggest disrespect for or hostility toward them.

Nonetheless, the consequences of the decision, particularly the failure to communicate the reasons for barring entry, were damaging. The order sent a vivid message to this white observer, a knowledgeable criminal justice professional, that black people were "shut out" from justice. The black members of the public, unfamiliar with court processes, likely would have experienced the exclusion even more keenly.

This trial, of a white police officer who had shot an unarmed black man during a raid on a house used by reggae musicians, was a significant event to black Ontarians. Many of them viewed the shooting itself as an exclusion from justice and saw the court process as a test of whether the justice system demonstrates equal concern for all Canadians. To them, the exclusion of black spectators from the lawyers' addresses to the jury – without warning, explanation or apology – would powerfully represent a lack of respect for black people and suggest that the system supports their racialization.

This example also shows that the racist impact of an act does not necessarily depend on comparing the treatment of black people and white people. In this case it would not have mattered if white people were also barred from the court, because the relative advantages of white and black spectators were not at issue. Rather, the concern was the relationship between the justice system, represented by the judge, and black Ontarians, represented by those locked out of the court.

How could the risk that locking the doors would have a racist impact have been reduced? First, the judge could have told spectators throughout the trial that although they were generally free to enter and leave the courtroom during the proceedings, the doors might be locked during addresses to the jury. A brief explanation of the reason would have done much to allay suspicion. Second, information about limitations on public access to courtrooms could have been posted throughout the courthouse to help spectators anticipate events. Finally, a court official could have been stationed at the locked door to explain to the public why entry was prohibited. Though people shut out of the court might still have felt frustrated, they would have been less likely to experience their exclusion as suggesting disrespect for them.

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\* The trial transcript shows that the defence lawyer requested the judge's order, after he was distracted by jurors' looking at spectators entering the court during his address.

This example shows how an apparently innocuous and routine decision could leave people with a strong sense of exclusion. It demonstrates the importance of criminal justice system officials being conscious of the experiences of racialized people and anticipating their needs and perceptions in carrying out the everyday business of the courts. It was encouraging that this example was brought to our attention by a white police officer who seemed to have an understanding of both the practical and symbolic consequences of this incident for members of racialized communities.

### ***Operating norms and racialization***

Systems manage personnel, decision-making and service delivery through law, internal procedures and policies, and through what Richard Ericson calls “recipe rules.” These informal rules are the often unspoken understandings about how the day-to-day work of the institution is conducted.<sup>27</sup> Together, the various rules, procedures and policies comprise a complex and dynamic culture that simultaneously influences and is influenced by individuals who work in the system.

Operating norms that set out inherently biased standards for decision-making directly transmit racialization into a system. They may also encourage further racialization in the system by promoting stereotypes and assumptions that races are real, different and unequal. For example a 1992 “race relations” audit of the Metro Toronto Police concluded –

The Force has done a reasonable job of ensuring that those who are recruited do not display an overt bias which would make them unsuitable to be a police officer. What is apparent is that a change occurs after joining the Force. There was significant evidence that many police officers ... develop strong feelings and beliefs as to attributes of individuals, based on factors such as appearance and racial backgrounds .... [T]hese ... attitudes can and do produce a bias in behaviour which results in unequal treatment of individuals of different cultural or racial backgrounds....

[W]hat is evident here is not so much a symptom of personal belief as evidence of a developed culture and value system within the organization.<sup>28</sup>

Operating norms may tolerate racialization in systemic practices. There are three main forms of toleration: passive toleration, disregard, and collusive toleration.

### **Passive toleration**

Passive toleration of racialization reflects lack of awareness that it infests the system. This exists when people responsible for the work of an institution fail to see evidence of racism in its practices. Passive toleration may persist because practices are not monitored, so no one officially recognizes that inherent or transmitted biases are affecting decisions.

The Commission found, for example, that black men charged with some offences are less likely to be granted bail than white men charged with the same offences, even after their criminal records and other relevant factors are taken into account



(see Chapter 5). This finding indicates systemic toleration of racial discrimination in the bail process. The toleration is passive because decision-makers and system managers may not know the extent to which practices result in discrimination because decisions to grant bail are not monitored.

### Disregard

More active toleration of racialization – disregard – exists when an institution knows about racism in its practices, but its operating norms do not produce an effective response. Sometimes disregard results from a system's operating norms not treating racial equality as a priority. People may know of racist incidents but ignore them because they think such events happen only on a small scale, or are isolated incidents. Several lawyers who responded to the Commission's surveys, for example, said systemic racism is not a problem in the criminal justice system because racist judges and lawyers are a small minority (see Chapter 2).

Disregard may also occur if decision-makers lack a clear idea about how to eliminate systemic racism, and the operating norms do not encourage development of the necessary expertise. Again, the result is that evidence of racism is known but ignored. A crown attorney who responded to the Commission's survey described the systemic problem this type of toleration poses: "At present, although certain individuals [judges] are notorious, nothing is done by the system. By tolerating their behaviour it is condoned, continues and increases." Even if the problem is created by "a small minority," the failure to deal effectively with them constitutes a systemic problem for the criminal justice system.

### Collusive toleration

The third form of institutional toleration of racism, collusion, occurs when operating norms encourage practices based on racialized standards. This form of systemic racism is active in the sense that the institution promotes the rules or norms. It is also explicit in the sense that the norms or rules are clearly acknowledged as acceptable.

In Canada today, however, the offending norm is rarely motivated by racial hostility. A rule may have been adopted for an apparently legitimate reason, but one of its consequences is discrimination against racialized people. The essence of collusive toleration is not the intention behind the rule, but the practice it promotes.

Until recently the dominant practice in Ontario courts, for example, had been to prefer a Christian oath for witnesses to bind themselves to tell the truth.\* This practice linked one dimension of how courts treat people to religion, one characteristic of origin. Although everyone must promise to tell the truth in court, the oath procedure biased their choice about how they do so.

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\* Recent changes to the *Canada Evidence Act* [S.C. 1994, c. 44, s. 88] have removed the formal preference for a religious oath. See Chapter 7 for fuller discussion of this issue.



Beyond the issue of choice, the traditional preference for a religious oath, particularly a Christian oath, was an important symbol. Making the holy book of Christianity, but not those of other faiths, available in courts suggested that the justice system viewed the spiritual tradition of Christian Canadians as normal and more acceptable than those of all other Canadians. In effect, the justice system operated as if professing a religion was the norm, and as if Christianity was the only faith worthy of respect. Differential treatment in this example was explicit and promoted by the justice system. It thus reflected collusive toleration of racialization in its systemic practices.

## **Systemic racism: summary of the process definition**

Systemic racism is a complex social process. It reveals itself in specific incidents, acts and consequences, but it is the underlying process that makes these events "systemic." This process in turn consists of other social processes. One of them is racialization, the other is the system.

To summarize, the starting point of this analysis of systemic racism is the process of racialization. Racialization in Canada consists of classification of people by reference to signs of origin and judgments about the character, skills, talents and capacity to belong in Canada that signs of origin represent.

Social systems – ways of organizing activities and accomplishing tasks – involve processes that do not inherently contain or perpetuate racialization. However, they may do so by incorporating it into their operating norms and decision-making and by tolerating it in service delivery.

Both the introduction and perpetuation of racialization in these social systems occur through their personnel. However, it is often impossible to identify any one or more persons responsible for introducing racialization because the classifications and judgments are built into the system's operating norms. This process of adopting and perpetuating racialization within these social systems constitutes systemic racism.

System personnel, the means by which a social system applies and transmits racialization, are also the only people who can eliminate it and protect the system against its return. While the staff and officials of a system cannot be expected to succeed on their own, they have to be committed to making racialization intolerable if they want to bring about real, effective and permanent change.

## **Recognizing and eliminating systemic racism**

Systemic racism is revealed by incidents, acts and consequences, and is recognized by its impact on racialized people. Elimination of systemic racism is a three-stage process that begins with detecting its impact. Next, systemic practices must be investigated to find out how racialization is being inserted, transmitted and supported. Then appropriate reforms may be developed and implemented.

The Commission found the greatest confusion in this process at the stage of establishing impact. There are two main approaches to recognizing racism by its impact. One emphasizes the experiences of racialized people. The other compares the outcomes of decisions affecting racialized and non-racialized people.<sup>29</sup>

In the experience-based approach, perceptions of exclusion and injustice that racialized people may have as a result of how they are treated are crucial to recognizing racist impact.<sup>30</sup> These perceptions may be recounted by them or an observer. A good example of observed experience is the incident noted above in which a senior police officer described the impact of an order to lock the courtroom doors during a portion of the trial of a white police officer charged with shooting a black man.

Experiences of members of racialized groups provide important insights into racism and say much about the impact of systemic practices. As such, they are a valuable tool in recognizing racism. Like other methods, however, experience has limits.

People experience the same events or practices differently. Thus a decision to believe the experiences of one person or group immediately poses the question of why the experiences of other people or other groups are less valid. Experience, even if presented with sincerity, coherence and balance, may fail to convince those who simply believe in another version of the truth. Even within a particular group, experiences may vary widely. For example, the comments of judges and lawyers reported in Chapter 2 illustrate radically different experiences about the extent to which systemic racism is a problem in the Ontario criminal justice system.

A second limitation of relying on experience to recognize racism is that gaining access to experience is difficult. Contrary to what some people think, racialized people are often reluctant to relate their experiences of racism. Few enjoy publicly recounting incidents in which they felt humiliated, and the impact of racism is for many among the more degrading, if only too common, experiences of their lives. As one Ontarian told the Commission at a public forum in Kingston,

“The problem with [experience] is that you put the person who is being victimized in a position of being re-victimized by having to tell their story. On the one hand there is great virtue in telling stories, but there has to be sensitivity in how those stories are gathered and ... respect [for] the voice and the position from which people are telling those stories.”

As this oral submission also notes, sceptical responses to experiences of racism tend to make people more reluctant to talk about its impact.

“People tell their stories at great risk, at great emotional pain, at great cost. There has to be sensitivity to that. Part of [sensitivity] is believing the stories that are told. If people are put in the position of their stories being called into question or being evaluated as to whether or not that is in fact a racist incident, you are not going to get [openness].”



As an alternative to experience, impact tests for racism may compare the results of systemic practices on racialized and non-racialized people. Such comparisons look for suspect patterns in standards used to make decisions, or in the way that standards are applied. Both may lead to differential outcomes or impact.

Comparative approaches often use statistical (quantitative) methods to identify patterns. These methods can be used to process large quantities of information, and the studies can be easily replicated. Thus, statistical comparisons are often seen as more objective and reliable than other ways of establishing systemic racism.

On the other hand, as researcher Marian FitzGerald points out, “we must look sceptically at the privileged status currently given to quantitative methods.” These methods also have their limits. FitzGerald warns that over-reliance on quantitative measurement may lead people to think too narrowly about racism. As she states,

[O]nce we try to reduce [racism] to a set of discrete, measurable components we have already lost its essence. What is racial ... is not only multifaceted, it arises and manifests itself differently in different places at different times for different groups .... It is not a “thing” of itself but is produced variously by a wide range of interactions between combinations of factors .... [W]hat produces a racial result for one group in one situation at one time may comprise none of the elements which produce a racial result for another group in a different situation at another time or in a different place.<sup>31</sup>

A narrow approach risks missing or misunderstanding relationships between racialization and other factors that may influence systemic practices, including other social divisions. For example, some lawyers and judges who acknowledge differential outcomes by race told the Commission that class or poverty is the real explanation for these differences in the criminal justice system’s treatment of white and racial minority people (see Chapter 2).

These comments show the difficulties that arise from viewing racism in isolation from other social factors.\* Many black and other racialized accused are more likely than white accused to be unemployed or to have low incomes.<sup>32</sup> Consequently, a standard that treats employment status or income as a necessary factor in criminal justice decisions is likely to result in disparate outcomes for white and racialized people.

Such a standard has a racist impact even though it is not motivated by racial hostility. The systemic racism involved may be indirect, and it may be transmitted from racialization in labour systems. Nevertheless, the bias would be a real problem that the criminal justice system must address if it is to combat systemic racism in its own practices.

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\* They also raise the question of why class or poverty in general affects the treatment of accused and convicted people.



A narrow approach may also miss the influence of combinations of factors on decision-makers. For example, a judge may treat employed white and black men who own property the same. However, factors such as unemployment, youth and residence locations may result in a different outcome. Thus a young unemployed black man who lives in a public housing location considered undesirable may be treated more harshly than a white man in equivalent circumstances. In other words, outcomes may not always be influenced by race alone, but by race in combination with other factors.

## Conclusion

Racism has a long history in Canada. It was fundamental to relationships between Canada's First Nations and the European colonizers. It has shaped immigration to this country and settlement within it. Racism has led to denials of basic civil and political rights to Canadian citizens, excluded adults from jobs and children from schools, limited opportunities to acquire property, and barred people from hotels, bars, theatres and other recreational facilities. In these ways, racism has restricted the opportunities and futures of some Canadians and benefited others.<sup>33</sup>

Though many Canadians throughout history have accepted racism, others have vigorously resisted it. They have lobbied, campaigned and protested against the fundamental denial of humanity that racism represents. These efforts have had significant results. While the law once promoted or permitted unequal treatment because of race, today it generally prohibits such discrimination. Equality is now guaranteed by our Constitution.

Despite these important achievements, racism is still entrenched in Canadian society. The Aboriginal Justice Inquiry in Manitoba,<sup>34</sup> the Donald Marshall Inquiry in Nova Scotia,<sup>35</sup> The *Cawsey Report* in Alberta,<sup>36</sup> the Interim Report of this Commission<sup>37</sup> and many other studies make the same point: racism in Canadian society continues to shape the lives of Aboriginal, black and other racialized people.

The current challenge is for Canadians to grapple with racism's systemic dimensions. The analysis in this chapter of the process of systemic racism provides the framework for our analysis of Ontario's criminal justice system in the chapters which follow.

## Endnotes

1. For research on how beliefs about "race" are socially constructed, see generally: Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging the State and Law and Order* (Basingstoke: Macmillan, 1978); Paul Gilroy, *There Ain't No Black in the Union Jack* (London: Hutchinson, 1987); Jan Nederveen Pieterse, *White on Black: Images of Africa and Blacks in Western Popular Culture* (New Haven: Yale University Press, 1992); Vron Ware, *Beyond the Pale: White Women, Racism and History* (London: Verso, 1992); Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History* (New York: Routledge, 1992).

For discussion of the concept of racialization, see generally: Robert Miles, *Racism* (London: Routledge, 1988); Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (London: Routledge, 1991); Stephen Small, *Racialized Barriers: The Black Experience in the United States and England in the 1980s* (London: Routledge, 1994); Michael Keith, *Race, Riots and Policing: Lore and Disorder in a Multi-Racist Society* (London: UCL Press, 1993).

For useful Canadian discussion of how to understand racism, see Carl E. James, *Seeing Ourselves: Exploring Race, Ethnicity & Culture* (Toronto: Thompson Educational Publishing, Inc., 1995); Frances Henry, Carol Tator, Winston Mattis and Tim Rees, *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt Brace and Company, Canada, 1995).

2. Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (Cleveland: World Publishing, 1964).
3. See generally, Montagu, *Man's Most Dangerous Myth* (note 2); Montagu, *The Concept of Race* (New York: Collier, 1964); Stephen Jay Gould, *The Mismeasure of Man* (New York: W.W. Norton, 1981).
4. See Henry et al., *Colour of Democracy* (note 1), for numerous examples of the power of racialization in modern Canada.
5. Miles, *Racism* (note 1).
6. Gould, *Mismeasure of Man*, and Montagu, *Concept of Race* (both note 3).
7. Canadian Press news wire [*Ottawa Citizen*, Dec. 9, 1993].
8. The original provision for segregated schools in Ontario was *An Act for the Better Establishment and Maintenance of Public Schools in Upper Canada*, S.C., 1849, 12 Vict., c. 83, ss 69-71. By 1960, the legislation was called the *Separate Schools Act* R.S.O. 1960, c. 368. This legislation was abolished in 1964 after Professor Harry Arthurs published a note criticizing it: "Civil Liberties and Public Schools: Segregation of Negro Students," *Canadian Bar Review* 41 (1963), p. 453.
9. See generally: Peggy McIntosh, "White Privilege: Unpacking the Invisible Knapsack," *Peace and Freedom* 11 (1989); Philomena Essed, *Understanding Everyday Racism: An*



- Interdisciplinary Theory* (Newbury Park, Calif.: Sage, 1991); Warc, *Beyond the Pale* (note 1); and Hall, *White, Male and Middle Class* (note 1).
10. Cited in Henry et al., *Colour of Democracy* (note 1), p. 87.
  11. Multiculturalism and Citizenship Canada, *Eliminating Racial Discrimination in Canada* (Ottawa: Supply and Services 1989), p. 7.
  12. *R. v. Parks* (1994) 84 C.C.C. (3rd) 353 at 369.
  13. See generally: Ron G. Bourgeault, "Race and Class under Mercantilism: Indigenous People in Nineteenth-Century Canada," and James Frideres, "Institutional Structures and Economic Deprivation: Native People in Canada," in B. Singh Bolaria and Peter S. Li, eds., *Racial Oppression in Canada*, second edition (Toronto: Garamond, 1988); D. Raunet, *Without Surrender, Without Consent: A History of Nishga Land Claims* (Vancouver: Douglas and McIntyre, 1984); Thomas Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1942-1992* (Vancouver: Douglas and McIntyre, 1992); Boyce Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas and McIntyre, 1993); Gail Kellough, "From Colonialism to Economic Imperialism: The Experience of the Canadian Indian," in J. Harp and J. Hofley, eds., *Structural Inequality in Canada* (Scarborough, Ont.: Prentice Hall, 1980).
  14. See generally: Mr. Justice William Riddell, "The Slave in Upper Canada," *Journal of Negro History* 4 (1919), p. 372; Riddell, "Interesting Notes on Great Britain and Canada with Respect to the Negro," *Journal of Negro History* 13 (1928), p. 185; M. Trudel, *L'esclavage au Canada français: Histoire et conditions de l'esclavage* (Quebec: Les presses de l'Université Laval, 1960).
  15. See examples in Daniel G. Hill, *The Freedom-Seekers: Blacks in Early Canada* (Agincourt: Book Society of Canada, 1981).
  16. See generally, Robin Winks, *Blacks in Canada* (New Haven, Conn.: Yale University Press, 1971).
  17. *Saturday Night*, Oct. 27, 1906, p. 1 (editorial).
  18. Cited in Carl Berger, *The Sense of Power: Studies in the ideas of Canadian Imperialism 1867-1914* (Toronto: University of Toronto Press, 1970), p. 228.
  19. Bolaria and Li, *Racial Oppression in Canada* (note 13); Satzewich, *Racism and Foreign Labour* (note 1); Roxana Ng, "Sexism, Racism, Canadian Nationalism," in Himani Bannerji, ed., *Returning the Gaze: Essays on Racism, Feminism, and Politics* (Toronto: Sister Vision Press, 1993); Ng, "Managing Female Immigration: A Case of Institutionalized Sexism and Racism," *Canadian Women Studies* 12 (1992), p. 20; Agnes Calliste, "Sleeping Car Porters in Canada: An Ethnically Submerged Labour Market," *Canadian Ethnic Studies* 19 (1987), p. 1; Calliste, "Race, Gender and Canadian Immigration Policy: Blacks from the Caribbean, 1900-1932," *Journal of Canadian Studies / Revue d'études canadiens* 28 (1993), p. 131; Calliste, "Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada," *Canadian Journal of Women and the Law / Revue femmes et droit* 6 (1993), p. 85.



20. Province of Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System, *Racism Behind Bars: The Treatment of Black and Racial Minority Prisoners in Ontario Prisons* (interim report) (Toronto: Queen's Printer, 1994).
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22. Quoted in Equal Opportunities Consultants, "A Community Consultation on the Perceptions of Racial Minorities," 1990 (manuscript on file), p. 36.
23. Mr. Justice Henry Brooke, "The Administration of Justice in a Multicultural Society," Kapila Lecture by the chairman of the Ethnic Minorities Advisory Committee, Judicial Studies Board, United Kingdom, Nov. 18, 1993, (manuscript on file), p. 8.
24. *R. v. Laws*, "Ruling on Dress Code," unreported, Nov. 15, 1993.
25. Calliste, "Women of 'Exceptional Merit'" (note 19).
26. Justice Brooke, "The Administration of Justice" (note 23), p. 19. Also quoted in Chapter 8.
27. Richard V. Ericson, "Rules for Police Deviance," in Clifford D. Shearing, ed., *Organizational Police Deviance: Its Structure and Control* (Toronto: Butterworths, 1981).
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30. See Essed, *Understanding Everyday Racism* (note 9).
31. FitzGerald, "'Racism': Establishing the Phenomenon" (note 29).
32. See Chapter 4, as well as unemployment statistics for "visible minorities" reported in *Canadian Social Trends* (Ottawa: Statistics Canada) June 1995.
33. See generally: Mr. Justice Walter S. Tarnopolsky, "Discrimination and the Law in Canada," in Tarnopolsky, J. Whitman, M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice / La discrimination dans le droit et l'administration de la justice*, Canadian Institute for the Administration of Justice / Institut canadien d'administration de la justice (Montréal: Éditions Thémis, 1993).
34. Province of Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg, 1991).
35. Province of Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution, *Report* (Halifax, 1989).

36. Province of Alberta, Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Report*, chair R.W. Cawsey ("*Cawsey Report*"). (Edmonton, March 1991).
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## Chapter 4

# Prison Admissions

*[S]ociety has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes – correcting the offender and providing permanent protection to society.*

– MacGuigan Report<sup>1</sup>

After presenting perceptions and understandings of racism in the criminal justice system, we now turn to evidence of racial inequality in practices. The Commission's Terms of Reference ask us to examine how far the exercise of discretion at important decision-making points adversely affects racial minorities. In fulfilling this mandate we concentrated on imprisonment before trial and after conviction.

We decided to emphasize imprisonment because isolating people from society and confining them is the harshest action that the Canadian state can take. Fundamental to the state's authority to take this action is the ideal that everyone is equally protected against unfair or unjust imprisonment. But practices do not always live up to ideals, particularly in highly discretionary systems – such as the criminal justice system – where general criteria govern the choices made.

This chapter documents our main findings about admissions to Ontario prisons. It shows that black men and women and male youths are massively over-represented among prison admissions, an over-representation that has increased dramatically in recent years and that is much worse among pre-trial admissions than sentenced prisoners. After presenting these findings, we summarize possible explanations for them, and outline the key stages of the criminal justice system where discretionary choices *could* result in racial inequality in imprisonment. Later in the Report, we examine these choices in more detail and document the extent to which criminal justice practices *do* produce racial inequality in imprisonment before trial (Chapter 5) and after conviction (Chapter 8).

## Introduction

Persons who are imprisoned before being tried are held in provincial jails and detention centres. Ontario is also responsible for housing almost all young offenders sentenced to imprisonment\* and adults sentenced to prison terms under two years. (Adults sentenced to imprisonment for two years or longer serve their time in federal prisons.)

Most people admitted to Ontario prisons are charged with or convicted of non-violent offences. Crimes against property dominate the provincial imprisonment statistics for both pre-trial and sentenced admissions. Drug charges and offences against the administration of justice, such as failure to appear in court and obstructing justice, also produce significant numbers of prisoners.

The low proportion of violent offences among sentenced admissions is particularly well documented. In 1990/91,<sup>†</sup> for example, more than 80 percent of sentenced prisoners were convicted of non-violent offences. In fact, almost 25 percent of all sentenced prisoners were imprisoned for nothing more than non-payment of fines. As might be expected from these statistics, few sentenced offenders receive the maximum provincial prison sentence of two years less a day. Over the last ten years, for example, the average sentence length has been consistently about 80 days.

This pattern of imprisoning non-violent offenders suggests that imprisonment is over-used. Imprisonment is extremely costly and inefficient at rehabilitating people. In fact, considerable evidence suggests that imprisonment makes people more, not less, likely to commit future offences. The futility of Canada's sentencing practices has been subject to frequent criticism. According to –

- Mr. Justice Vancise, J.A.:

[Historically] ... imprisonment was based on either religious objectives [or] the provision of work and training, and, more recently, deterrence and rehabilitation. It is ... clear ... that imprisonment has failed to achieve any of these objectives in any meaningful way ...<sup>2</sup>

- the Prévost Commission:

At the very heart of our convictions about punishment is our absolute confidence that drastic penalties remain the most efficient way to bring the guilty to respect the law. However the vast majority of inmates are recidivists. Thus our prisons generate their own clientele.<sup>3</sup>

- the MacGuigan Report:

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\* Young offenders aged 14 or older may be ordered tried as adults for some very serious crimes. If convicted, they may serve some or all of their time in a federal penitentiary or adult provincial prison. All other custodial sentences served by young offenders are served in provincial institutions, in which they are kept separate from adults.

<sup>†</sup> Provincial statistics are drawn from annual reports covering Ontario's fiscal year, which runs from April 1 to March 31.

Most of those in prison are not dangerous. However, cruel lock-ups, isolation, [and] the injustices and harassment deliberately inflicted on prisoners unable to fight back, make non-violent inmates violent, and those already dangerous more dangerous.<sup>4</sup>

- the Law Reform Commission of Canada:

The need for restraint can be viewed as an echo of the belief that incarceration is a breeding ground for crime. If imprisonment is realized to be, at best, a partial failure, it is only logical to recommend that it be used with extreme moderation.<sup>5</sup>

- the LeDain Commission:

Perhaps the chief objection of imprisonment is that it tends to achieve the opposite of the result which it purports to seek. Instead of curing offenders of criminal inclinations it tends to reinforce them.<sup>6</sup>

- the federal Ministry of the Solicitor General:

[G]rowing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals.<sup>7</sup>

- Judges Lilles and Stuart:

Canada incarcerates at a rate that is third highest in the westernized world ... [A]s the incidence of both crime and incarceration is not going down, it is obvious that incarceration does not have the general deterrent effect that we imagine .... The majority of admissions to jail are non-violent offenders who do not need to be incarcerated to protect the public .... A large proportion of persons are incarcerated because there are no appropriate places or programs for them.<sup>8</sup>

- Mr. Justice Wood, J.A.:

[W]e send too many people to jail in this country. Every royal commission on sentencing in the last 159 years, and there have been many, has come to the same conclusion.<sup>9</sup>

These quotations acknowledge that our criminal justice system's costly emphasis on imprisonment has failed to reduce crime. Our findings of racial inequality in prison admissions provide another reason for justice system officials to promote restraint in the use of incarceration and to support alternatives.

## Findings about racial inequality in prison admissions

### *A note of caution*

The Commission urges caution in interpreting data that the Ministry of the Solicitor General and Correctional Services made available to us. For several reasons the numbers presented are, at best, estimates of the racial make-up of Ontario's prison



populations.\* Although they are the most complete data available, and they do give a general idea of racial inequalities in prison admissions<sup>†</sup> at various stages of the criminal justice process, it is essential to understand their limitations.

The first problem is that since the Ministry did not collect these data for systematic analysis, standard research conventions were not used in their collection. For example, a uniform practice was not used in the identification of prisoners by race. We were told that a correctional officer in each prison's Admissions and Discharge Unit usually makes such identification. However, we were also told that sometimes incoming prisoners are asked to self-report their racial origins.<sup>‡</sup>

Thus we do not know which data measure correctional officers' perceptions of race, and which data use the prisoners' self-identification. This distinction is important because self-identification and another person's observation of race tend to produce different results. In particular, classification by an observer carries a serious risk of error. Therefore, some groups may constitute a larger proportion of prison populations than the data suggest, while others may be smaller.

Another limitation arises from the working conditions of admissions and discharge officers. Often, especially in large urban detention centres, officers work quickly and under pressure. Since information about race apparently has little operational value to prison authorities, careful identification of prisoners' race is unlikely to be a high priority for admitting officers.<sup>§</sup> A relatively high proportion of prisoners are probably either not racially classified or are given designations that would be different if the officers had more time. We have no means of assessing the extent of this potential limitation.

A recent change in the ministry classification system makes investigations of trends over time difficult. Three of the groups are the same – white, Aboriginal and Oriental. However, the initial “black or brown” category was divided into “black”

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\* More detailed information about the methodology and findings of this study are available in our Technical Volume. See Appendix B.

† These data are based on admissions, not persons. An individual imprisoned more than once in a year is counted as a separate admission on each entry into the prison system.

‡ Ministry policy, we understand, assumes that correctional officers ask prisoners to self-identify race according to prescribed categories. Our description of practice is based on what we learned from correctional officers in the prisons.

§ The Ministry has been collecting this information for many years and storing it on computer. Until approached by the Commission, however, Ministry staff told us they had not attempted to aggregate, process or publish it.

and "East Indian" under the new system, and a new category of "Arabs" was added.\*

This change in classification makes investigation of trends over time difficult. In order to investigate admission trends before and after June 1991 (specifically, from 1986/87 to 1992/93), we used the five earlier categories and collapsed the post-June 1991 categories of "black" and "East Indian" into one. However, because we know that the vast majority of these admissions were described as black in 1991/92 and 1992/93, we report the changes over time as increases in admissions of black people.

Finally, the Commission emphasizes that these data do not measure participation in crime. Nor do they even approximately measure punishment, since they do not include non-prison sentences such as probation or fines.† They measure only prison admissions before trial and after conviction. As such they raise, but do not answer, the question of how prisoners came to be admitted to the institutions.

In spite of the limitations, the data present a picture of prison admissions that cannot be ignored. Even if all of these obstacles are taken into account, the results are overwhelming. While the precise numbers may be open to challenge, their general thrust is irrefutable.

### ***Summary of findings***

Ontario prison data show that over the six-year period from 1986/87 to 1992/93 –

- The number of prisoners described as black admitted to Ontario prisons increased 204%, while the number of white prisoners admitted increased 23%.
- Black admissions to prisons serving the Metro Toronto area for drug trafficking/importing‡ charges increased by several thousand percent. White admissions to the same prisons for drug trafficking/importing also increased, in some prisons by large percentages, but nowhere near as much as the growth in black admissions.

Data from 1992/93 show that among total admissions –

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\* The category "Other/Unknown" continues under the new system, but because of the other changes it may be used differently. For example, under the old system many people of "Arab" heritage were probably classified as "Other/Unknown"; under the new system, they are placed in a separate category.

† The Ministry does not collect post-sentence data about the race of people who are fined or given community-based penalties.

‡ "Trafficking/importing" is the category the Ministry used in collecting these data, and includes the offence of possession for the purposes of trafficking. To the best of our knowledge, it is not possible to separate the different charges in the data for this category of admissions.



- Both men and women described as black or Aboriginal are over-represented relative to their proportions in the provincial population, while those described as Asian, East Indian or Arab are under-represented.
- Although many more black and Aboriginal men are in jail than black and Aboriginal women, women described as black or Aboriginal are more over-represented among prison admissions than are men described as black or Aboriginal.

Data from 1992/93 on remand\* and sentenced admissions show that –

- People described as black, Asian, South Asian and Arab are admitted to prison at much higher rates before trial than after conviction, while people described as white or Aboriginal are admitted to prison before trial at about the same rates as after conviction. (As noted above, people described as Asian, South Asian and Arab are not over-represented among total admissions.)

Data from 1992/93 on the offences leading to admission to prison show that –

- Persons described as black are most over-represented among prisoners charged with drug offences, obstructing justice and weapons possession.
- Persons described as black are most under-represented among prisoners charged with impaired driving offences.

### ***Prison admissions over time: The growth of racial inequality***

Statistics Canada's profile of ethnic groups reports 158,140 black residents in Ontario in 1986.<sup>10</sup> By 1991, the black population consisted of 215,775 residents,<sup>11</sup> an increase of 36.4% while the population of the province as a whole grew by 10.8%. Thus between 1986 and 1991, the Ontario black population grew from 2.4% to 3.1% of the province's total population.<sup>†</sup>

The growth in black admissions to Ontario prisons over a similar period was much higher. There were 4,205 black admissions in 1986/87, and three times that number (12,765) in 1992/93. The more recent statistic shows that black people account for

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\* "A remand is an adjournment of a case when the court fixes the time and place of the next hearing." (I. Bing, *Criminal Procedure and Sentencing in the Magistrate's Court* (3rd ed.) (London: Sweet and Maxwell, 1994), p. 37.) If the accused has not yet had a bail hearing or has been ordered detained in custody pending trial, he or she is described as a "prisoner on remand."

† The sub-categories used to estimate the black population include only persons identified as "Black," "Ghanaian Black," "African Black n.i.e" and "Black – multiple origins" on the census form. At the Commission's request, Statistics Canada generated a detailed profile of Ontario's black population in 1991, using the more comprehensive "employment equity" categories. This method produced an estimate of 310,965 for the 1991 black population of Ontario. We used the lower estimate to calculate the change, however, because it used the same criteria as the narrower 1986 classification.



15% of prison admissions while they constitute only about 3% of the province's population.

This six-year-period also saw a significant rise in white admissions to Ontario prisons, from 49,555 in 1986/87 to 60,929 in 1992/93. But this 23% increase is smaller than the overall rise in total admissions (40%) and pales in comparison with the 204% growth in black admissions.<sup>\*</sup> Thus, despite the increase in white admissions, the percentage of white people among prison admissions dropped from 84% in 1986/87 to 73% in 1992/93.

**Table 4-1: Adult admissions to Ontario prisons, 1986/87 and 1992/93**

	1986/87		1992/93		Change between 1986/87 & 1992/93	
	%	Number	%	Number	% change	Number
White	83.4%	49,555	73.1%	60,929	+23.0%	+11,374
Black/brown <sup>1</sup>	7.1%	4,205	15.3%	12,765	+203.6%	+8,560
Asian	0.9%	549	2.0%	1,686	+207.1%	+1,137
Aboriginal	8.3%	4,958	5.9%	4,921	-0.7%	-37
Other/unknown <sup>2</sup>	0.3%	162	3.7%	3,100	+1,813.6%	+2,938
<b>Total</b>	<b>100.0%</b>	<b>59,429</b>	<b>100.0</b>	<b>83,401</b>	<b>+40.3%</b>	<b>+23,972</b>

*Source:* Ontario Ministry of the Solicitor General and Correctional Services

1. These are the original racial categories from the 1986/87 database. In order to make comparisons, the "Black/brown" category for 1992/93 includes people classified as either "Black" or "East Indian."
2. In 1992/93 the "Other/unknown" category includes people who were classified as either "Arab" or "Other" (categories not used in 1986/87).

### Trends in admissions of black and white men

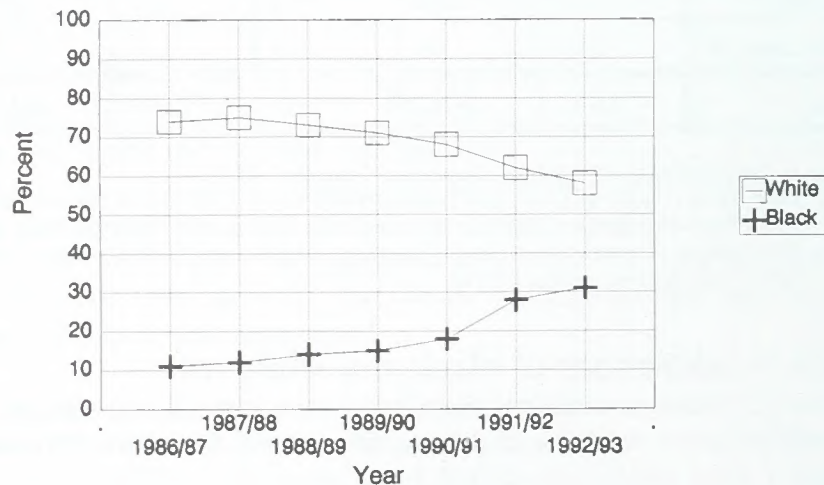
The disparity between white and black admissions over the six-year period is even more striking when we focus on prisons which serve the Metro Toronto area. We analyzed –

- **Metropolitan Toronto West Detention Centre:** In 1986/87, about 75% of male admissions were white and about 11% were black. In 1992/93, white admissions amount to less than 60% and black admissions more than 30% (Figure 4-1a).
- **Toronto Jail:** In 1986/87, over 73% of admissions were white and about 13% were black. In 1992/93, white admissions amount to 54% and black admissions 32% (Figure 4-1b).

<sup>\*</sup> Table 4-1 shows an even larger (207%) growth in admissions described as Asian, but the 1986/87 base was relatively small. Persons described as Asians were not overrepresented among 1992/93 admissions.

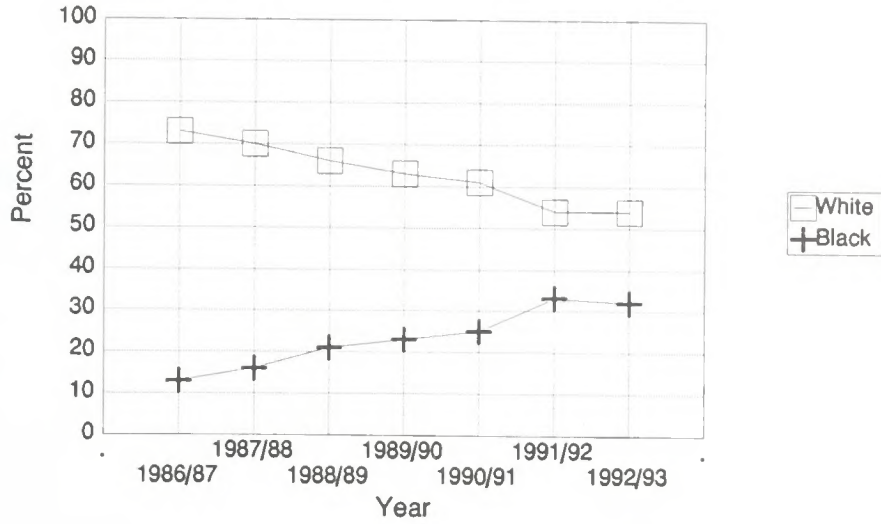
- **Metropolitan Toronto East Detention Centre:** In 1986/87, over 70% of admissions were white and about 13% were black. In 1992/93, white admissions amount to about 61% and black admissions 28% (Figure 4-1c).
- **Mimico Correctional Centre:** In 1986/87, almost 80% of admissions were white and less than 10% were black. In 1992/93, white admissions amount to about 61% and black admissions 31% (Figure 4-1d).
- **Maplehurst Correctional Centre:** In 1986/87, 90% of admissions were white and less than 10% were black. In 1992/93, white admissions amount to about 57% and black admissions almost 40% (Figure 4-1e).
- **Hamilton-Wentworth Detention Centre:** In 1986/87, about 82% of male admissions were white and about 3% were black. In 1992/93, white admissions still amount to about 82%, but black admissions have risen to about 9% (Figure 4-1f).

Figure 4-1a: Black and white male admissions to Metropolitan Toronto West Detention Centre, 1986/87 to 1992/93



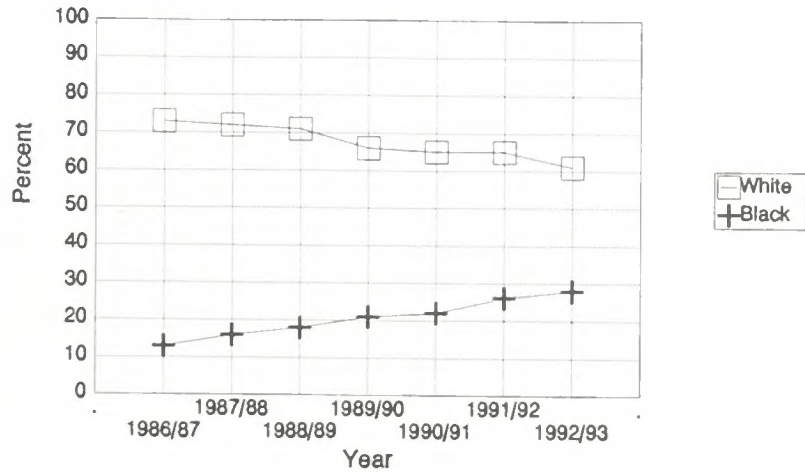
Source: Ministry of the Solicitor General and Correctional Services

Figure 4-1b: Black and white male admissions to Toronto Jail, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services

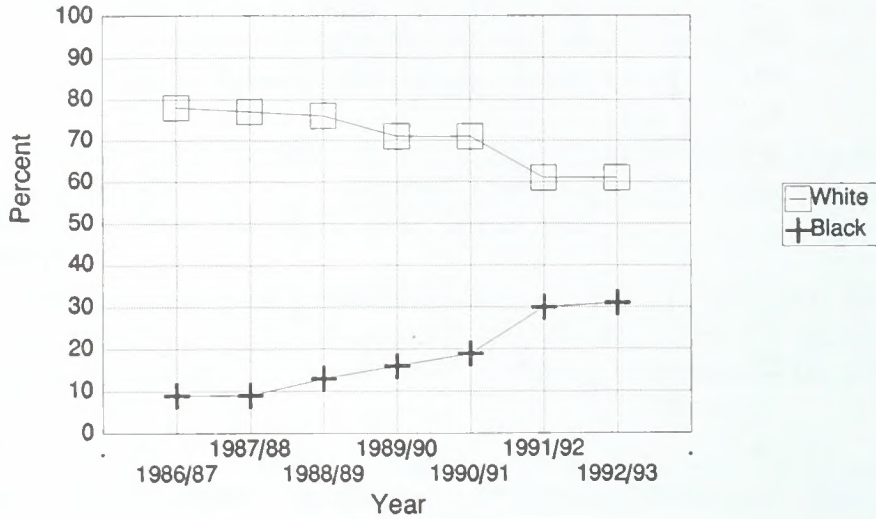
Figure 4-1c: Black and white male admissions to Metropolitan Toronto East Detention Centre, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services

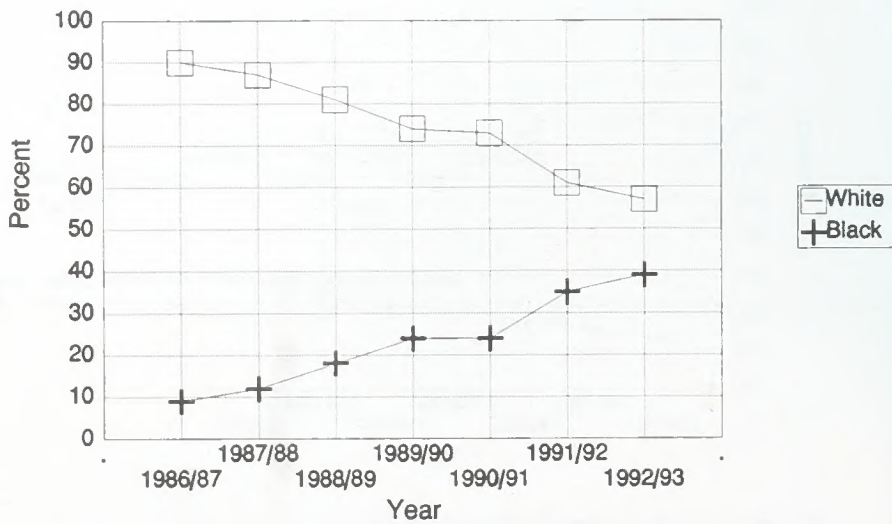


Figure 4-1d: Black and white male admissions to Mimico Correctional Centre, 1986/87 to 1992/93



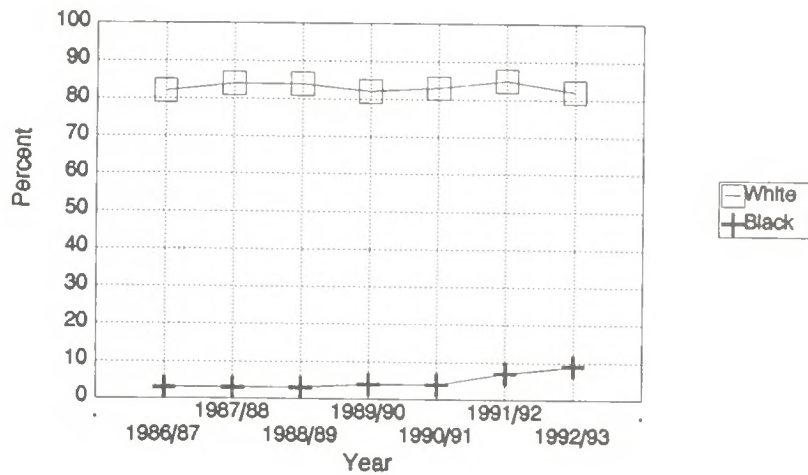
Source: Ministry of the Solicitor General and Correctional Services

Figure 4-1e: Black and white male admissions to Maplehurst Correctional Centre, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services

Figure 4-1f: Black and white male admissions to Hamilton-Wentworth Detention Centre, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services

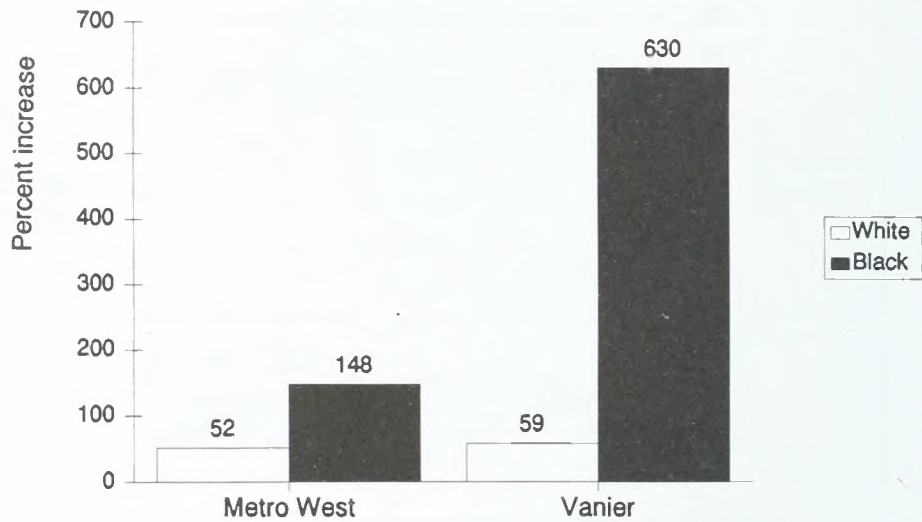
### Trends in admissions of black and white women

Admissions of white women to the two major provincial prisons where women are held rose over the six-year period. In 1992/93, Metropolitan Toronto West Detention Centre (women) admitted 52% more white women than in 1986/87. At Vanier Centre for Women, the increase in white female admissions was 59%.<sup>\*</sup> Increases in black female admissions, however, are much larger. In 1992/93, Metro West admitted 148% more black women than in 1986/87; at Vanier, the increase was 630% (Figure 4-2).

The two prisons differ in the proportions of black and white women admitted.

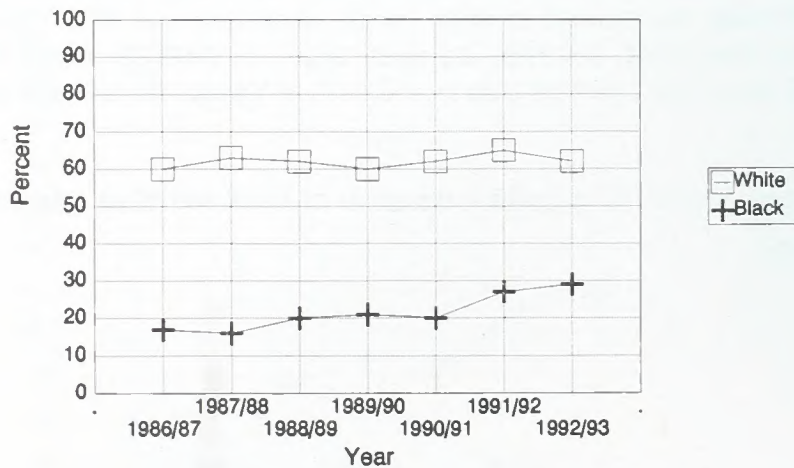
<sup>\*</sup> These percentage changes are greater than for white male admissions at any of the selected prisons for men, which suggests that the rate of imprisonment of white women is growing faster. Another possibility with regard to sentenced prisoners is that more white men may have been sentenced to prison terms in federal institutions in 1992/93. In that case, what looks like a relatively small increase in admissions of white men to provincial institutions could have been supplemented by larger increases in admissions of white men to federal prisons. Further research is necessary on this and other possibilities.

Figure 4-2: Increase in female admissions to selected Ontario prisons, 1986/87 to 1992/93, by racial group



Source: Ministry of the Solicitor General and Correctional Services

Figure 4-3a: Black and white female admissions to Metropolitan Toronto West Detention Centre, 1986/87 to 1992/93

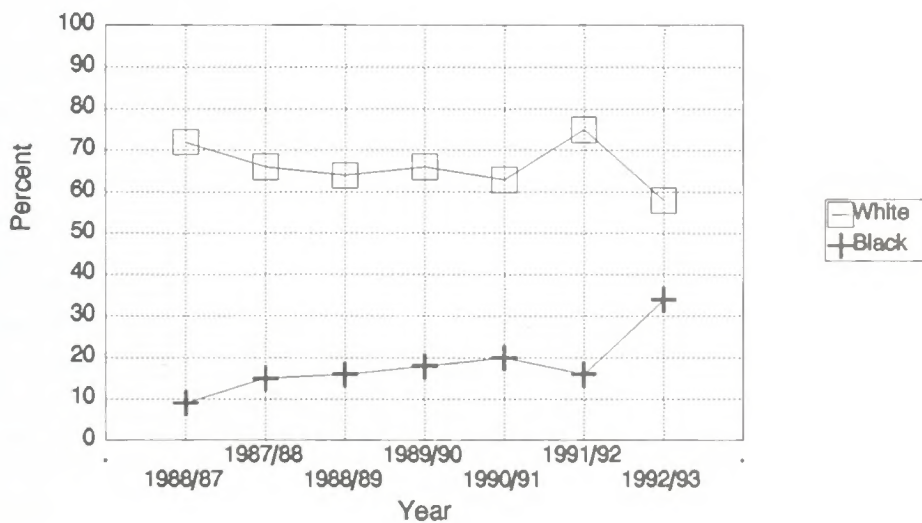


Source: Ministry of the Solicitor General and Correctional Services

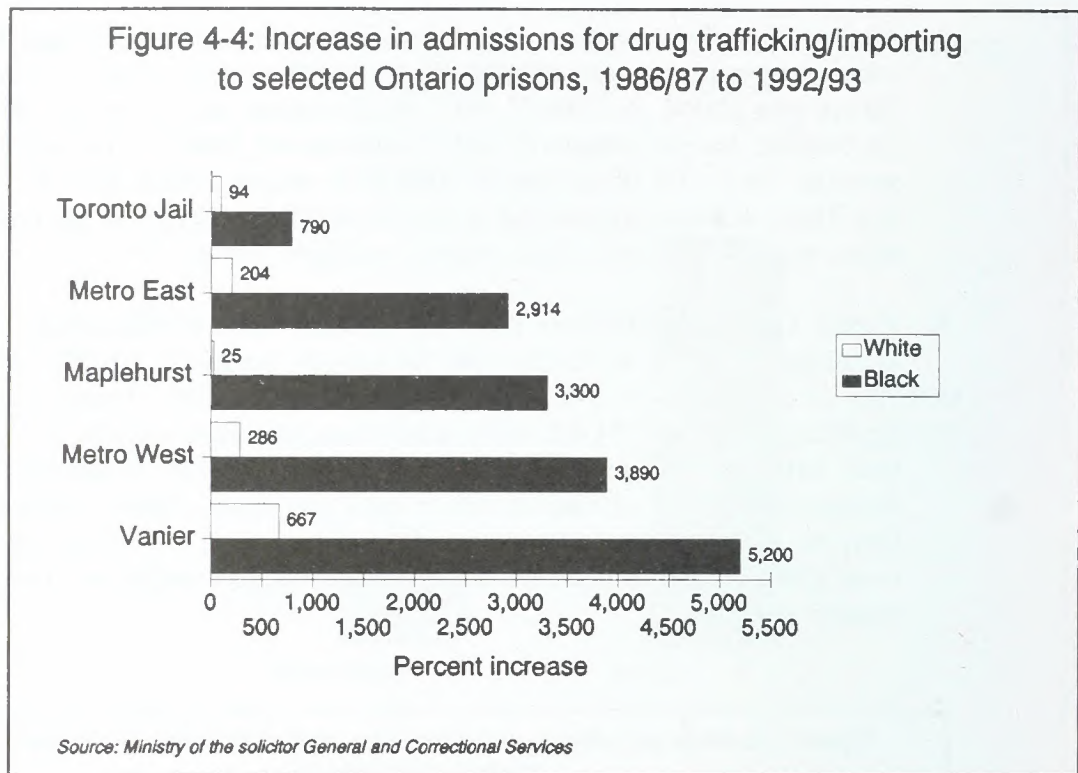


- Metropolitan Toronto West Detention Centre (women):** The proportions of white women among admissions to this prison show only minor fluctuations over the six-year period. In 1986/87, 60% of admissions were white; in 1992/93, 62%. By contrast, the percentage of black women among admissions shows a steady increase, from 18% of the total in 1986/87 to almost 30% in 1992/93 (Figure 4-3a). These findings suggest that in this prison black women are not replacing white women but women from another racialized group.
- Vanier Centre for Women:** The proportions of white women among admissions to this prison appear to decline over the six-year period. In 1986/87, more than 70% of admissions were white; in 1992/93, less than 60%. There is, however, a significant spike in 1991/92: white admissions jumped from 62% to 75% of the total, before declining the next year to a low of 58%. The percentage of black women among total admissions rose in each year since 1986/87, except 1991/92. Over the six-year-period, black women have gone from 9% of total admissions to over 30% (Figure 4-3b). These data suggest that black women are replacing white women at Vanier.

Figure 4-3b: Black and white female admissions to Vanier Centre for Women, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services



### Trends in black and white admissions on drug trafficking/importing charges

The reported increases in black and white admissions cover a range of charges, but one category dominates: drug trafficking/importing.\* Changes in black and white admissions for these charges at four of the Toronto-area men's prisons and at Vanier Centre for Women are summarized in Figure 4-4. Increases from 1986/87 to 1992/93 in the numbers of white prisoners admitted for drug trafficking/importing ranged from 25% at Maplehurst to 667% at Vanier. These increases in white admissions are large at most of the prisons but appear minor when compared with changes in admissions of black prisoners on the same charges. The Toronto Jail, with a 790% increase in the number of black admissions, showed the smallest change. At Metro East the increase is 2,914%, at Maplehurst 3,300%, and at Metro West (men) 3,890%. The biggest increase is at Vanier, which in 1992/93 admitted 5,200% more black women convicted of trafficking/importing drugs than in 1986/87.†

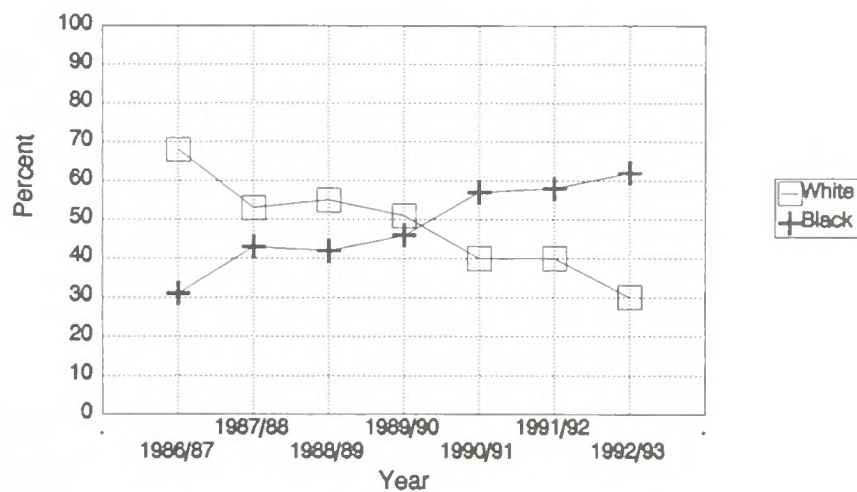
\* This category, used by the Ministry, does not separate importing from trafficking charges. Other research that we conducted, however, indicates that charges of trafficking and possession for the purposes of trafficking are far more common against men than importing charges. Women are more likely to be charged with importing drugs.

† In part, the percentage increase is in the thousands because of the small numbers involved. In 1986/87, only one black woman was admitted to Vanier Centre for Women on this charge. In 1992/93, 53 black women were admitted for drug trafficking/importing. More details about the number of admissions are in the Technical Volume. See Appendix B.

These changes are reflected in the proportions of black and white prisoners admitted on drug trafficking/importing charges in each prison. The data show that in all five prisons most 1986/87 trafficking/importing admissions were white, but by 1992/93 the majority are black.

- **Toronto Jail:** 31% of drug trafficking/importing admissions in 1986/87 were black and 68% white. In 1992/93, 62% of admissions in this category are black and 30% white (Figure 4-5a).
- **Metropolitan Toronto West Detention Centre (men):** 11% of drug trafficking/importing admissions in 1986/87 were black and 86% white. In 1992/93, 56% of admissions in this category are black and 42% white (Figure 4-5b).

Figure 4-5a: Black and white admissions to Toronto Jail for drug trafficking/importing, 1986/87 to 1992/93

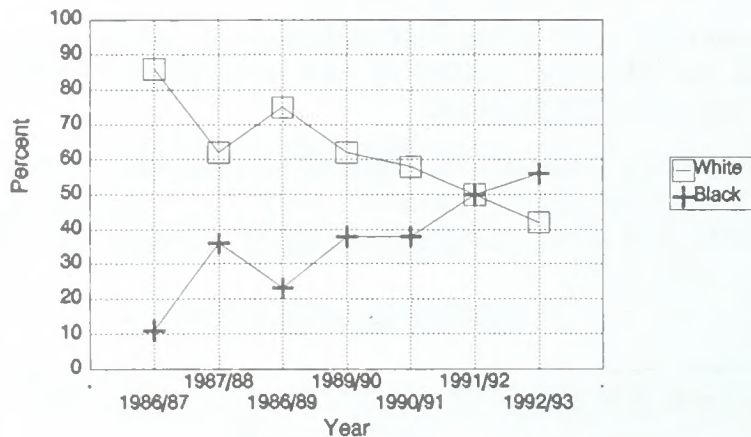


Source: Ministry of the Solicitor General and Correctional Services

- **Metropolitan Toronto East Detention Centre:** 13% of drug trafficking/importing admissions in 1986/87 were black and 86% white. In 1992/93, 56% of admissions in this category are black and 39% white (Figure 4-5c).

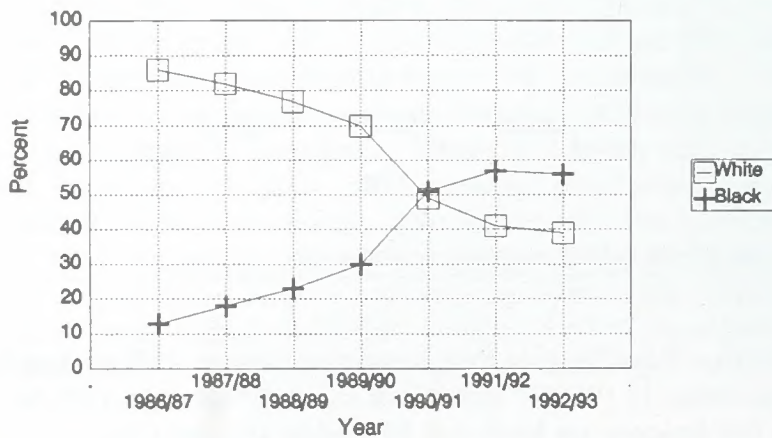


Figure 4-5b: Black and white admissions to Metropolitan Toronto West Detention Centre for drug trafficking/importing, 1986/87 to 1992/93



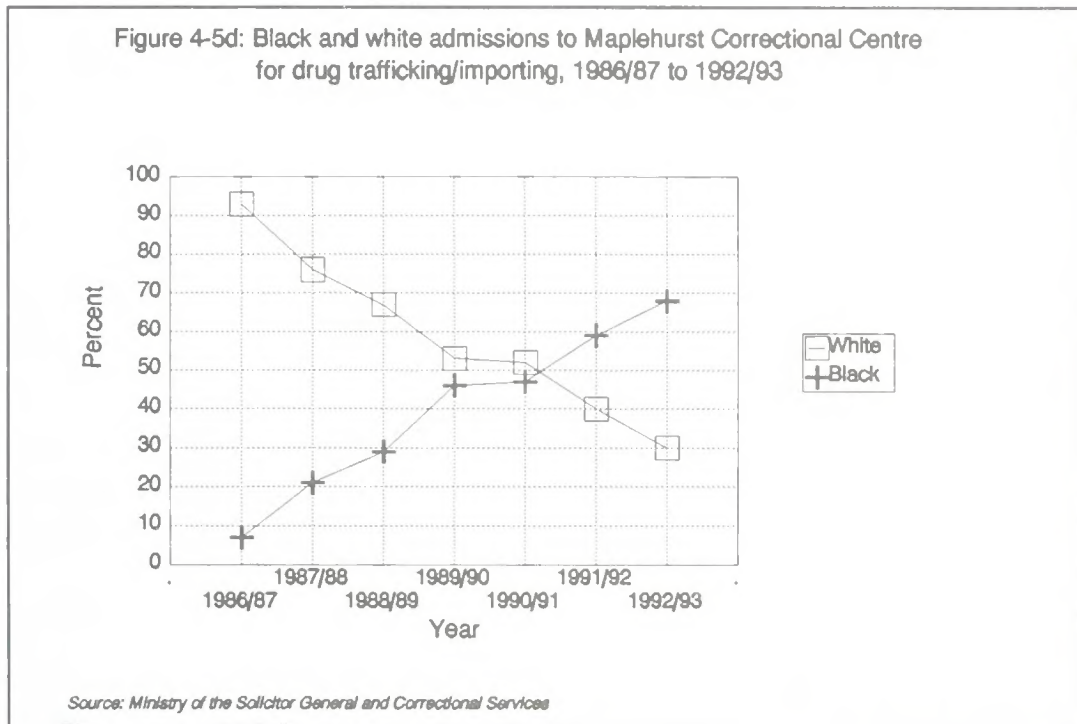
Source: Ministry of the Solicitor General and Correctional Services

Figure 4-5c: Black and white admissions to Metropolitan Toronto East Detention Centre for drug trafficking/importing, 1986/87 to 1992/93



Source: Ministry of the Solicitor General and Correctional Services

- **Maplehurst Correctional Centre:** 7% of drug trafficking/importing admissions in 1986/87 were black and 93% white. In 1992/93, 68% of these admissions are black and 30% white (Figure 4-5d).
- **Vanier Centre for Women:** 14% of drug trafficking/importing admissions in 1986/87 were black and 86% white. In 1992/93, 53% of admissions are black and 47% white (Figure 4-5e).

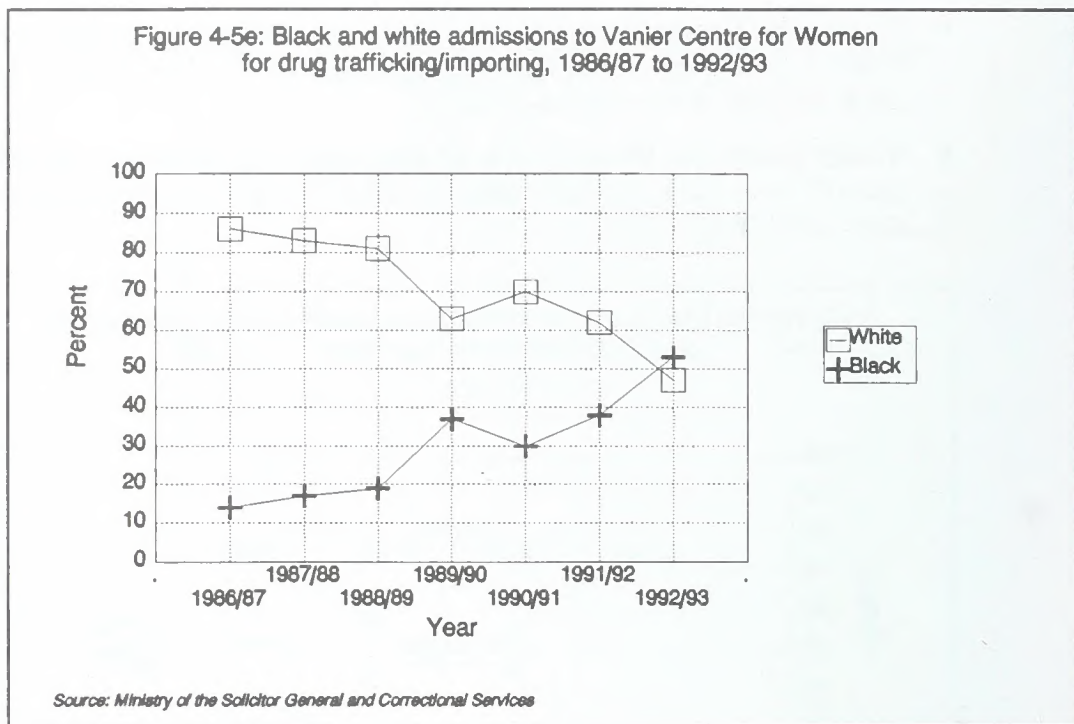


### Comment on the growth of racial inequality in admissions

These prison admission trends are shocking. Over only six years, the admission of black persons to prison increased dramatically, especially for drug-related offences. What explains these remarkable trends?

Two general factors are evident: expansion of prisons and changes in criminal justice practices. During the 1980s, the province embarked on a large prison expansion program. By 1992, Ontario's prison capacity was 30% higher than in 1985. Meanwhile, Quebec and British Columbia maintained their prison capacities at 1985 levels. In 1992, Ontario's officially recorded crime rate was about the same as Quebec's, but the imprisonment rate was one-third higher.<sup>12</sup> Between 1985 and 1992, British Columbia experienced a much higher population growth than Ontario and higher crime rates, but in 1992 Ontario's imprisonment rate was one-third higher.

Expansion of Ontario's prisons is clearly associated with overall increases in prison admissions. Why, though, have admissions of black women and men grown so much



faster than admissions of white women and men? At least part of the answer is that the so-called “war on drugs” has different impacts on white and black people.

From the mid-1980s, Canada has followed the United States in emphasizing law enforcement as a primary strategy to control drug use.\* As in the U.S., one strategy has been to attempt to reduce the supply of drugs by convicting and imprisoning large numbers of suppliers and users. Intensive police operations attack street-level trading and the couriers who bring drugs across Canada’s borders to distributors. Such policing is supported by vigorous prosecution, and efforts to imprison convicted offenders no matter how small the amount of drugs involved.†

This emphasis on convictions and imprisonment also serves other important purposes. Convictions and prison sentences can be counted and publicized to reassure the public

\* In 1987, the federal government established “Canada’s Drug Strategy,” which planned to spend some \$210 million in new funds on the entire field of substance abuse over five years (See Health and Welfare Canada, *Canada’s Drug Strategy: Phase II* (Ottawa: Supply and Services Canada, 1992)). Seventy percent of this money was allocated to measures to reduce the demand for drugs, such as education, treatment and rehabilitation. Recent research indicates, however, that the traditional prohibition approach continued to dominate Canadian drug policy over that period: Patricia G. Erickson, “Recent Trends in Canadian Drug Policy: The Decline and Resurgence of Prohibitionism” 121 *Daedalus – Journal of the American Arts and Sciences* (1992), p. 239; Benedikt Fischer, “‘Maps’ and ‘Moves’” (1994) 5 *International Journal of Drug Policy* 70.

† For example, the Ontario Court of Appeal has generally supported significant prison terms for trafficking, in the absence of extenuating circumstances. See the review of Canadian case law in Clayton C. Ruby, *Sentencing*, fourth edition (Toronto: Butterworths, 1994), pp. 683–713.



responding to concerns about drug use and drug dealing. But because of the organization of drug distribution, this response tends to focus on relatively minor offenders and offences.

Drug distribution is organized in a classic pyramid fashion. A few individuals at the top invest heavily to protect themselves against exposure. At the bottom are street dealers and couriers, who are easy to recruit and replace. Though law enforcement against those at the top of the pyramid may greatly reduce the supply of certain drugs, this is costly, time-consuming, difficult and seldom successful. Enforcement against street dealers and couriers is much easier and brings quick success in the form of convictions and imprisonment. But since individual street dealers and couriers typically handle relatively small quantities of drugs and are easily replaced, enforcement directed at them may have little or no effect on the supply of drugs.<sup>13</sup> (Even enforcement against persons at the top of the pyramid may be remarkably unsuccessful in achieving any permanent reduction in the availability of certain drugs.)

How does this "war on drugs" produce racial inequalities in imprisonment? Neither patterns of drug use nor control over drug supply explain our findings. No evidence shows that black people are more likely to use drugs than others or that they are over-represented among those who profit most from drug use. Events of the last few years do show, however, that intensive policing of low-income areas in which black people live produces arrests of a large and disproportionate number of black male street dealers. Similarly, intensive policing of airline travellers produces arrests of a smaller, but still disproportionate, number of black female couriers. Once the police have done this work, the practices and decisions of crown prosecutors, justices of the peace and judges operate as a conveyor belt to prison.<sup>14</sup>

The futility of using heavy law enforcement against minor suppliers and couriers to control drug use is well documented.<sup>15</sup> Experts in drug policy are clear: law enforcement directed at small-scale traders and couriers has an insignificant impact on drug use. It is a waste of resources. Many police officers, lawyers and some judges (including some we consulted) acknowledge this.\* They know that effective drug policies emphasize treatment and prevention of abuse. Such strategies focus resources on existing and potential drug users, not petty suppliers. Without a local demand for drugs, street trading would disappear and small-scale couriers would not be recruited.

It is clear from our findings that in Ontario, as in many parts of the United States,<sup>16</sup> one effect of the "war on drugs," intended or not, has been the increase in imprisonment of black people. This is an intolerable consequence of a policy that experts recently described as "mistaken, harmful and at times absurd."<sup>17</sup> We return to the racial inequalities produced by the "war on drugs" in Chapters 5 and 8, where we

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\* A recent study by the Addiction Research Foundation documents considerable concern among some judges and lawyers about the futility of such law enforcement. Patricia G. Erickson and J. Cohen, *Alcohol and Other Drugs in the Criminal Justice System: Perceptions of Justice System Personnel* (preliminary report) (Toronto: Addiction Research Foundation, forthcoming).

also show how the exercise of discretion produces disproportionate imprisonment of black people.

The particular strategies selected in the so-called "war on drugs" account for much of the growth of racial inequality in prison admissions between 1986/87 and 1992/93. However, not all of this inequality is due to drug charges. To find out more about the patterns of racial inequality among admissions, the Commission analyzed data for 1992/93, the first year of our mandate, in more detail.

### ***Prison admissions in 1992/93: The details of racial inequality***

#### **Youth admissions**

The Commission's Terms of Reference mandate "particular attention to the impact of systemic racism on racial minority youth." Unfortunately, lack of data defeated our attempts to focus on youth admissions to prison. We encountered two problems.

First, the Ministry of Community and Social Services, the government agency responsible for incarceration of young people aged 12 to 15, does not keep information about their race. Consequently, we have no means of monitoring the population of young people in institutions run by that Ministry.

Second, although information about prison admissions of youths aged 16 and 17 is available, we were unable to obtain accurate demographic estimates for this age group. The age categories used by Statistics Canada in census estimates are not the same as the age group used for youths under the jurisdiction of the Ministry of the Solicitor General and Correctional Services. Consequently, we cannot calculate rates of admission by race or charges, but only suggest the general relationships between the youth population and prison admissions. These general findings show significant racial differentials in prison admissions of youths aged 16 and 17.

#### ***Youth admissions by sex and race***

In 1992/93 a total of 4,705 youths aged 16 and 17 were admitted to prisons run by what was then the Ministry of Correctional Services. Of these admissions, 4,369 (93%) are male. Prisoners described as white dominate both male and female admissions, amounting to 72% of male, 71% of female and 72% of total youth admissions in this age group.

At 13%, prisoners described as black are the second largest group of admissions. The representation of black young women among young female admissions is strikingly low at 1.5%, in stark contrast to the findings about adult admissions reported below.

Of 16- and 17-year-old admissions, 7% are described as Aboriginal. Young Aboriginal women make up 22% of female youth admissions, while only 6% of male youth admissions are young Aboriginal men.



Youths classified as Asian, East Indian and Arab together represent 4% of female, 5% of male and 5% of total youth admissions.

**Table 4-2: Admissions of youths aged 16 and 17 to Ontario prisons, by sex and race, 1992/93**

	Female	Male	Total
White	70.8%	71.9%	71.8%
Black	1.5%	13.3%	12.5%
Aboriginal	22.0%	6.3%	7.5%
Asian	2.4%	3.0%	3.0%
East Indian	0.3%	1.3%	1.3%
Arab	0.9%	0.8%	0.8%
Other/unknown	2.1%	3.3%	3.2%
Total percent*	100.0%	99.9%	100.1%
Total number of admissions	336	4,369	4,705

*Source:* Ontario Ministry of the Solicitor General and Correctional Services.  
 \* Percentage estimates may not add up to 100% due to rounding.

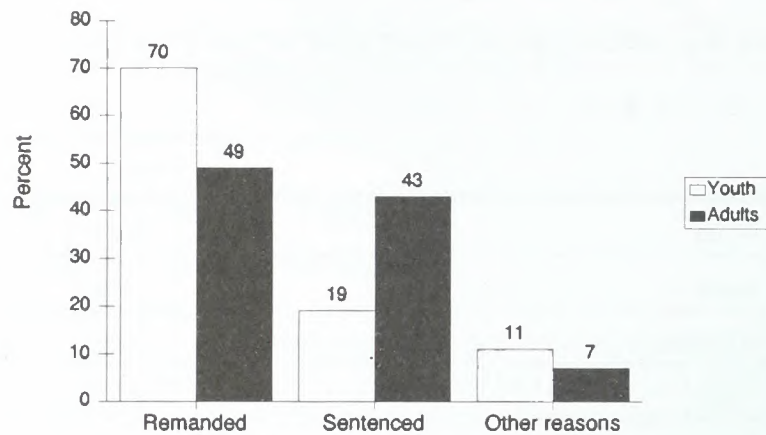
***Youth admissions by reason for admission and race***

Youths aged 16 and 17 are more likely than adults to be held in prison before trial. Of the 4,705 admissions in 1992/93, 70% are on remand, 19% are sentenced, and 11% are held for other reasons (Figure 4-6).

Table 4-3 shows that youths described as white are a higher proportion of sentenced (76%) than remanded (70%) admissions, while for youths described as black the reverse is true. Black youths represent 13% of remanded and 10% of sentenced admissions in 1992/93. There is little difference between proportions of admissions of youths described as Aboriginal on remand and after sentencing.



Figure 4-6: Admissions of youths aged 16 and 17 and adults to Ontario prisons, by reason for admission, 1992/93



Source: Ministry of the Solicitor General and Correctional Services

Table 4-3: Admissions of youths aged 16 and 17 to Ontario prisons, by race and reason for admission, 1992/93

	Remanded	Sentenced	Other reason	Total
White	70.4%	76.0%	73.4%	71.8%
Black	13.1%	10.0%	13.1%	12.5%
Aboriginal	7.4%	7.7%	7.2%	7.5%
Asian	3.4%	2.2%	1.6%	3.0%
East Indian	1.4%	0.7%	1.2%	1.3%
Arab	0.9%	0.7%	0.2%	0.8%
Other/unknown	3.3%	2.8%	3.2%	3.2%
Total percent*	99.9%	100.1%	99.9%	100.1%
Total number of admissions	3,289	919	497	4,705

Source: Ontario Ministry of the Solicitor General and Correctional Services

\* Percentage estimates may not add up to 100% due to rounding.

**Adult admission totals: an overview**

***Adult admissions by sex and race***

Of the 83,401 adult admissions to Ontario's prisons in 1992/93, 76,403 (92%) are male. Among both male and female admissions, prisoners described as white are by far the dominant racial group. They make up almost three-quarters of male admissions and just over two-thirds of female admissions. Of the total admissions for both sexes, 73% are white.

Broken down by sex as well as race, the data show that adult prisoners described as black are a higher proportion of female admissions (17%) than of male admissions (13%). A similar pattern is true of prisoners described as Aboriginal: 9% of female admissions compared with 6% of male admissions. Three other racial groups included in the 1992/93 data - Arab, East Indian and Asian - make up small proportions of male, female and total adult admissions.

**Table 4-4: Adult admissions to Ontario prisons, by sex and race, 1992/93**

	Female	Male	Total
White	67.4%	73.6%	73.1%
Black	17.1%	13.4%	13.7%
Aboriginal	9.2%	5.6%	5.9%
Asian	2.0%	2.0%	2.0%
East Indian	1.0%	1.6%	1.6%
Arab	0.3%	0.8%	0.7%
Other/unknown	3.1%	3.0%	3.0%
Total percent*	100.1%	100.0%	100.0%
Total number of admissions	6,998	76,403	83,401

Source: Ontario Ministry of the Solicitor General and Correctional Services

\* Percentage estimates may not add up to 100% due to rounding.

***Adult admissions by reason for admission and race***

People are held in prison for a variety of reasons. The vast majority are awaiting criminal trials or serving sentences, while others are held for reasons such as non-payment of fines, immigration processing and breaches of parole conditions. Of the 83,401 adult admissions in 1992/93, 41,195 (49%) are in custody awaiting further processing of charges and 36,188 (43%) are sentenced. Only 6,018 admissions (7%) are for other reasons.



As shown in Table 4-5, white prisoners make up 80% of adult admissions after sentencing. Though still the largest group, white admissions are only 69% of admissions on remand. Their representation among admissions for other reasons, at 62%, is also noticeably lower than among the sentenced population.

By contrast, persons described as black make up a higher proportion of remanded (16%) than sentenced (9%) admissions and about one-quarter of the "other" category. Persons described as Aboriginal amount to 6% of both remanded and sentenced admissions, but only 3% of those admitted for other reasons.

**Table 4-5: Adult admissions to Ontario prisons, by race and reason for admission, 1992/93**

	Remanded	Sentenced	Other reason	Total
White	68.9%	79.9%	61.5%	73.1%
Black	16.1%	9.0%	25.8%	13.7%
Aboriginal	6.0%	6.3%	2.8%	5.9%
Asian	2.9%	1.0%	2.1%	2.0%
East Indian	2.0%	1.1%	1.8%	1.6%
Arab	0.9%	0.4%	1.4%	0.7%
Other/unknown	3.2%	2.3%	4.6%	3.0%
Total percent	100.0%	100.0%	100.0%	100.0%
Total number of admissions	41,195	36,188	6,018	83,401

*Source:* Ontario Ministry of the Solicitor General and Correctional Services

### **Adult admission rates: A more precise measure**

Analysis of admission rates – the number of admissions per 100,000 community members in Ontario – provides a more vivid and accurate picture of racial disparities than simple totals.<sup>18</sup> Unfortunately, here we once again encountered problems of data collection.

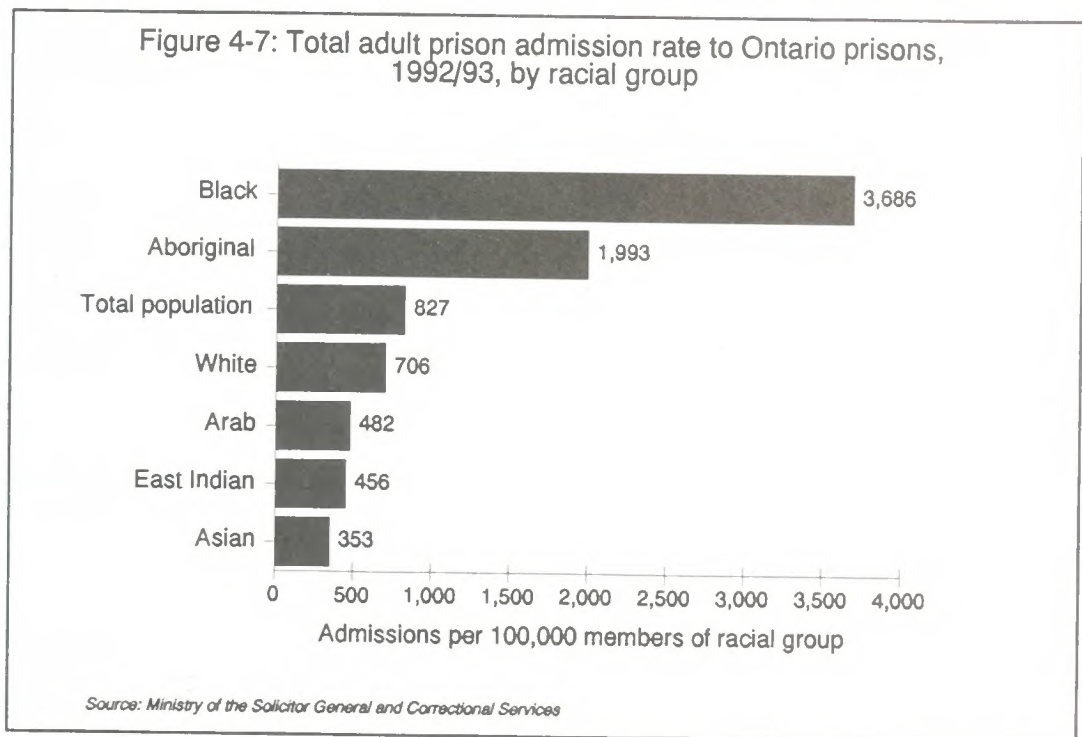
Ontario's prison system and the federal census use different methods of classification and different categories. The Ministry uses race and includes a category for white people. The census, by contrast, uses the concept of ethnicity. Instead of a "white" category there is a variety of European national or regional affiliations: British,



Scottish, Italian, Portuguese and so on. Statistics Canada can estimate “visible minority” populations from the census data, but has no specific estimate of Ontario’s “white” population. To obtain the number of persons in this group, we therefore subtracted estimates for identified visible minority populations from the province’s total population.

**Admission rates by race**

Figure 4-7 shows adult prison admission rates for the six racial designations used by the Ministry of the Solicitor General and Correctional Services. Behind the total admission rate of 827 per 100,000 Ontarians is considerable variation among the groups. In particular, while adults described as black are admitted at five times the rate of adults described as white, and adults described as Aboriginal at almost three times, those described as Asian are admitted at half the rate of white adults.



**Admission rates by race and sex**

Prison admission rates of women show greater racial inequality than admission rates of men. Whereas black men are admitted to prison at a rate just over five times that of white men in 1992/93, the admission rate for black women is almost seven times that of white women. Similarly, the admission rate for Aboriginal women was almost

five times that of white women, while Aboriginal men are admitted at less than three times the rate of white men.\*

### ***Admission rates before and after trial***

Analysis of these rates by type of admission and racial group reveals two striking patterns: the rate of pre-trial admission is significantly higher than the rate after sentence for all racialized groups except Aboriginal people. White people, though, are, imprisoned before trial at about the same rate as after sentence. Particularly noteworthy is the dramatic difference between the pre-trial and sentenced admission rates of adult prisoners described as Asian (Figure 4-8).

**Table 4-6: 1992/93 Adult prison admission rates, by sex and race**

	Male prison admissions per 100,000	Female prison admissions per 100,000
Total	1,542.5	136.4
White	1,326.4	107.3
Black	6,976.6	730.7
Aboriginal	3,600.9	502.7
Asian	669.9	55.5
East Indian	842.0	48.3
Arab	845.3	39.5

*Source:* Ontario Ministry of the Solicitor General and Correctional Services

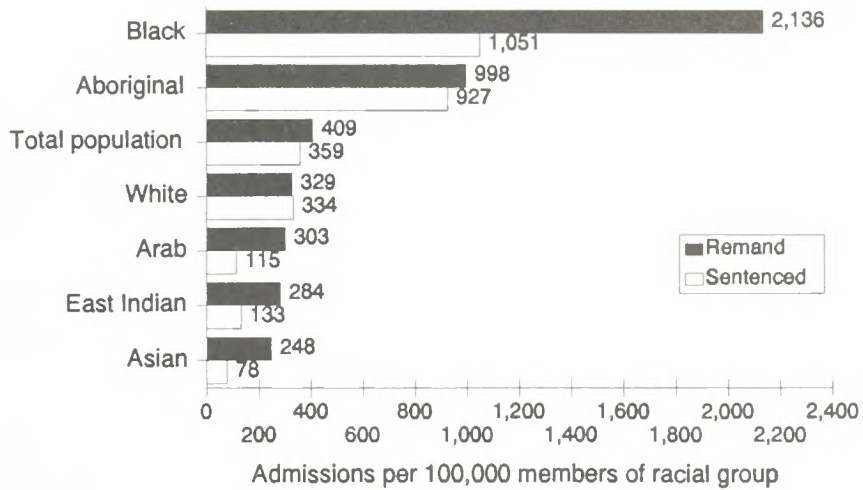
### ***Admission rates by specific charges***

Behind the overall ratio of five to one in black to white adult admission rates is considerable variation among charges. For example, in 1992/93, the black admission rate for drinking and driving offences (34 per 100,000) is half of the white rate. By contrast, the 1992/93 black admission rate for obstructing justice (112 per 100,000) is ten times higher than the white admission rate (11 per 100,000).

For each of four charges – trafficking/importing drugs, possession of illegal drugs, obstructing justice and weapons possession – black admission rates are more than nine times greater than white admission rates. As Figure 4-9 shows, the inequality in admission rates for trafficking/importing drugs is by far the largest among the four offence categories. The ratio of black-to-white admission rates on this charge is 22:1.

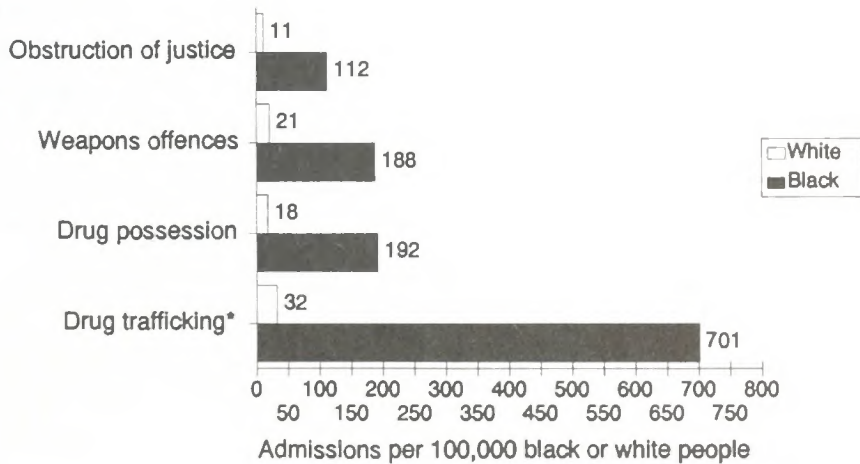
\* The precise ratios are 5.3 to 1 for black men to white men; 6.8 to 1 for black women to white women; 4.7 to 1 for Aboriginal women to white women; and 2.7 to 1 for Aboriginal men to white men.

Figure 4-8: Remand and sentenced adult admission rates to Ontario prisons, 1992/93, by racial/ethnic group



Source: Ministry of the Solicitor General and Correctional Services

Figure 4-9: Black and white adult admission rates to Ontario correctional institutions, 1992/93, by selected criminal offences



\* Includes drug trafficking/importing

Source: Ministry of the Solicitor General and Correctional Service



Racial differentials in admissions are larger at the pre-trial stage (remand) than after conviction. With regard to –

- **drug trafficking/importing charges**, black remand rates are 27 times higher than white remand rates in 1992/93. The admission rate ratio for convicted persons, though still very high, drops to 13:1.
- **drug possession charges**, black remand rates are 15 times higher than white remand rates. The admission rate ratio for convicted persons, though still high, drops to 7:1.
- **obstructing justice charges**, black remand rates are 13 times higher than white remand rates. The admission rate ratio for convicted persons, though still high, drops to 7:1.
- **weapons charges**, black remand rates are 9 times higher than white remand rates. The admission rate ratio for convicted persons is about the same at 8:1.

### Other variables

Differences other than race likely account for some of the inequality in prison admissions. Age, unemployment and poverty, for example, are all known to be associated with the offences that are policed, prosecuted and punished most vigorously in Ontario and similar jurisdictions.\* And black and Aboriginal Ontarians are younger, poorer and more likely to be unemployed than those of British ethnicity.

In the 1991 census, for example, 57% of black males and 65% of Aboriginal males are under 30 years of age, compared with 46% of males of British ethnicity and 45% of all Ontario males. Unemployment rates show dramatic differences by ethnicity, especially among young males. In 1991, for example, 26% of black males compared with 15% of British and 17% of all males in Metro Toronto aged 15 to 24 are unemployed (Figure 4-10). A similar pattern exists for women in the same age group, as Figure 4-11 shows. In 1991, 20% of black and 16% of Aboriginal, compared with 11% of British and 13% of all young women in Metro, cannot find work.

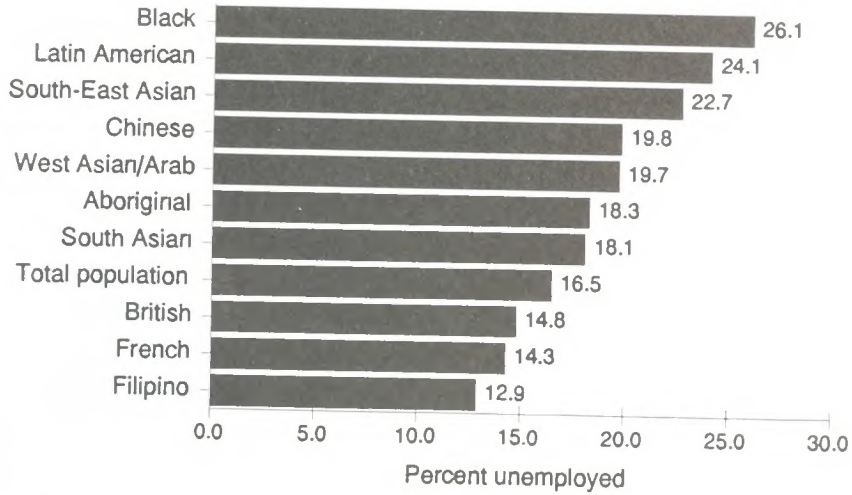
Black men and women in Metro, as well as Aboriginal men and women, are also considerably poorer than men and women of British ethnicity, and their incomes are lower than the average for Metro residents.

Examination of census estimates also suggests that the category “Asian” used in Ministry of Correctional Services admissions statistics may mask important variations. In Toronto, for example, the 1991 census shows 28% of Vietnamese men aged 15 to 24 as unemployed, compared with 14% of men in the same age group who identify themselves as Japanese. Yet prisoners from both communities would be classified in prison admissions data as Asian. Consequently, low numbers of admissions from Asian communities that are relatively wealthy and established could obscure disturbing

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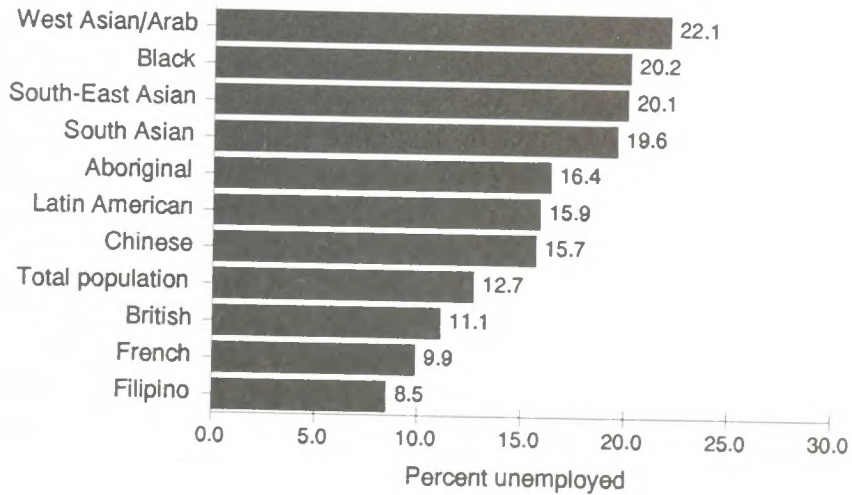
\* See the discussion of differential enforcement below.

Figure 4-10: Unemployment rate by racial/ethnic group, males aged 15 to 24 years in Metro Toronto, 1991



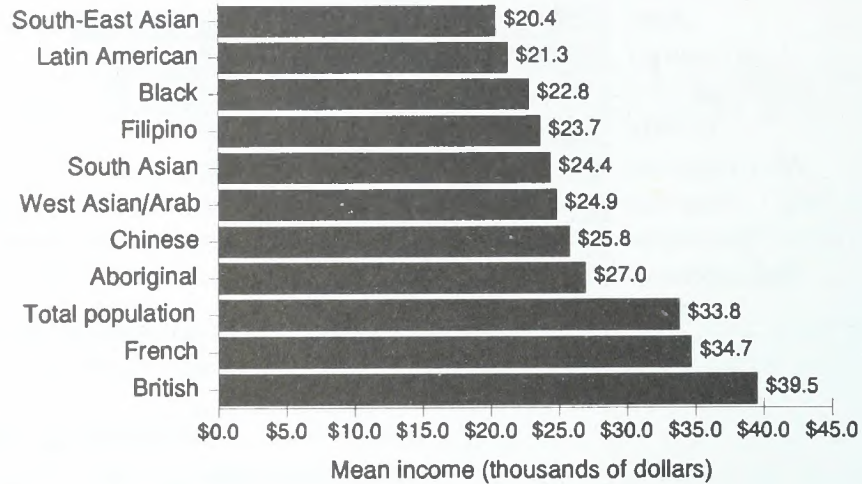
Source: Statistics Canada - 1991 Census

Figure 4-11: Unemployment rate, by racial/ethnic group, females aged 15 to 24 years in Metro Toronto, 1991



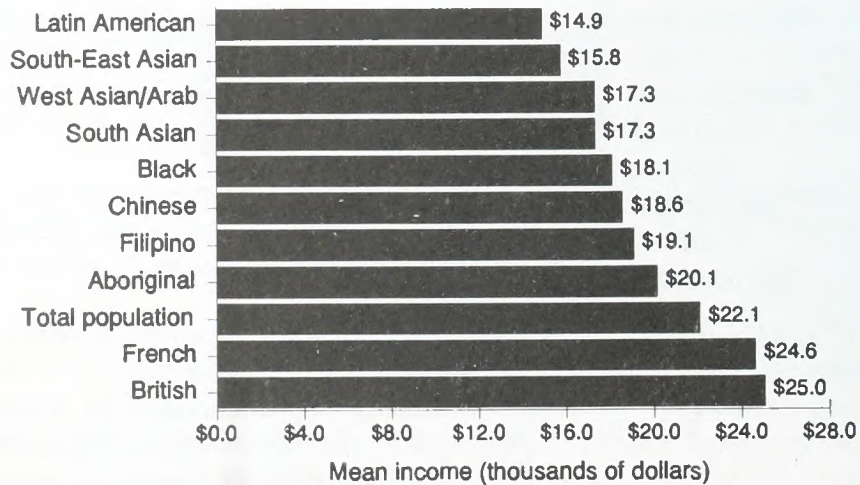
Source: Statistics Canada - Census Canada

Figure 4-12: Mean personal income by racial/ethnic group, males aged 15 years and over in Metro Toronto, 1991



Source: Statistics Canada - 1991 Census

Figure 4-13: Mean personal income, by racial/ethnic group, females aged 15 years and over in Metro Toronto, 1991



Source: Statistics Canada



patterns in the admission of prisoners from poorer, less established Asian communities.\*

Since we are unable to assess accurately the "ethnicity" of prisoners, we cannot be sure that these conditions apply in Ontario. Nonetheless, we note this possibility because the Commission has found serious and growing concerns within the Vietnamese community that large numbers of Vietnamese male youths and adults are being admitted to Ontario's prisons.

### Comment on the findings

These findings clearly demonstrate that black people are vastly over-represented where the criminal justice system has its harshest impact – imprisonment. While the precise numbers may be open to debate, the Commission believes the patterns of inequality they reveal are reliable.

These findings about 1992/93 admissions pose the general question of why black people, like Aboriginal people, are so over-represented among admissions to Ontario's prisons. They also raise two very specific questions. Why are pre-trial admission rates for black and other racialized people so much higher than sentenced admission rates, when corresponding rates for white and Aboriginal people are the same? And why are black and Aboriginal women even more over-represented than black or Aboriginal men among prison admissions?

Taken alone, these findings do not explain racial inequalities in prison admissions, nor do they suggest solutions. Without a clear understanding of the problems, there can be little confidence that solutions will be effective.

## Understanding over-representation

Why are black people over-represented among prison admissions? What explains the dramatic increase in the imprisonment of black women and men since 1986/87? Why is there such a large difference in imprisonment rates of black and white people for some offences and much smaller differences, or even under-representation of black people, for other offences?

A superficial answer might be that the data "prove" that black people are inherently criminal. This explanation does not fit the facts. Equally superficial – and equally unconvincing – is the conclusion that all white police officers, lawyers and judges are blatantly racist and deliberately criminalize black people.

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\* A similar point has been made in Britain. There, "Asian" indicates groups that might identify themselves as "South Asian/East Indian" in Canada. In Britain this group is dominated by people of Indian ethnicity whose wealth and employment status are similar to those of white people. British people of Pakistani and Bengali ethnicity are considerably poorer, younger and less likely to have secure jobs. Analyses of British prison data have concluded that "Asians" are not over-represented among prisoners. More detailed recent studies, however, suggest that British people of Bengali and Pakistani heritage are over-represented among "Asian" prisoners, and may be over-represented in the prison population as a whole. (Marian FitzGerald, "Racism": Establishing the Phenomenon" in *Racism and Criminology* Dee Cook and Barbara Hudson, eds., (London: Sage, 1993). )

Consider the superficial view that race determines criminal behaviour, and that racial inequality in prison admissions merely reflects black people's inherent criminality. How could race cause people to commit criminal offences? Is the answer in biology – could a gene related to dark skin, curly hair and broad noses cause people to commit crimes? Would this gene lead black people to specialize in drug trafficking? Does a gene cause white people to drive after drinking alcohol? Does pale skin and straight hair, or a gene related to these characteristics, prevent people from obstructing justice?

Consider also the dramatic increase in prison admissions of black people. How could a biological link between race and crime explain this? Surely the genetic make-up of black Ontarians did not suddenly change during the late 1980s and early 1990s.

Most important, if biology causes criminality, why are only a small percentage of black Ontarians in conflict with the law? Even if each prison admission represented one individual (which is not the case),\* 96 percent of black people were not admitted to prison in 1992/93. If a "race gene" caused black people to commit crimes, then most of Ontario's black residents, and few or no white Ontarians, would be in jail.

Such questions are absurd, as is the belief that biology explains criminal behaviour. There is no such thing as a criminality gene, nor, more fundamentally, is there any scientific evidence of a race gene. As Stephen Jay Gould states:

Intense studies ... have detected not a single "race gene" – that is a gene present in all members of one group and none of another. Frequencies vary, often considerably, among groups, but all human races are much of a muchness .... [T]he great preponderance of human variation occurs within groups, not in the differences between them ....

Human groups do vary strikingly in a few highly visible characteristics (skin colour, hair form) – and these external differences may fool us into thinking that overall divergence must be great. But we know now that our usual metaphor of superficiality – skin deep – is literally accurate.<sup>19</sup>

Clearly then, the dark skins and curly hair of black people do not cause criminal behaviour. Nor does some other genetic difference lead black people to commit crimes. Since biology is not destiny, the explanation of racial inequalities in prison admissions must lie elsewhere.

Some people who rightly reject biological explanations of criminal activity find cultural ones persuasive. Recognizing that racial appearance cannot determine behaviour, they may think, nonetheless, that culture does. Are cultural propensities to criminality, violence or lack of respect for law and authority the reasons for racial differentials in admissions to Ontario's prisons?

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\* See Footnote † on page 68.



If all or some black cultures are inherently criminal, but white cultures are not, why are the vast majority of prison admissions people from white cultures? Why are most black people (like most white people) not in conflict with the law? If black culture causes criminality, what explains the relatively low proportions of black admissions in 1986/87 and the massive increase since then?

Finally, how do cultural explanations of criminality account for what John Pitts calls "one of the few things we know with any certainty about the relationship between race and crime" – the evidence, documented in many countries, that crime rates among immigrants are lower than among persons born in the country?<sup>20</sup> Crime rates among descendants of immigrants, however, tend to be the same as or higher than crime rates of the dominant culture.<sup>21</sup> If culture explains crime, why are members of the immigrant generation, who presumably have the allegedly criminal tendencies of an "alien" culture in its strongest form, less likely to commit offences than their children and grandchildren raised in the culture of the new society?

The answer, of course, is that cultural characteristics do not explain the evidence. As Pitts states,

Crime rates are neither a simple product of the proclivities of individuals nor of the cultural penchant of particular ethnic groups but, rather, a product of the chances, choices and solutions available within the milieu they enter. The rise in crime rate among the second and subsequent generations of an immigrant group is a product of ... [the] process whereby people make an accommodation with, and establish ways of being within, a new social environment. In the process some "incoming" young people will adopt the strategies and behaviours of the established social group [where they live].<sup>22</sup>

Cultures may be real and enriching forces in people's lives, but they are not "timeless and inexorable determinants of behaviour."<sup>23</sup> They do not, in other words, dictate what people do. Culture cannot cause people to commit crimes or account for racial inequalities in prison admissions. Far from explaining anything, beliefs that some cultures are inherently violent, criminal, anti-social or disrespectful of law are stereotypes that racialize others. They promote constructions of races as real, different and unequal, and allow people to act as if such constructions were true.

Cultural characteristics of specific racialized groups or minority groups in general clearly cannot explain racial differentials in prison admissions. So how do we explain these differentials in Ontario prisons? In jurisdictions where disproportionate imprisonment of black people has been openly recognized for years, research suggests two general explanations, which may overlap. One explanation emphasizes the influence of social and economic inequality on behaviour; the other points to differential enforcement of the criminal law, including racial discrimination in the administration of justice.



### ***Social and economic inequality***

Some studies of differential imprisonment emphasize failures to integrate black and other racialized people into the wider society. They draw on evidence of disproportionately high rates of unemployment and dead-end jobs among racialized people, particularly young adults. They also cite poor housing conditions and lack of educational opportunities. These studies make the important point that social and economic opportunities are racialized. That is, members of racialized groups are much more likely than members of non-racialized groups to have limited opportunities. Since people with limited social and economic opportunities are most likely to be policed, prosecuted and punished as criminals,<sup>24</sup> racialized people are more likely than white people to be in conflict with the law. Thus they are over-represented at all stages of the criminal justice process, including prisons.

Three important elements of this explanation are worth emphasizing. First, those who adopt it may generally accept that racialized people are over-represented in prison populations, at least in part, because of greater participation in some criminal activities.<sup>25</sup> They do not accept, however, that biology or culture is the reason for higher rates of participation. Nor do they always see racism in the wider society as the only contributing factor.

According to this view, the social and economic conditions of people's lives are crucial to their participation in criminal activity. The criminality rate should be the same for racialized and non-racialized people where these conditions are the same. If, on the other hand, opportunities are unequally distributed, members of the socially disadvantaged groups are likely to commit a higher proportion of crimes than others. If a higher proportion of a particular racialized group has limited opportunities, compared with other groups, then the average crime rate for this group is likely to be higher.

Second, according to this approach sub-groups with similar life opportunities – in racialized and non-racialized communities alike – are likely to display similar levels of criminality. Young, unemployed white men living in areas of social stress and economic deprivation, for example, would be likely to commit crimes as their young, male, unemployed black neighbours. Conversely, as Pitts noted of the British context, "... the amount of street crime perpetrated by 28-year-old, male, British Afro-Caribbean chartered accountants is the same as that perpetrated by 28-year-old, male, British Caucasian chartered accountants, namely 0.0 per cent."<sup>26</sup> The point is that any difference in street crime rates of British Afro-Caribbean men and British Caucasian men arises because fewer of the former have opportunities for economic advancement.

Finally, this viewpoint does not imply that lack of opportunities or social inequality causes individuals – whether white or racialized – to commit crimes. It does say, rather, that people with limited life-chances may be more likely to view some forms of criminal activity as more attractive or exciting than their other choices.<sup>27</sup> They may see crime as a means to acquire material goods otherwise unobtainable. They may fail to respect the rules of a society that excludes them from its benefits. They may feel

they have much to gain and little to lose from criminal activity. Crime may make them feel powerful. It may add excitement to, or provide a means of escape from otherwise dreary lives. Crime, in short, may be a rational choice.

Experts who make these observations do not, of course, excuse or condone the actions of any individual who harms others. They recognize that crime is a serious social problem, hurting immediate victims and the families and friends of victims and perpetrators. They know that fear of crime may severely restrict people's lives. But since imprisonment does not appear to deter or in any other way significantly to reduce crime, it is important to develop strategies likely to work rather than to continue with those known to fail. More emphasis on or investment in crime prevention, as opposed to punishment, is their answer.

### ***Differential enforcement***

Other explanations of racialized patterns in prison admissions also stress social and economic conditions, but from a different perspective. These conditions are seen as explanations of who is caught, not who commits crimes.<sup>28</sup> Enforcement practices, rather than offending behaviours, are key.

People who hold this view argue that involvement in criminal activity is not limited to an identifiable group of anti-social and marginal individuals. Criminality is instead a widespread social phenomenon in which many ordinary and apparently respectable people participate. Drawing on studies of employers, employees, taxpayers, retailers and service suppliers, police officers, university students, youths and drug users, and women and children abused by men, these experts conclude that with regard to crime "everybody does it" at least occasionally.<sup>29</sup>

If criminal activity is indeed widespread among the population, the explanation for racial inequality in prison admissions cannot be attributed mainly to disproportionate involvement in crime. Studies in Canada and elsewhere consistently show, for example, that more than 90 percent of young men say they have committed criminal offences.<sup>30</sup> This indicates that variations in offending rates by race or economic class may be small. Variations in enforcement practices likely make the difference.

Law enforcement is not the only possible response to crime, nor is it always desirable. Many studies suggest that law enforcement is costly, blunt and not very effective in reducing crime.<sup>31</sup> Since law enforcement resources are finite, priorities must be established and variations in enforcement practices are inevitable. The critical question is what criteria are used to decide which offenders and which offences the criminal justice system should select.

Formal and informal selection criteria are used in law enforcement. Experts suggest that these criteria make black and other racialized people particularly vulnerable. They point, first, to poverty. Study after study shows that offences by those at the bottom of social and economic hierarchies are more likely to be policed, prosecuted and punished severely than offences committed by wealthier people.<sup>32</sup> The implication is



clear: a society that allows racialization to influence people's economic opportunities is likely to produce racial inequality in its prison populations.

Even if criminal activity is widespread, patterns of offending behaviour differ according to the opportunities available. Those with access to other people's money through their employment or profession, for example, are much more likely to embezzle funds than to sell drugs on a street corner. They are also less likely to be caught. Crimes committed in the privacy of corporate offices tend to be more difficult to detect and prosecute than street crimes because of their low visibility, and because the law generally shelters these private spaces from state officials.

Enforcement practices clearly vary with the seriousness of offences committed, and also with factors such as whether and how offences are reported, ease of identification and apprehension, and likelihood of conviction. Racialization in the wider society may also influence law enforcement practices. The criminal justice system requires police officers, lawyers, justices of the peace and judges to make judgments about individuals and their behaviour. Though the law provides a general framework for these judgments, it seldom specifies fixed rules that dictate outcomes. Instead, the law sets out broad standards that allow considerable scope for interpretation of the standards, the individual and the (alleged) offence.

For example, when deciding if someone should be imprisoned before trial, judges or justices of the peace are expected to predict whether the accused, if released, will fail to appear for trial or is substantially likely to commit a criminal offence before the trial. Rarely does a judge or justice of the peace have much information about the accused relevant to such a prediction.\* Consequently their decisions must draw more heavily on intuition and what lawyers responding to our survey describe as "empathy." This in turn increases subjectivity in decision-making. It creates conditions under which lack of familiarity with racialized communities may lead a decision-maker to rely subconsciously on stereotypes.

Because the processes leading to discretionary choices in the criminal justice system are subtle and complex, studies of racial discrimination in this system use an approach that is now well established in human rights law. They begin with evidence of adverse impact – such as our findings of racial disproportion in prison admissions – and investigate how far legitimate non-discriminatory factors explain the adverse impact. Racial inequalities that remain after these factors have been taken into account are then treated as evidence of racial discrimination that is tolerated by the criminal justice system.

Using this approach, studies in many jurisdictions have documented direct and indirect discrimination that results in over-representation of black or other racialized people in prisons.<sup>33</sup> Later in this Report we document the Commission's findings that racial

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\* A significant body of evidence suggests that the factors they consider are not good predictors of failure to appear or offending before trial. See Chapter 5.



discrimination in policing, bail hearings and sentencing decisions affects Ontario prison admissions. The remainder of this chapter presents a brief overview of the various stages where the exercise of discretionary authority may be susceptible to the introduction of racialization.

### ***Decisions that produce imprisonment: an overview***

The criminal justice process involves a great deal of interaction among different people with different roles. Decisions made at one stage affect those made later. It is essential to view the system as a whole. Imprisonment is always ordered by a particular judge or justice of the peace, but that decision results from the cumulative choices made by police officers, crown attorneys, defence counsel and probation officers.

### **Entry into the criminal justice process**

In general, accused persons are drawn into the criminal justice system in two ways. Reports of crime may come from victims or observers. In addition, accused persons may be identified by proactive policing.

Victims are an important source of information about violent offences and property crimes. Their decision about whether to report a crime is crucial. Surveys in Canada and elsewhere show that large proportions of individuals harmed by criminal offences do not report them to the police.<sup>34</sup>

These surveys raise the question of whether racialization influences people in selectively reporting offences. As yet, no Canadian data deal with this question, and evidence from other jurisdictions is mixed. Some studies indicate racial inequalities result from victim reporting;<sup>35</sup> others do not show such patterns.<sup>36</sup>

Offences may also be identified through planned and systematic police work. Police may seek evidence of specific offences or focus their attention on specific geographic areas or particular communities. Police may also initiate encounters, such as stopping vehicles and people on the street during routine patrols. Whether or not it is planned, such proactive policing is highly discretionary.

Much evidence from other jurisdictions indicates that this type of policing disproportionately pulls black people into the criminal justice system.<sup>37</sup> Officers working on “gut feelings” or popular stereotypes may stop black people more than others, and may question them more aggressively. Hostile encounters may not only uncover offences but also produce them.

### **Police discretion to charge**

Once the police have information identifying a person with an alleged criminal offence, they must decide whether to charge the suspect. Police officers are not legally or professionally obligated to lay charges, even if they believe they have

enough grounds (evidence) to meet the test. They may instead do nothing, simply caution suspects, or advise victims how to lay charges themselves.

The scope of police officers' discretion in laying charges is extremely broad. For example, an 18-year-old who shoves another and runs off with the other's baseball cap could be charged with robbery (punishable by up to life imprisonment), theft (two years), assault (five years) or possession of stolen property (two years). As an alternative to laying charges, the police could instead talk with the teenager, perhaps in the presence of family members. This range of choices provides considerable scope for police officers' personal attitudes, perceptions and stereotypes to influence their decision. Even when an officer is acting with conscious fairness and objectivity, subtle influences may arise such as, in this example, whether the teenager comes from what the officer perceives to be a "good" or "stable" family. This assessment might lead to the conclusion that a black youth should be subjected to the criminal justice process, whereas a white youth could be dealt with adequately in the home.

Studies of the extent to which racialization influences police discretion over charging tend to concentrate on outcomes because police interpretations of alleged criminal incidents and their classification are not open to scrutiny. Formal records of officers' conclusions on whether and what to charge are available and may be studied, but the process by which officers arrive at these conclusions is not always obvious. Evidence from some jurisdictions, such as Britain, clearly shows that police discretion not to charge has racialized outcomes, at least with regard to youths. Canadian studies document class and other biases in police practices, particularly in their processing of Aboriginal people.<sup>38</sup>

### **Imprisonment before trial**

Once a charge is laid, the next critical set of decisions concern whether to hold accused persons in prison or to seek other controls on them during the period before trial. *Criminal Code* provisions suggest that once the accused have been processed by police and told of their duty to appear in court to answer the charges against them, the vast majority of accused persons should be set free.

However, a judge or justice of the peace may order imprisonment before trial if it is necessary to ensure that the accused person will attend court for trial. The accused may also be detained if it is necessary to protect the public. The decision to detain or free the accused takes into account the seriousness of the charges and the accused's criminal record as well as criteria such as "ties to the community,"<sup>39</sup> employment status and mental health.

Racialization may influence police decisions about whether to release accused persons, and may affect the bail process through information the police supply to crown attorneys. Racialization may also be introduced through the criteria used to predict whether the accused will fail to appear at trial or is "substantially likely" to commit a criminal offence before trial. There is little Canadian research on imprisonment before trial. Some studies conducted in other jurisdictions have found evidence that



racialization influences pre-trial release decisions;<sup>40</sup> others are inconclusive.<sup>41</sup> Chapter 5 reports our findings that racial inequalities do appear in the outcomes of bail decisions.

### **Processing charges**

Once charges have been laid, crown attorneys assume responsibility for how they are processed. Crown attorneys have a professional duty to scrutinize charges and decide whether some or all should be withdrawn because of lack of evidence or because prosecution would not be in the public interest. They may also engage in resolution discussions with defence counsel to see if charges can be disposed of without a contested trial. This may also be an important step for the exercise of crown discretion.

Since crown attorneys make these decisions mostly on the basis of written material rather than interaction with accused persons, there seems to be little scope for racialization to influence their choices. Nonetheless, research in other jurisdictions suggests that the possibility cannot be dismissed.<sup>42</sup> Much of the information available to crown attorneys is supplied by police officers who have met the accused and may have formed racialized judgments. For example, clues to accused persons' racial origin may be recorded on paper. Their names, countries of birth and physical descriptions are all normally included in the information available to crown attorneys. Moreover, some residential areas are identified with racialized communities, so that even an address may be taken to indicate the race of an accused. The exercise of crown discretion is discussed later in this Report (see chapters 5, 6 and 7).

### **Court resolutions**

Even if charges have been resolved through plea discussions, the accused person still appears in court. This appearance is a public announcement of the conviction and sentence. If the crown attorney and defence counsel have agreed on sentence before the court appearance, they present their agreement to the judge. Judges always have discretion to decide on an appropriate sentence, but they generally accept joint proposals. Consequently, in cases with a guilty plea, potential for racial inequality in sentencing may arise from the resolution discussions that led to the plea and from judges' responses to sentencing proposals.

An accused who contests the charge(s) appears in court for a trial at which verdicts and any punishment are determined. These are adversarial processes in which crown attorneys and defence lawyers compete to influence decision-makers (judges and juries). If there is any possibility that decision-makers may be swayed by racialization, one side or the other may use it (see Chapter 7).

This risk has been raised concerning jury trials of white police officers charged with shooting black persons.<sup>43</sup> It has also been addressed concerning jury trials of black and other racialized accused. In *R. v. Parks*, the Ontario Court of Appeal specifically acknowledged that anti-black racism may influence potential jurors in criminal trials.<sup>44</sup>



Sentencing is highly discretionary. The *Criminal Code* sets out maximum sentences for each offence, but offers judges little further guidance about the appropriate penalty for a typical offender who commits a routine offence. Although appellate decisions provide a framework for sentencing, the trial judge retains a broad discretion to determine sentence.

Concerns about inconsistency in sentencing decisions in Canada and other jurisdictions are long-standing. Research has identified “extraordinary discrepancies in almost all aspects of sentencing”<sup>45</sup> and noted that “disparity between courts in sentencing practices ... is an established fact.”<sup>46</sup> In this connection the prison admissions data presented earlier in this chapter raises the question of how far the disparity reflects racialization in the criminal justice system.

There are clearly strong and widespread perceptions that judges discriminate against accused people from racialized groups.\* Evidence concerning sentencing practices in Canada and other jurisdictions is mixed. Many studies show racial inequalities in sentencing practices;<sup>47</sup> others do not or are inconclusive.<sup>48</sup> In Chapter 8 we report the Commission’s findings that racial inequalities do appear in sentencing decisions.

## Conclusion

There can be few more significant interventions by the public into the private than imprisoning someone ... the decision to imprison a person, to take away their capacity to act in private society and to subject them constantly and totally to the supervision of the state, stands therefore in need of particularly clear justification by law.<sup>49</sup>

Imprisonment is society’s most vivid and extreme form of exclusion. The dramatic findings presented in this chapter show that black women, men and youth in Ontario disproportionately experience imprisonment, and that this massive inequality in Ontario prison admissions is a relatively recent occurrence. Ontario simply must not continue to admit black people to prisons at the current rates.†

These findings simply cannot be rationalized by suggesting that black people are inherently more criminal than others. Nor can they be rationalized as reflecting a criminal justice system consisting of officials who are driven by racial hatred. However, racialization in Canadian society is a recognized fact both inside and outside

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\* See Chapter 2 for perceptions of judges’ general treatment of people.

† Late in our mandate we became aware of a recent report, for the federal and provincial Ministries of the Solicitor General, analyzing remand populations in six southern Ontario detention centres. In total, 304 randomly selected adult male remand prisoners were interviewed in early 1994. The study showed revealed that 49% of adult male remand prisoners in the sample self-identified as “caucasian,” 31% as black and 20% as “other racial minority/unknown.” [Barklay Resources, “Awaiting Trial: Accused persons remanded to Custody,” August 1995 (unpublished).] In other words, this study indicates that the patterns of gross over-representation are continuing.

the criminal justice system. Wherever broad discretion exists, racialization can influence decisions and produce racial inequality.

The criminal justice system operates through a series of highly discretionary decision-making stages. Discretion is exercised in subtle, complex and interactive ways, which leave considerable scope for racialization to influence practices and decisions, and for bias to be transmitted from one stage of the process to others.

In the remainder of this Report we document evidence of the influence of racialization on criminal justice practices, and evidence that this influence is tolerated – evidence of systemic racism. We also make recommendations for securing racial equality in the criminal justice system.

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# **PART II**

## **Examining Practices**

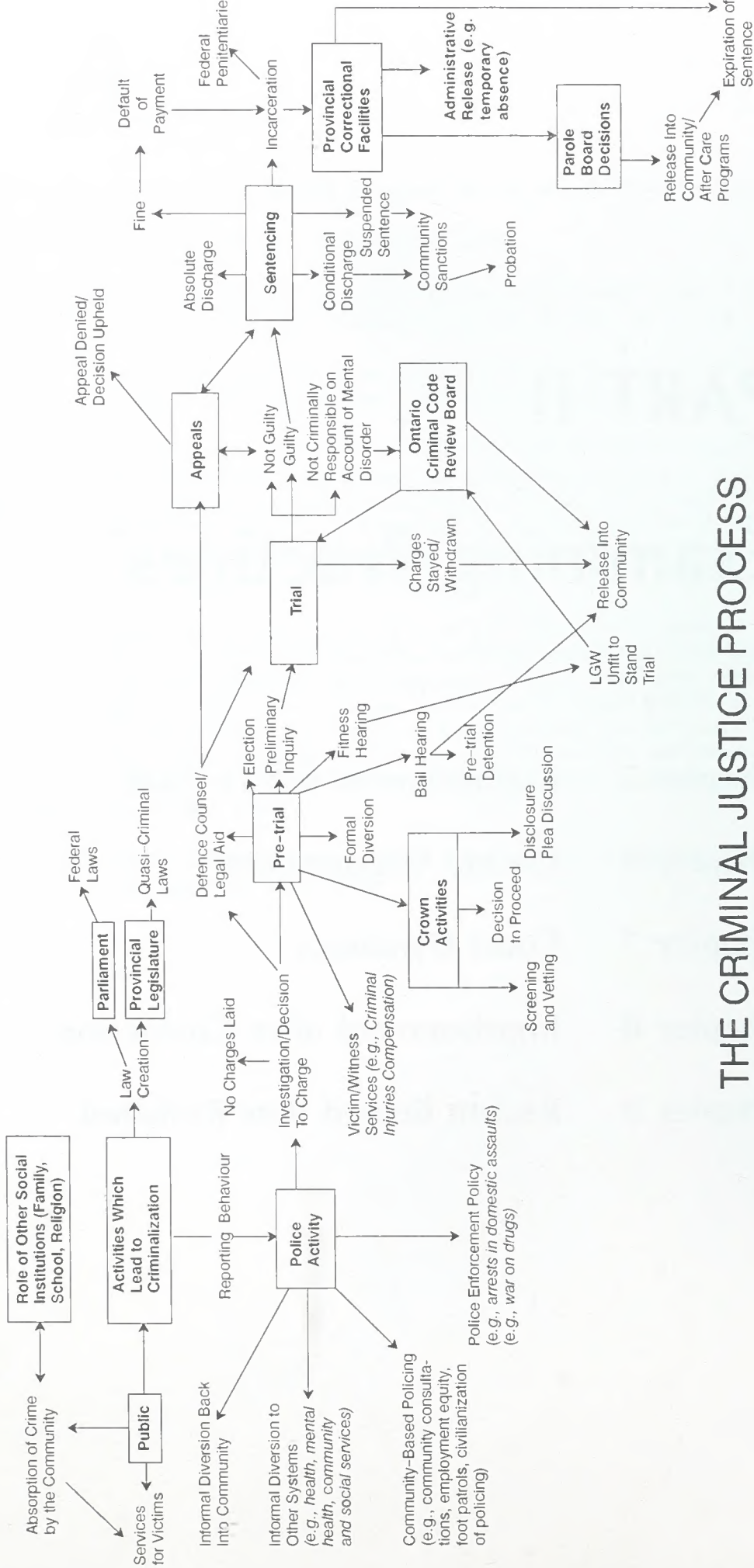
**Chapter 5     Imprisonment before Trial**

**Chapter 6     Charge Management**

**Chapter 7     Court Dynamics**

**Chapter 8     Imprisonment after Conviction**

**Chapter 9     Racism Behind Bars Revisited**



# THE CRIMINAL JUSTICE PROCESS



## Chapter 5

# Imprisonment Before Trial

*Fairness requires that [pre-trial] detention should be used as a last resort .... Unjustified detention shows disregard for human rights.<sup>1</sup>*

This chapter focuses on the decisions that result in imprisonment of accused people before their trials. At this stage of the process, the criminal justice system is imprisoning persons whom it considers innocent, and who may yet be acquitted or have the charges against them withdrawn. Yet, historically and currently the criminal justice system tends to treat this decision-making with much less precision or concern than the criminal trial.

Excessive detention of untried accused was documented in Martin Friedland's 1965 study of Toronto courts,<sup>2</sup> and subsequent *Criminal Code* amendments were intended to reduce imprisonment of untried persons. Nevertheless, every year in Ontario tens of thousands of untried accused spend time behind bars. In 1992/93, for example, 41,195 (49%) of a total of 83,405 admissions to Ontario prisons were unsentenced prisoners, of whom the vast majority had not been tried.<sup>\*</sup> By 1993/94, these remand admissions (46,151) amounted to 54% of total admissions (86,022)<sup>3</sup> to provincial prisons.<sup>†</sup>

Our preliminary consultations revealed serious and persistent concerns that systemic racism makes black and many other racialized accused in Ontario especially vulnerable to imprisonment before trial. Some lawyers recounted incidents of harsh treatment of black and other racialized clients in the bail process. Many others described subtle biases in the exercise of discretion. They and other community members also expressed concerns about inadequacies in justice services – particularly interpreter services – that contribute to the unnecessary imprisonment of racialized accused.

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<sup>\*</sup> Accused people may be remanded into custody at any stage before they are sentenced. Thus data on remand admissions includes for example, people who have been convicted but are ordered into custody pending a sentencing hearing. Most remand admissions, however, are of untried persons.

<sup>†</sup> The federal-provincial *Barklay Report* notes that in November 1994 the number of adult remand prisoners in six Ontario institutions was 9.2 percent higher than the same month in the previous year, a pattern that "continues a trend that began several years ago." ("Awaiting Trial" [note 24], p.4.)

The prison admissions data documented in the previous chapter are consistent with these allegations about the use of imprisonment before trial. In 1992/93, for example, the remand admission rates for people classified as black, South Asian, Asian or Arab were at least twice as high as their sentenced admission rates.\* (In other words, for every member of these groups sentenced to prison, at least two members of the group were jailed on remand.) By contrast, for people classified as white or Aboriginal, the remand and sentenced admission rates were virtually identical (for every white or Aboriginal person sentenced to prison, one member of the group was jailed on remand). This peculiar finding – that people who are not white or Aboriginal were much more likely to be admitted to prison while presumed innocent than they are after guilt was established – warranted further investigation.

The research used a variety of methods, including statistical analysis, file and transcript reviews, interviews and opinion surveys, analysis of case law and legislation, and court observation. For the most part we summarize our findings and conclusions in the course of discussing specific issues. But the findings of our major statistical study are documented in considerable detail because it is the most comprehensive Canadian research conducted to date on racial differences in pre-trial imprisonment decisions.

We begin with an overview of: the rationale for imprisonment before trial and the problems it poses; the principles of restraint, fairness, equality and accountability that should generally govern pre-trial imprisonment; and legal justifications for ordering it. We then document our findings about the exercise of discretion. Here we focus on our major study, which compares the results of police and court release decisions for black and white adult males charged with the same offences. This study shows that across the entire sample and for some specific offences –

- black accused are more likely than white accused to be imprisoned before trial.
- little of the difference in the use of imprisonment for black and white accused is explained by factors said to be relevant to imprisonment decisions.
- imprisonment decisions are significantly influenced by the race of the accused.
- reliance on employment status in court release decisions contributes significantly to differential imprisonment of black accused.

After presenting these findings, we return to the legal and other operating norms of the pre-trial detention process with recommendations to ensure that the criminal justice system no longer tolerates racial inequality in deciding whether to imprison accused persons before trial.

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\* See Chapter 4, Figure 4-10.



## Regulating imprisonment before trial

[T]he presumption of innocence is an animating principle throughout the criminal justice process .... The starting point for any proposed deprivation of life, liberty or security of the person ... charged with ... an offence must be that the person is innocent.<sup>4</sup>

Canadian law generally allows the state to imprison people as punishment for committing a crime, to force compliance with court orders and to control them until specific legal processes are completed. In a democratic society it is fundamentally wrong to imprison people before trials as punishment, or for oblique purposes such as to force them to plead guilty, or to assist officials in investigations.

Control, by contrast, is viewed as a legitimate reason for imprisoning some accused people before trial. This use of imprisonment, sometimes known as “detention” or “custody,” is to ensure the accused person attends trial or prevent offending before trial. But strict limitations on the use of imprisonment for this purpose are essential.

### *Reasons for limiting pre-trial imprisonment*

Imprisonment before trial is a substantial interference with liberty, and deliberately inflicts suffering on people who are legally presumed innocent. Moreover, imprisonment is generally a harsher experience for untried accused than for convicted persons in Ontario institutions. All accused held before trial are kept under maximum-security conditions whether they are charged with possession of drugs, theft, obstructing justice or murder. Jails and detention centres housing remand prisoners are usually overcrowded, resulting in poor living conditions, a virtual absence of privacy and heightened anxiety. As Judge Stortini noted in 1992, these institutions can offer little useful or productive activity to untried prisoners: “local jails are considered maximum [security] holding facilities. There are no or very little rehabilitative programs for people. Local jails ... warehouse people.”<sup>5</sup>

Beyond their immediate suffering, untried prisoners are considerably disadvantaged throughout the criminal justice process. Imprisonment before trial intensifies pressures on them to plead guilty, hampers their preparations for trial, and may affect how they are perceived in court. Several studies in different jurisdictions have shown that imprisoned accused who plead not guilty are less likely to be acquitted at trial than those who are not detained before trial; and that whatever the plea, they are much more likely to receive a prison sentence if convicted.<sup>6</sup> These studies recognize that the differential is often largely explained by the courts relying on similar factors during bail, trial and sentencing proceedings. But they also suggest

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<sup>4</sup> Ironically, the lack of services is often justified on the basis that prison programs are an aspect of punishment and as such should not be used for those presumed innocent. The consequence of this policy for the untried prisoner is, at best, intense boredom; at worst, emotional and psychological damage. See for example, *R. v. Bennett* [1993] O.J. No. 892.



that part of the difference at trial and sentencing is due to the earlier detention decision.

The negative consequences of imprisoning untried accused may continue well after the trial. It is extremely expensive to “warehouse” people, and doing so may breed anger, bitterness and alienation from society. Pre-trial imprisonment may be especially harsh and embittering for the innocent accused person, because the experience “leaves a stigma even if [the accused] is eventually found innocent. This kind of social dislocation may strengthen his belief that there is no place for him in the normal community.”<sup>7</sup> Imprisonment before trial also results in many untried prisoners adjusting to the authoritarian and often violent regimes in which they are held by developing precisely the types of anti-social attitudes and behaviours that the criminal justice system wants to deter. The Canadian Committee on Corrections in 1969 warned of the dangers of imprisoning untried first offenders except where absolutely necessary:

The period following his first arrest is a crucial one for the first offender. If he is unwisely dealt with, he may come to see society as an enemy and to assume that his future lies with the criminal element. If he is released while awaiting trial he may continue his positive family and social relationships; if he is held in jail he will more readily identify himself with the criminal element.<sup>8</sup>

### ***Principles for limiting pre-trial imprisonment***

Four key principles are the basis for limiting the use of imprisonment before trial. Each stems from the fundamental value that “society is not warranted in inflicting greater harm on a person ... than is absolutely necessary for the protection of society.”<sup>9</sup>

- ***Restraint*** “requires that detention be used as a last resort.”<sup>10</sup> This principle means, generally, that pre-trial imprisonment should be an exceptional event. No one should be imprisoned before trial unless the state demonstrates a specific, compelling reason for detention and shows that no less intrusive method of control is available.
- ***Fairness*** requires that every individual whom the state seeks to imprison before trial understands the specific and compelling reason for this action and is given a full opportunity to challenge the state’s position. It also means that decisions must be made by unbiased officials and based on clear, known criteria. If the state fails to show a compelling reason for imprisonment, decision-makers must not make freedom conditional on financial or other conditions that the accused cannot meet.
- ***Accountability*** requires that the use of imprisonment to control accused persons is open to public scrutiny and to challenge by persons subject to it. Also, there must be opportunities to correct mistakes that result in unjustified detention before trial, and remedies for individuals who are harmed by it.

- *Equality* requires that all accused at risk of pre-trial imprisonment are treated with the same respect as individuals and with concern for their specific interests. Obviously, social constructions of racialized groups as “unequal,” “undesirable” or “criminal” must not be allowed to influence imprisonment decisions. Equal respect also requires the justice system to ensure that all accused have access to the services needed to defend themselves against the threat of imprisonment before trial.

### ***Legal justifications for imprisonment before trial***

Detention before trial begins when the police exercise the power of arrest, one of several methods of initiating criminal proceedings. Arrest is the only method that allows the police to hold individuals and, if they decide to lay charges, to recommend imprisonment. By contrast, criminal proceedings launched by summons do not involve any detention, and those commenced by an appearance notice may involve only a brief “investigative detention” when the police make contact with the accused.

After arrest, detention of an accused must be justified at two or more distinct stages of the criminal justice process. The first stage is controlled entirely by the police (police detention). It should end as soon as possible, normally within 24 hours after arrest.<sup>\*</sup> By the end of this period, an arrested person must be either released or taken before a justice for a hearing on judicial interim release or “bail.”<sup>†</sup> At this second stage, justices of the peace or judges (bail justices) decide whether imprisonment is necessary, based on information and reasons presented to them by lawyers for the state (crown attorneys)<sup>‡</sup> and the accused (defence or duty counsel).

In some instances, a police decision to hold an accused person after arrest is automatic. Police have no authority to release a person charged with an indictable offence for which the maximum penalty is more than five years imprisonment, but must take the accused to a bail hearing. All other legal detentions or imprisonment of accused people involve discretionary judgments that detention is necessary to achieve specific purposes. These judgments are based on predictions about how an accused person would behave if set free before trial.

When making representations or deciding on release, the police, crown attorneys and justices are expected to use available information to predict what the accused would

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\* Section 503(1)(b) of the *Criminal Code* permits the police to detain an accused for longer than 24 hours if a justice is not available within that period. In that case, the accused must be taken before a justice as soon as possible.

† Though “bail” technically is a sum of money posted as a surety to guarantee attendance at trial, it is commonly used to refer to the hearings at which release or detention decisions are made (bail hearings). And it is sometimes used to mean the system for making these decisions (the bail system).

‡ At most bail hearings in Ontario, the state is represented by lawyers (known as crown attorneys) employed or retained part-time by the provincial government. Bail hearings – and prosecutions – for some offences, such as drug charges, are conducted by federally employed or retained lawyers, generally known as crown prosecutors or agents.



do if freed until trial. Unsurprisingly, the basic justifications for imprisonment and hence the predictions to be made at the two stages of the process are similar. But there are important differences in how the law structures decision-making.

The *Criminal Code* sets out three purposes for discretionary police detention, but gives no direction about the order in which the police should consider them, their relative importance or what information is relevant. It simply states that the police may detain an accused if the officer in charge has reasonable grounds to believe detention is necessary to ensure that the accused attends court or to promote the public interest in preventing crime or investigating the alleged offence.

Justices at bail hearings use similar criteria: ensuring attendance at court and protection of the public. But the *Criminal Code* explicitly requires them to focus separately on each justification for imprisonment and directs them to consider the reasons in sequence. Thus a justice deciding whether to imprison an untried accused must first hear evidence about the risk that the accused will fail to appear at trial and rule on this “primary ground.” Only after the justice decides that the risk of flight is not significant enough to justify imprisonment does the “secondary ground” become relevant. At this point the focus shifts to any evidence that the accused is substantially likely to offend or interfere with justice before trial.\*

The *Criminal Code* gives general guidance to justices, but not to the police, about the information they may consider when deciding whether to imprison untried accused. Section 518 emphasizes three categories of prior contact with the criminal justice system: criminal record, previous breach of a bail order, and outstanding charges. A fourth factor is the “strength of the evidence against the accused.”

In addition, judges have developed case law that identifies other factors as relevant to decisions on pre-trial imprisonment. Rulings have established that evidence of an accused’s “ties to the community” is highly significant to assessing the risk of flight (the primary ground). Though community ties is a vague concept, it is generally taken to include “residence, fixed place of abode, employment or occupation, marital and family status ... proximity of close friends and relatives, character witnesses and personal history.”<sup>11</sup>

With respect to the secondary ground – to prevent crimes or interference with the administration of justice – judges have mostly emphasized the accused’s previous criminal history, if any, and the nature of the offence. Thus the time since the last offence (currency of record) may be a significant factor, as may previous violent offences or violence used in the incident that resulted in the charge.

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\* Until 1992, justices could also base their decisions on a third criterion – public interest. In that year the Supreme Court of Canada said “public interest” was too vague and that reliance on it to imprison accused persons would contravene the fundamental right not to be denied reasonable bail. (*R v. Morales* (1992) 77 C.C.C. (3d) 91).



## Racial inequality in the use of pre-trial imprisonment: findings

### *Lawyers' perceptions of racial bias*

Many defence and duty counsel perceive differential treatment in the bail system. For example, our survey of defence counsel shows that 67% of lawyers with substantial (40% or more) racial minority clientele think that racial minority people charged with drug trafficking are more likely to be detained before trial than white people charged with the same offence. Large proportions of these lawyers also perceive differential treatment of racial minority and white people charged with armed robbery (50%), drug possession (41%), aggravated assault (39%) and sexual assault (37%).

Lawyers commented that differential treatment at bail arises because –

“White accused are able to show more often than racial minorities those things (wealth, employment, drug rehabilitation, family support, community support, etc.) which impel crowns, police and judges to extend bail leniency. Class biases overlap with racial biases.”

“Assumptions are made by police, crowns and judges that certain racial minorities are more likely to be guilty of certain categories of offences, and discretion at bail is exercised or restricted accordingly.”

“The worst, i.e., most widespread problem [of systemic racism] is at the bail stage because police recommendations weigh so heavily and reflect nothing more than whether they like the guy or not – other things (e.g., seriousness of offence) being equal.”

Consultations, submissions and survey comments<sup>\*</sup> produced many examples of unjust discretionary imprisonment of accused from racialized communities, including:

“I had one terrified 18 year-old-young black man up for a show cause [bail hearing]. He'd never been in trouble before, was illiterate and completely at a loss to understand the court process. I had him seen by the Bail Program. He was approved and therefore, ought to have been released right away – he was only charged with possession of a stolen bicycle. The Crown requested and received three additional days to verify his identity. The implicit motivation behind this three-day remand request was that they were incredulous that the black boy didn't have a record. I was disgusted .... My client had already been detained for two days (over the weekend). It should have been ample time for the police and Crown to 'investigate' his identity.”

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\* Crown attorneys and judges who responded to surveys tended not to perceive racial bias at the bail stage. Those who did perceive bias simply recorded an opinion without giving examples.

“I had a bail hearing with a Vietnamese youth client who was charged as a minor player on an extortion offence. The Crown was agreeable to release until finding out that the accused was Vietnamese. The Crown then immediately asked for a detention order because it was assumed to be a ‘gang’ incident.”

Other defence lawyers do not agree that racial minority and white persons are treated differently in the bail system. They, like the vast majority of crown attorneys we surveyed, think race has no impact on pre-trial detention. These lawyers made comments such as: “I have never seen race enter into discretion in the pre-trial process” and “in the vast majority of cases, at the pre-trial stage, the crown does not even know the race of the accused.”

Unsurprisingly, many crown attorneys surveyed by the Commission were adamant that they are not influenced by an accused’s race. Often their comments emphasized the lack of opportunity for a crown attorney even to think about race. They pointed out that their decisions are usually based on file documents and that the pace of their work makes it impossible for anyone to discriminate deliberately. For example, one crown attorney stated that “my position on bail is usually made before I’ve seen the accused ... I don’t know their racial background.” Several commented that “sometimes it is so busy in court that we hardly notice the accused.”

As these examples show, strong perceptions of differential treatment articulated by many lawyers are matched by insistent denials from others. Thus the Commission considered it particularly important to conduct research into the outcomes of pre-trial release and detention decisions.

### ***Introduction to the major study***

To investigate the exercise of discretion in the remand process, the Commission conducted a statistical study of imprisonment decisions for samples of black and white persons charged with any of five offence types: drug charges, sexual assaults,\* bail violations, serious non-sexual assaults† and robbery. We commissioned the Canadian Centre for Justice Statistics to gather the data, and Professors Anthony Doob of the University of Toronto and Julian Roberts of the University of Ottawa to analyze them.‡

The sample, 821 adult males described by the police as black and 832 adult males described by the police as white, was drawn from Metro Toronto Police files (which included crown briefs) for 1989/90. About half of each group was aged 27 or

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\* The *Criminal Code* has three levels of sexual assault offences: “sexual assault,” “aggravated sexual assault causing bodily harm” and “aggravated sexual assault.” The sample was drawn from all 1989/90 sexual assault charges, but all of the charges in the sample we could identify specifically are of the first type (level 1 offences).

† This category consists of aggravated assault, assault bodily harm and assault peace officer charges.

‡ Details of this study can be found in our Technical Volume. See Appendix B.



younger. Metro Toronto was selected to ensure that the samples – particularly the black sample – would be large enough for meaningful analysis. This type of study requires approximately equal numbers of black and white accused for each of the five offence types. It would not have been difficult to find sufficient white accused in the police files of any major urban centre. But Metro Toronto, because it has the highest concentration of black residents of any Ontario police jurisdiction, seemed more likely than most to yield an adequate sample of black accused persons for the period covered by the study.<sup>\*</sup> As Table 5-1 shows, each offence category contains similar numbers and proportions of black and white accused persons.

The study period, 1989/90, was selected for two reasons. First, the Commission intended to use the same samples to analyze sentencing decisions and wanted to be certain that processing of the charges was complete. When the data were collected (fall 1993), 1989/90 was the most recent year for which we could feel confident that virtually all court proceedings were completed. Second, 1989/90 was the mid-point of a period with an astounding and disproportionate rise in the admission of black persons to Ontario prisons, particularly to prisons serving the Metro Toronto area.<sup>†</sup>

**Table 5-1: Number and proportion of accused persons in each offence category in sample, by race.**

	White charged sample		Black charged sample		Proportion of total sample	
	%	number	%	number	White	Black
					%	%
Drugs	25	204	27	221	12	13
Sexual assault	14	116	14	118	7	7
Bail violations	20	167	15	125	10	8
Serious assault	23	191	26	210	12	13
Robbery	19	154	18	147	9	9
Total	101*	832	100	821	50	50

\*Total exceeds 100 due to rounding.

Obviously, a study based on samples in one jurisdiction of persons charged with one of five offence types cannot explain total prison admissions for 1989/90.

<sup>\*</sup> Even in Metropolitan Toronto, there were not enough offences in every category during the year to use random samples. We could obtain a large enough sample for some offence types only by including all persons charged within the category.

<sup>†</sup> See Chapter 4 for details.



Nevertheless, it may shed light on whether the exercise of discretion contributes to differential imprisonment rates.

The Commission collected a large amount of data on the personal characteristics of accused in the sample, including their criminal histories, if any. This permitted the exercise of discretion to be examined in three stages. First we compared outcomes for black and white accused at both stages of the remand process: police detention and bail hearings. Because this analysis clearly revealed racial differences across the five charges and for some specific offences, we then turned to other characteristics of the accused. We conducted separate, detailed analyses of criminal history and ties to the community, as described by the police, to see if these factors might account for differential rates of imprisonment. Finally, we analyzed the overall impact of all the recorded characteristics of the accused to see if race significantly influenced the results when previous criminal histories and ties to the community were taken into account.

The Commission's decision to use matched samples of persons charged with the same offences has strengths and weaknesses. Its main strength is that it largely eliminates the possibility that any difference in imprisonment outcomes is due to different patterns of (alleged) offending.\* Since the matched samples of black and white accused compare virtually the same numbers of people charged with each offence, the analysis could focus specifically on the exercise of discretionary powers that produce imprisonment before trial. This approach meant, in short, that we could answer a simple question fairly easily: do the data indicate that black accused are imprisoned before trial while white persons accused of similar offences are not?

This approach also allowed us to test for variations across a limited range of offences. The prison admissions data confirmed our preliminary consultations, which suggested that racial inequality in pre-trial detention decisions is pronounced for some offences, but less evident for others (see Chapter 4). Such results could be explained by different patterns of alleged offending or differences in police charging practices. Another explanation is that racial bias in the remand process involves a complex and subtle response to combinations of the accused's race and specific offences. (These explanations are obviously not mutually exclusive.)

Subtle and complex forms of racial bias in the exercise of discretion are central to the Commission's mandate. By selecting samples of black and white persons charged with a small range of offence types, we were able both to test for differential treatment, and also to see if it appeared consistently across a (limited) range of offences or was mostly related to specific charges.

The main limitation of our approach is that we do not know the extent to which the same patterns would appear in imprisonment decisions about persons charged with offences other than those in the sample. We do not know, for example, if

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\* But see discussion of the drug charges below.

comparisons of black and white persons charged with common assault or with theft over \$1,000\* would have shown larger differences, smaller differences or no difference in outcomes.

Another limitation is that the analyses of the total sample weight each offence type equally rather than by reference to its frequency among all recorded crimes. This provides a reasonable way to analyze these data without distorting comparisons of black and white samples in this study. However, the differential outcomes found in the total sample should not be generalized to all criminal offences.

The study is also limited by the restriction of the sample to adult males. Initially, the Commission wanted to examine remand decisions for black adult women and male youths, and for accused from other racialized communities. In each case we came across the same problem: the number of persons from these groups imprisoned before trial in any one year is small compared with the numbers of white and black adult men. Consequently, to obtain large enough samples for the analyses we would have had to collect data over a longer term and at much greater cost.

Restricting the samples to black and white adult males means that the study does not tell us the extent to which systemic racism affects remand decisions regarding black women or youths, or accused from other racialized groups. This limitation, together with the restrictions on the sample due to age and offence types, means the research documents racial bias in pre-trial imprisonment decisions but does not determine its extent.

### ***Basic finding: racial inequality in bail decisions***

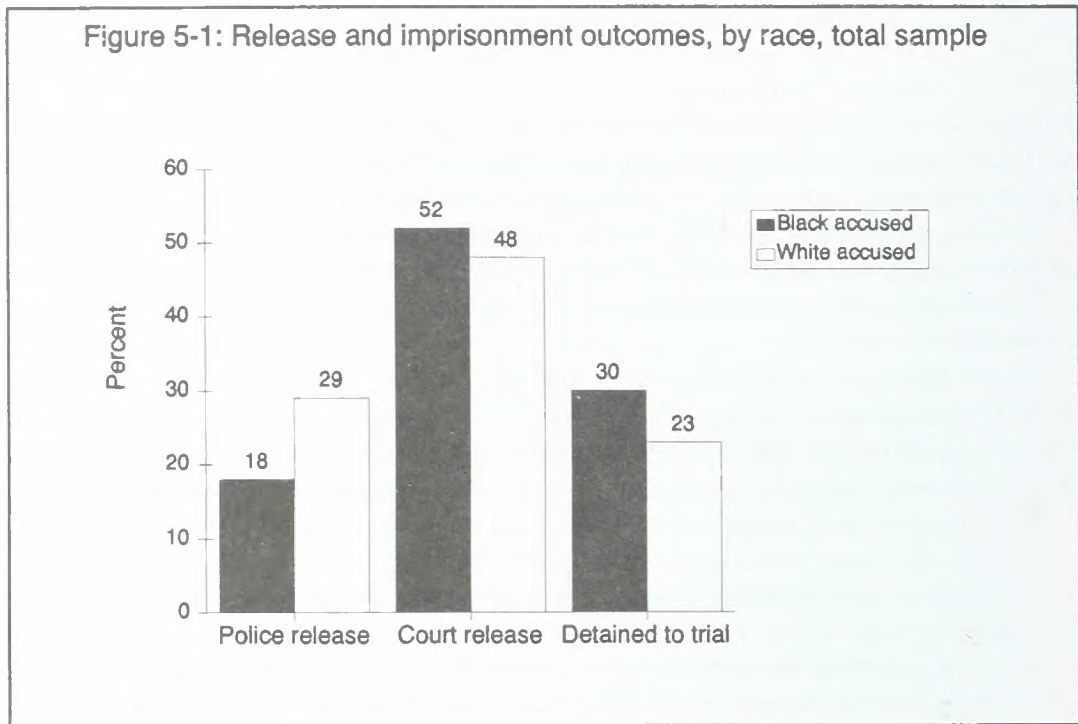
Across the sample as a whole, 26% of accused were detained after a bail hearing. Some of those detained were not subsequently convicted of the offence charged. The data show that 18% – close to one in five – of all accused who were not found guilty at trial had been denied bail. This experience was significantly more common for black accused than white accused: among those who were not convicted, 21% of black accused compared with 14% of white accused had been imprisoned before their trials.

Analysis of the outcomes of police and bail court decisions for the entire sample shows that white accused (29%) were significantly more likely than black accused (18%) to be released by the police. Black accused (30%) were significantly more likely than white accused (23%) to be refused bail and imprisoned before their trials (Figure 5-1).

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\* The limitation for this offence has recently been raised to \$5,000 by S.C. 1992, c.44.





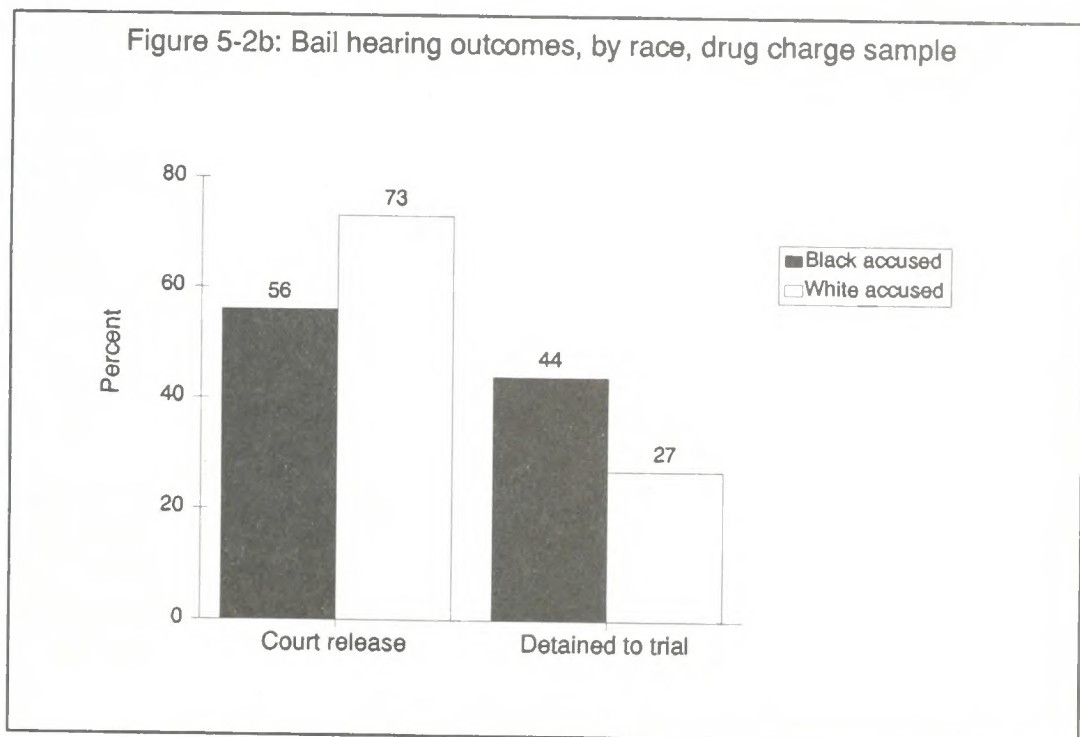
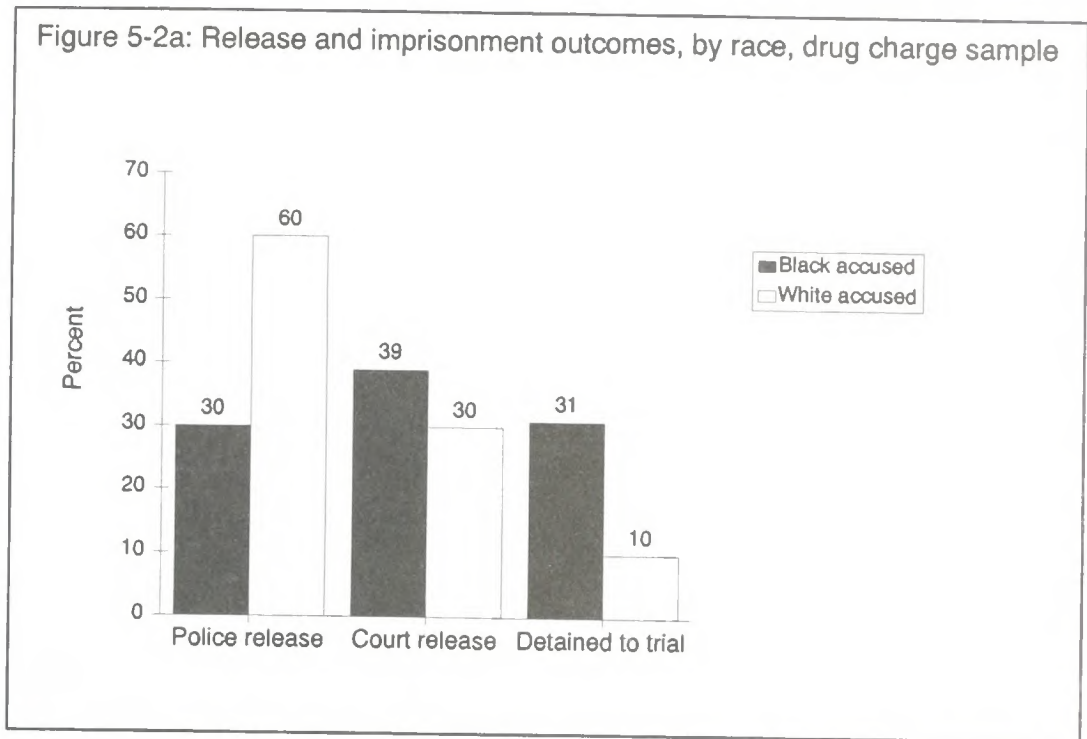
Comparisons of detention decisions for specific offences show –

- dramatic differences for white and black adult males charged with drug offences.
- significant differences for white and black adult males charged with serious non-sexual assaults.
- no statistically significant differences for white and black adult males accused charged with sexual assaults, bail violations and robberies.

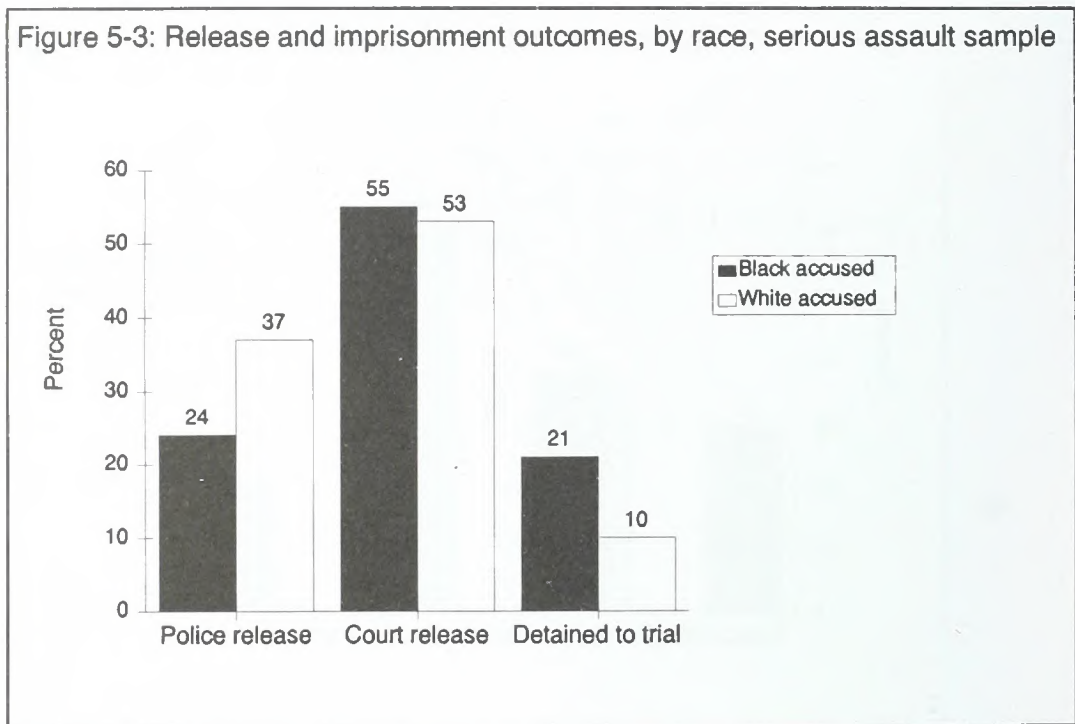
Figure 5-2a, which represents the entire drug charge sample, shows that, overall, white accused (60%) were twice as likely as black accused (30%) to be released by the police. Black accused (31%) were three times more likely to be refused bail and ordered detained than white accused (10%). Figure 5-2b represents only that portion of the drug charge sample held for a bail hearing. It shows that 44% of these black accused, compared with 27% of the white accused, were refused bail and imprisoned before trial.

The differences in release outcomes for black and white accused charged with serious non-sexual assault were also significant, but not as large as in the drug cases. Figure 5-3 shows that over a third (37%) of white accused facing serious non-sexual assault charges were released by the police, but only a quarter (24%) of the black accused were released at that stage. Of those not released by the police, 84% of white accused, and 73% of black accused were granted bail at court. Because of the relatively small numbers, however, this difference was not statistically significant.





These findings are highly suggestive. But without more analysis, it would be premature to infer from them direct racial bias in detention decisions. What appears to be a clear relationship between race and imprisonment could be masking other legally relevant differences between white and black accused. Findings of such other



differences would not necessarily disprove that systemic racism influences pre-trial imprisonment decisions, but would shift the focus of concern to potential sources of indirect bias in the remand process.

To look for other factors that might account for the racially unequal results, we analyzed four characteristics across all offences:

- previous criminal history,
- employment status,
- fixed address, and
- “marital” status.

We also looked more closely at the nature of the charges laid in the drug offence sample.

### ***Nature of the charge: the special case of drugs***

Since this study matches samples of black and white persons charged with the same types of offences, it largely eliminates the significance of “nature of the charge” as a reason for differences in bail outcomes. Drug charges, however, are special under the law. Simple possession charges under the *Narcotic Control Act*, and all drug charges (including trafficking) under the *Food and Drugs Act*, are governed by the standard bail procedure. This procedure presumes that an accused person detained by the police will be released after a bail hearing, and requires a crown attorney to “show cause” for imprisonment. By contrast, trafficking, possession for the purposes

“show cause” for imprisonment. By contrast, trafficking, possession for the purposes of trafficking and importing charges under the *Narcotic Control Act* are “reverse onus” offences, which means that the bail process is based on a presumption of detention (see below).

This difference in operating norms is significant to release outcomes because persons charged with reverse onus offences cannot be released by the police and must make the case for release at the bail hearing. Therefore, if a higher proportion of black accused than white accused in the sample were charged with a reverse onus drug offence, then some or all of the difference in outcomes might be due to the nature of the charge. Such a finding would not allay concerns about systemic racism, but might suggest that the main problem lies with the law that establishes reverse onus offences, or with charging decisions rather than detention decisions.

A small supplementary study conducted by the Commission based on later data supports the possibility that differences in the drug charges laid against black and white accused may contribute significantly to differential imprisonment before trial. This study of charges laid by 5 District Drug Squad of the Metropolitan Toronto Police in 1992 shows that among those charged with drug offences, white accused (41%) were more likely than black accused (21%) to be charged with simple possession. Black accused (79%) were more likely than white accused (59%) to be charged with the more serious charges of possession for the purposes of trafficking or another trafficking offence (under the *Narcotic Control Act*). Analysis of police release decisions for this sample show that black accused were significantly less likely to be released.\*

The data in the major study, however, do not generally suggest that differences in the nature of the charge explain the differential outcomes. Analysis of the drug charge sample indicates three important facts:

- Regardless of race, accused who were charged with a reverse onus offence were more likely to be detained pending trial than those who were charged with other offences. This finding suggests that the nature of the charge affects the results of bail decisions for drug offences.
- No statistically significant difference was found in the proportions of black and white accused who were recorded as charged with a reverse onus offence. This finding suggests that the differential outcomes seen in Figures 5-2a and 5-2b were not due to differential charging. But we cannot be sure of this conclusion because of the incompleteness of the record.
- The data on file do not include the specific charge laid against 68% of black accused and 53% of white accused.

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\* Black and white accused in this sample also differed in that black accused were more likely to be described by the police as unemployed than white accused. White and black accused were equally likely to have a criminal record, and to have ties to the community such as a fixed address.



It is fruitless to speculate about differences in charging patterns in the absence of adequate evidence. But available evidence does not suggest that black accused in this sample are significantly more likely than the white accused to be facing a reverse onus charge.\* Thus, on this evidence there is no reason to believe that the racial inequality in detention decisions for those charged with drug offences is due to differences in the type of charge laid.

### ***Prior contact with the criminal justice system***

#### **Criminal record**

“Criminal record” is a complex concept that can be measured in different ways. We selected six key aspects of criminal records as criteria for comparing black and white accused:

- number of previous convictions for any criminal offences
- time since the last conviction – “currency of record”
- number of previous convictions for violent offences
- number of previous convictions for the same offence as the current charge – offence “track record”
- most serious previous conviction
- length of jail sentence(s) for previous conviction(s)

We first considered whether each aspect appeared to influence the detention decision, regardless of race, and then compared its patterns in the records of black and white accused. Where we found differences, we considered whether that specific aspect of criminal record would account for the disparity in imprisonment.

#### ***Aspects not disclosing significant differences***

One aspect of criminal record – previous conviction for a violent offence – proved to be significant to detention decisions, regardless of race. However, black and white accused in the sample were equally unlikely to have such a conviction on their records. About two-thirds of the total sample had no previous conviction for a violent offence.

Another characteristic – most serious previous conviction – appeared in different patterns on the records of white and black accused, but the relevance of the patterns to detention decisions was unclear. Of those with a criminal record, white accused

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\* We compensated for the missing data by sorting the sample into two groups: “known to be charged with” a trafficking (or importing) offence (reverse onus) and “not known to be charged” with a trafficking or importing offence. All accused whose specific charges were missing were placed in the latter category (along with everyone charged with simple possession). Because the results of release decisions for the two categories reveal a clear and significant difference, most of the unknowns were likely facing standard onus charges similar to others in that group. Otherwise, their presence in the “not known to be trafficking” group should have meant that the outcomes for the “known” and “not known” groups should have been more similar.

were more likely than black accused to have a robbery or break-and-enter conviction as their most serious previous offence. The records of black accused were more likely than those of white accused to include common assault, another violent offence apart from robbery, or a “victimless” offence as the most serious previous conviction.

The previous convictions for violent offences of black accused might be expected to make pre-trial imprisonment on the current charge more likely, but the previous robbery convictions of white accused would also have made them vulnerable to imprisonment on the current charge. Similarly, the data show that, regardless of race, accused whose most serious previous offence was “victimless” were less likely to be detained on the current charge than accused whose most serious prior conviction was break-and-enter. This difference suggests that black accused would be less likely than white accused to be ordered detained before trial. Given that the patterns of previous offences appear to be comparable, it is unlikely that differences in “most serious previous conviction” factor explains the basic findings of unequal outcomes.

### ***Existence and length of criminal record***

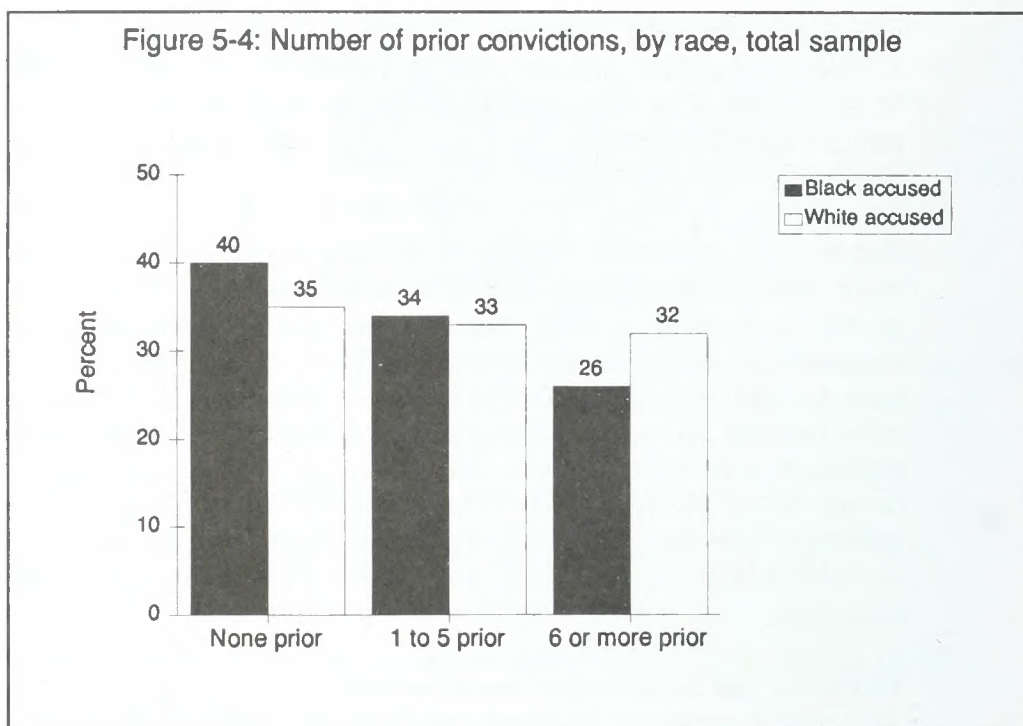
As would be expected, existence and length of a criminal record were strongly related to imprisonment before trial. The data for the entire sample show that regardless of race, accused without a criminal record were less likely to be imprisoned (12%) before trial than accused with records of one to five previous convictions (27%) or records of six or more previous convictions (45%).

But across the sample as a whole, black accused (40%) were more likely than white accused (35%) to have no previous convictions, and black accused (26%) were less likely than white accused (33%) to have a record of six or more previous convictions. Though the differences are not large, they are statistically significant.

Analyses of previous records for each offence type shows –

- no difference in the existence of a record or number of previous convictions of white and black persons charged with drug offences, sexual assaults or serious non-sexual assaults. This finding means that the number of previous convictions does not explain the harsher outcomes for black persons charged with drug offences and serious non-sexual assaults that we document above.
- a small but statistically significant difference in the number of previous convictions of white and black persons charged with robbery. Black accused (27%) were more likely than white accused (23%) to have no previous convictions, and they were less likely (35%) than white accused (49%) to have six or more previous convictions.
- substantial differences in the number of previous convictions of white and black persons charged with bail violation. Black persons charged with this offence (35%) were much more likely than white accused (17%) to have no previous





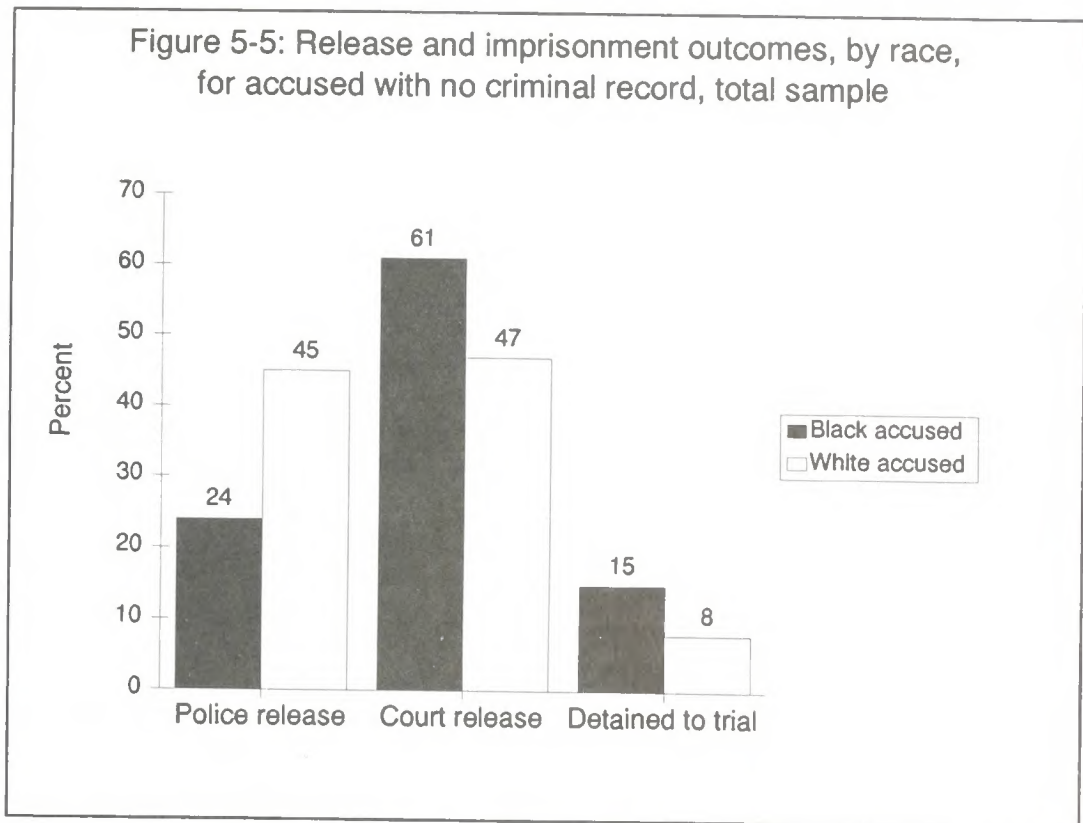
criminal convictions; and black accused (25%) were much less likely than white accused (43%) to have six or more previous convictions. These findings are interesting because although many more white accused than black accused had records and had lengthy records, white accused (35%) were not significantly more likely than black accused (34%) to be imprisoned before trial.

These striking findings – that black accused were less likely than white accused to have any criminal record or to have a lengthy criminal record – led us to compare release decisions about accused with the same type of record or lack of record. This analysis shows that the most dramatic differences in outcomes occur for accused without any previous convictions. As Figure 5-5 demonstrates, across the sample as a whole, white accused without a criminal record (45%) were almost twice as likely to be released by the police as black accused without a record (24%). Black accused with no previous convictions (15%) were twice as likely to be denied bail and imprisoned before trial as white accused with no convictions (8%).

The same pattern recurs among white and black accused with one to five previous convictions, although the difference is smaller.\* The pattern persists among accused

\* The police released 24% of white accused, but only 18% of black accused who had a record of one to five previous convictions. Release on bail was denied to 23% of white accused but to 31% of black accused who had such a record.





with six or more convictions.\*

Analysis by specific charge of black and white accused with no previous convictions shows –

- no racial difference in detention decisions for persons charged with sexual assaults, bail violations or robberies.
- a distinct racial difference in detention decisions for persons charged with serious non-sexual assaults. As Figure 5-6 shows, only 31% of black accused but 54% of white accused were released by the police. While 3% of white accused without previous convictions were denied bail and detained, 10% of black accused were denied bail and detained.
- a substantial racial difference in detention decisions for persons charged with drug offences. As Figure 5-7 shows, 72% of white accused who had no previous convictions but only 37% of black accused without previous convictions were released by the police. Bail was denied to 3% of white accused compared with 16% of black accused.

\* White accused (16%) were almost twice as likely as black accused (9%) to be released by the police. Release on bail was denied to 51% of black accused but to only 41% of white accused with six or more previous convictions.

Figure 5-6: Release and imprisonment outcomes, by race, for accused with no criminal record, serious non-sexual assault sample

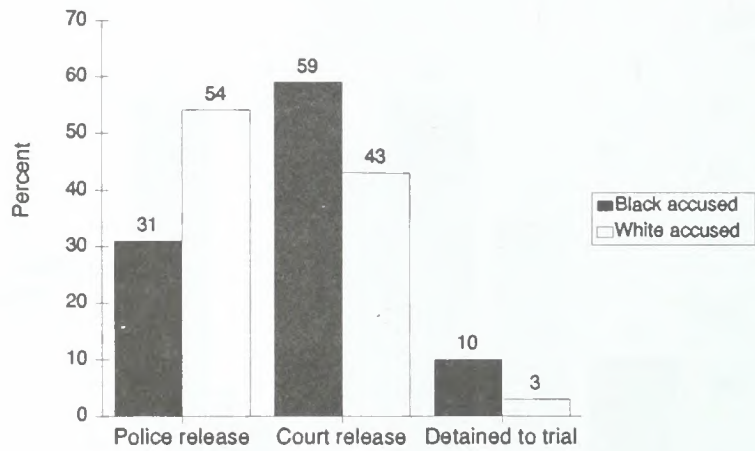
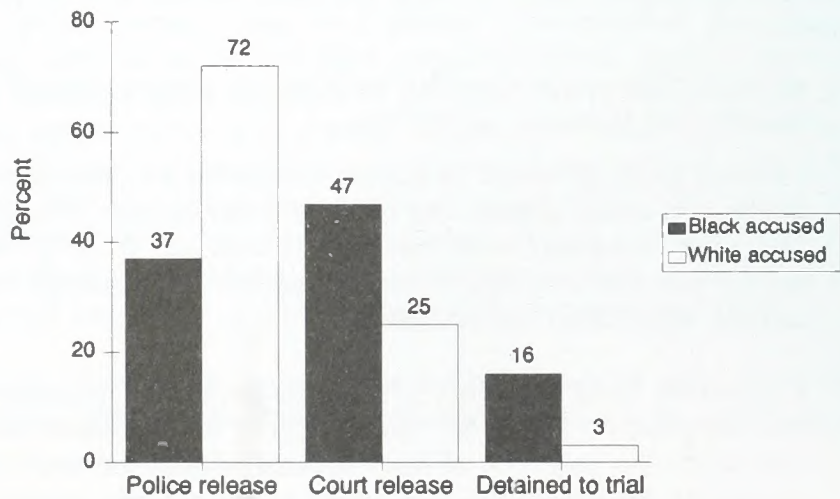
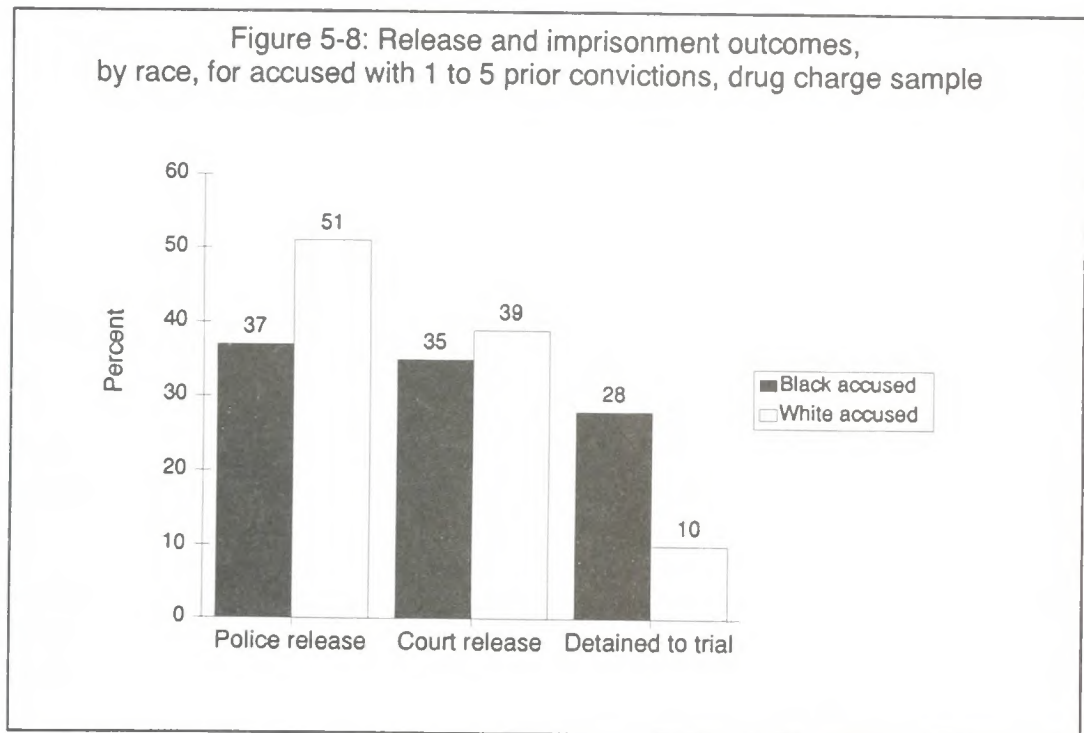


Figure 5-7: Release and imprisonment outcomes, by race, for accused with no criminal record, drug charge sample



Among accused with records of one to five previous convictions, the data show –

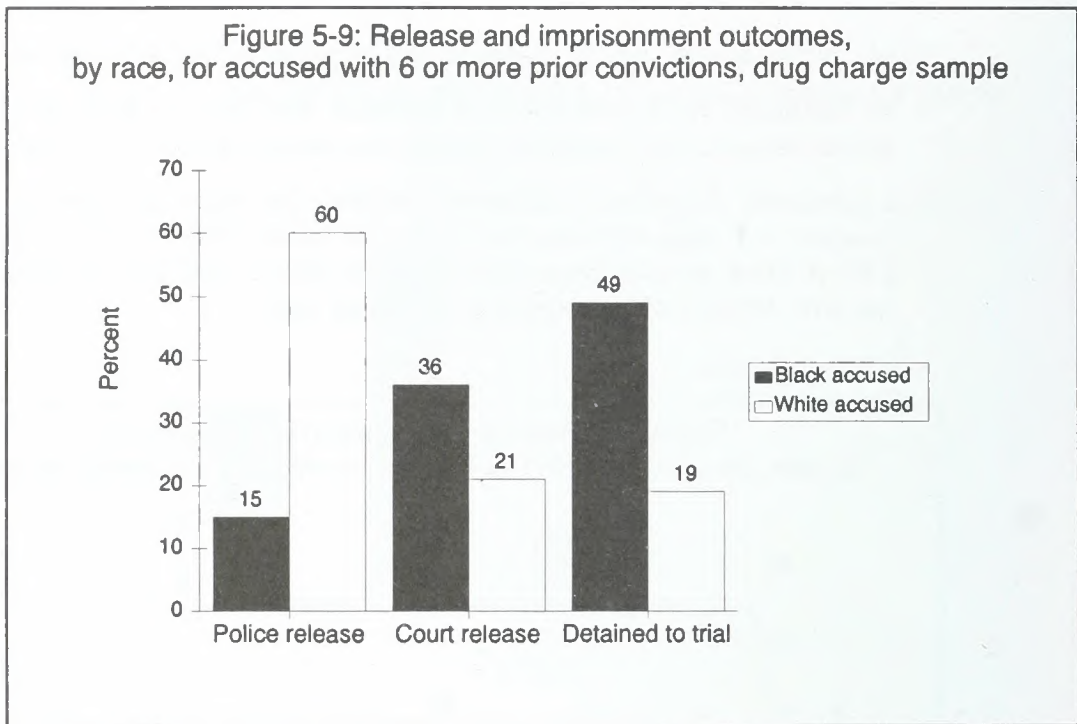
- no significant racial differences in detention decisions for those charged with sexual assaults, bail violations, serious non-sexual assaults or robberies.
- a substantial difference in detention decisions for white and black persons charged with drug offences. As Figure 5-8 shows, 51% of white accused and 37% of black accused were detained by the police, and 28% of black accused but only 10% of white accused were denied bail.



Among accused with six or more previous convictions, the data show:

- no racial differences in detention decisions for persons charged with sexual assaults, bail violations, serious non-sexual assaults or robberies.
- a substantial racial difference in detention decisions for accused charged with drug offences. As Figure 5-9 shows, white accused (60%) were four times more likely than black accused (15%) to be released by the police, and black accused (49%) were more than twice as likely as white accused (19%) to be denied bail.





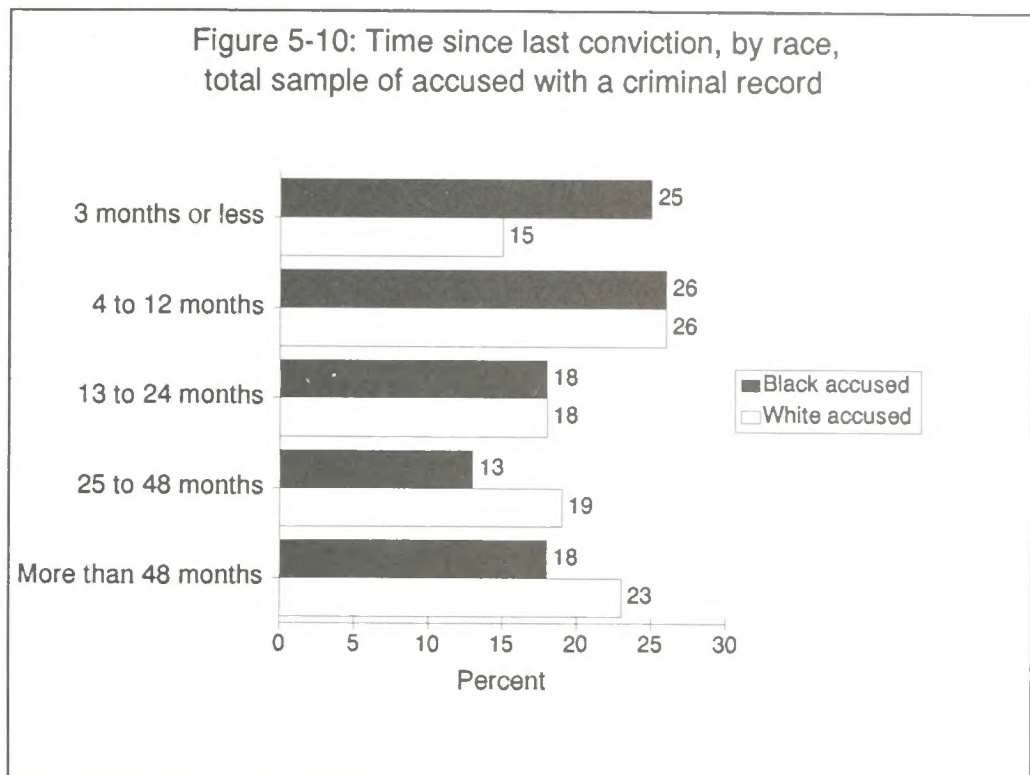
### ***Currency of record***

Decision-makers are likely to consider “currency of record,” or the time since the last conviction, especially when trying to predict if an accused is likely to commit an offence before trial. Thus it was not surprising to find in the sample that, regardless of race, the time since the last conviction was significant to bail decisions. Accused with a conviction within the previous three months were much less likely to be released by the police, and more likely to be ordered detained after a bail hearing, than accused with a substantial period of “clean time.”

Comparison of white and black accused shows that of those with at least one previous conviction, black accused (25%) were more likely than white accused (15%) to have been convicted within the previous three months. Conversely, white accused were more likely to have been last convicted more than two years before the current charge (Figure 5-10).

Comparisons by offence type show –

- no statistically significant difference in the currency of record for white and black persons charged with sexual assault, robbery or bail violation.
- significant differences in currency of record for white and black persons charged with serious non-sexual assaults and drug offences. As Figure 5-11a shows, 28% of black but only 8% of white accused charged with serious non-sexual assault who had a criminal record had been convicted within three months of the current charge. Figure 5-11b shows that 27% of black but 15% of white accused



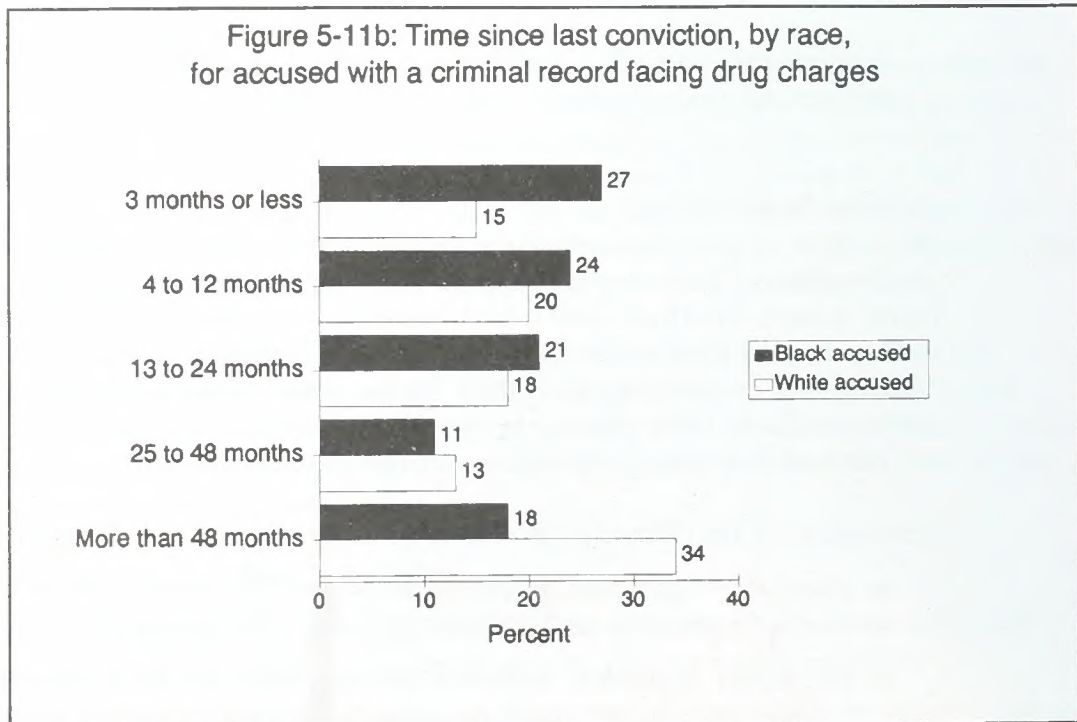
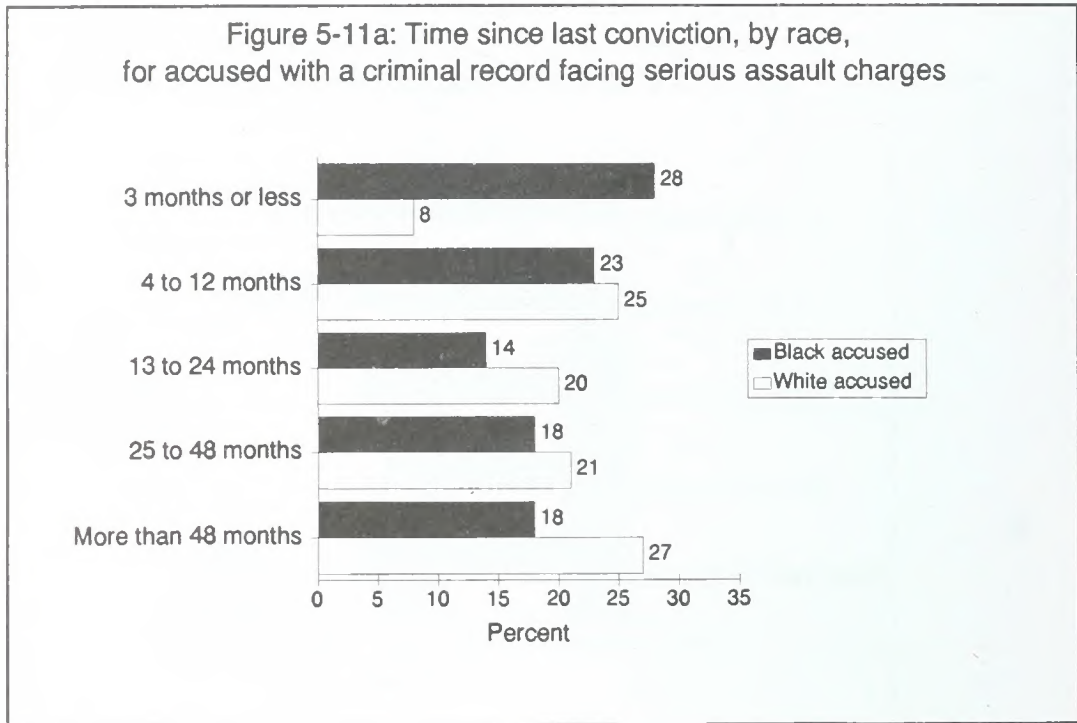
charged with drug offences who had a criminal record had been convicted within the previous three months.

### **Offence “track record”**

The number of previous convictions for the same or a similar offence as the current charge (offence “track record”) may be used to assess the risk that the accused would commit an offence before trial. Analysis of the data confirms that regardless of race, offence track record had a significant influence on detention decisions. Accused with no previous convictions for the same offence as the current charge were more likely to be released by the police and much less likely to be denied bail and detained than those with such a previous conviction.

Comparison of the offence track records of white and black accused shows –

- no statistically significant difference across the total sample. About 15% of both groups had a previous conviction for a similar offence to current charge.
- no statistically significant difference between white and black accused charged with sexual assault, bail violation, serious non-sexual assault or robbery. The proportions of accused with a prior conviction for a similar offence ranged from 5% (sexual assault) to 23% (bail violation).
- a difference between black and white accused charged with drug offences. Neither sample had extensive records, but black accused facing this type of



charge (25%) were more likely than white accused (15%) to have a previous conviction for a drug offence.



### ***Previous prison sentence***

Criminal records that include prison sentences are likely to be viewed as more serious than records without prison sentences. Thus it is not surprising to find that, regardless of race, accused who had served a prior prison sentence were less likely to be released by the police and more likely to be denied bail than those who did not have such a record.

Comparison of the two samples reveals distinct patterns. About the same proportion of each group had not served a prison sentence, and the two groups were equally likely to have served a sentence of one to three years. White accused (14%) were twice as likely as black accused (7%) to have received a long sentence (three years or more). By contrast, white accused (20%) were less likely than black accused (25%) to have a prison term of one year or less as the longest sentence on their records.

### **Bail status at the time of charge**

Bail status at the time of charge is very significant to pre-trial detention decisions. Persons charged with committing a serious (indictable) offence while free awaiting trial for an indictable offence or a breach of a previous bail order cannot be released by the police, and at the bail hearing they must overcome a presumption of detention. In addition, the *Criminal Code* specifically identifies bail status at the time of charge as a relevant factor in bail decisions.

These data confirm that bail status has a strong influence on the decisions of police officers and justices, regardless of race. While only 9% of those charged while on bail were released by the police, 31% of those not on bail were released at this point. Release was denied to 38% of those charged while on bail, but to only 20% of accused who were not on bail when charged.

Comparison of the bail status of white and black accused shows that –

- across the sample as a whole, black accused were slightly more likely than white accused to be on bail at the time of the current charge.
- black and white persons charged with sexual assaults, robbery and, of course, bail violations were equally likely to be on bail at the time of the alleged offence.
- black persons charged with drug offences (Figure 5-12) and serious non-sexual assaults (Figure 5-13) were almost twice as likely as white accused facing the same charges to be on bail at the time of charge.

### **Serving sentence in the community**

The data show that accused who were serving a sentence in the community – on probation, parole or mandatory supervision – at the time of being charged were more likely to be detained than those who were not serving such a sentence. But since only 3% of white accused and 1% of black accused were recorded as serving

Figure 5-12: Bail status at time of charge, by race, drug charge sample

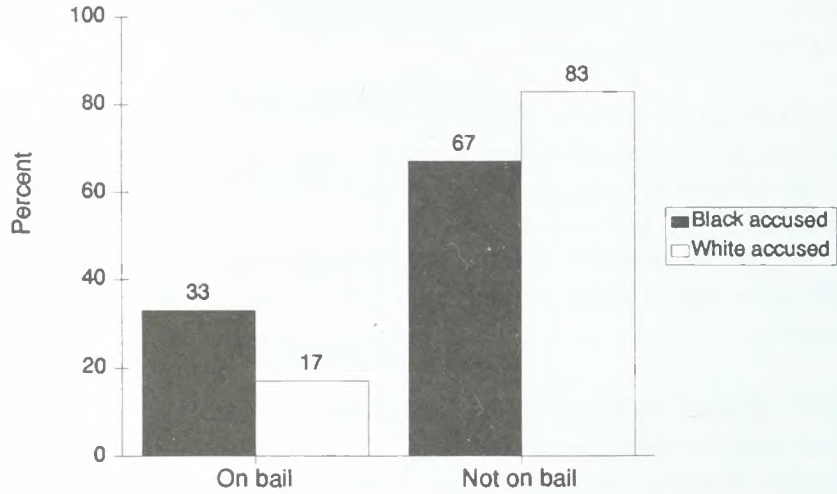
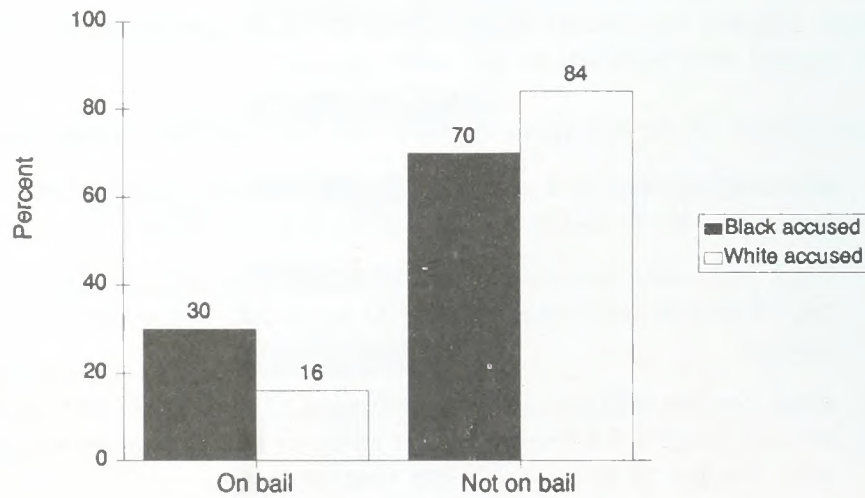


Figure 5-13: Bail status at time of charge, by race, serious non-sexual assault sample



such a sentence at the time of the new charge, this factor does not account for the differential outcomes.

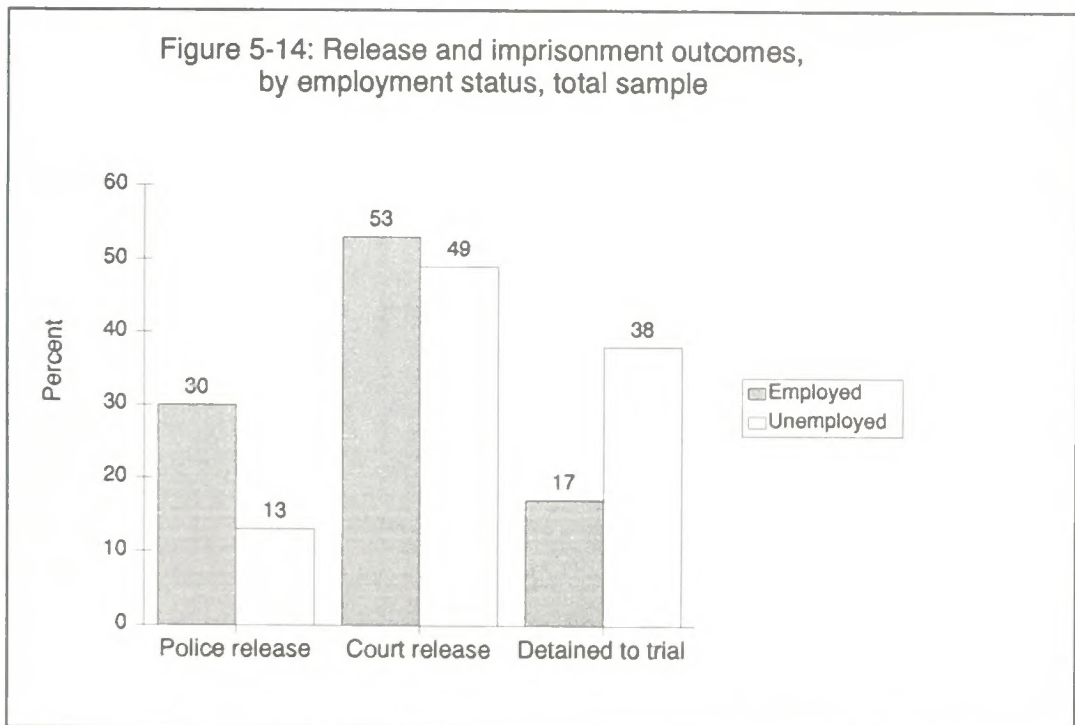
### *Ties to the community*

#### **Employment status**

As we show in Chapter 2, many lawyers and judges recognize that income, poverty and economic class are significant to criminal justice decisions such as bail. Some of them suggested that apparent racial differences in outcomes of the criminal justice process are in reality reflections of racial inequalities in income or employment status.

Our study produced several important findings about relationships among unemployment, race and pre-trial release for these accused. Regardless of race, however, a large number of accused were recorded by police as unemployed. According to the records, 48 percent of the total sample did not have a job when they were charged.

As Figure 5-14 shows, unemployment had a strong influence on detention decisions. Employed accused (30%) were more than twice as likely as unemployed accused (13%) to be released by the police, and unemployed accused (38%) were more than twice as likely as employed accused (17%) to be detained after a bail hearing.





Comparison of the employment status of black and white accused shows –

- a statistically significant racial difference in unemployment rates across the sample as a whole. The police had recorded 44% of white accused and 53% of black accused as unemployed.
- no statistically significant racial differences in the unemployment rates of accused persons charged with robbery, sexual assaults and serious non-sexual assaults.
- substantial differences in the unemployment rates of white and black persons charged with drug offences and bail violations. Almost two-thirds (64%) of the black persons charged with drug offences were described by the police as unemployed, compared with 43% of the white accused. The police had recorded 39% of white and 59% of black persons charged with bail violations as unemployed.

The patterns of pre-trial imprisonment decisions for unemployed white and black accused were similar. Most were not released by the police, and a high proportion of both groups were denied release at the bail hearing.

The patterns of release decisions for employed white and black accused were different. Figure 5-15 illustrates two important findings. First, employed white accused (36%) were much more likely than employed black accused (23%) to be released by the police. Second, employed black accused (40%) were more likely than white accused (29%) to be required to find a surety as a condition of obtaining freedom before trial.

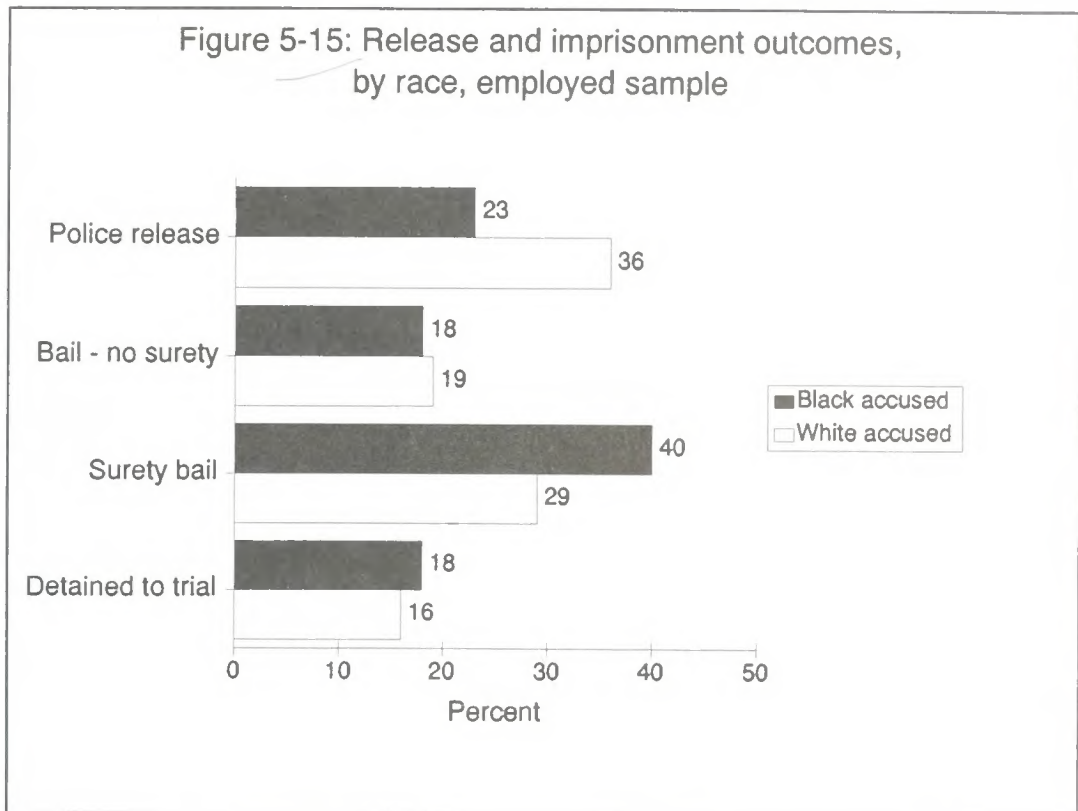
### **Fixed address**

The criminal justice system usually views “fixed address” as an indication of an accused’s “ties to the community,” which in turn is an important factor in assessing risk of flight before trial.

Regardless of race, whether an accused person had a fixed address had a large impact on release decisions in our sample. As Figure 5-16 shows, accused with a fixed address (29%) were ten times as likely to be released by the police than those without a fixed address (3%). Also, accused without a fixed address (51%) were 2.5 times as likely to be denied bail than accused with a fixed address (21%).

Comparison of black and white accused in the sample reveals –

- no statistically significant racial difference in the proportions of the accused with a fixed address across the sample as a whole. About four-fifths of both groups had a fixed address at the time of charge.
- no statistically significant racial difference in the proportions of accused with a fixed address among those charged with drug offences, sexual assaults, bail violations and robberies.

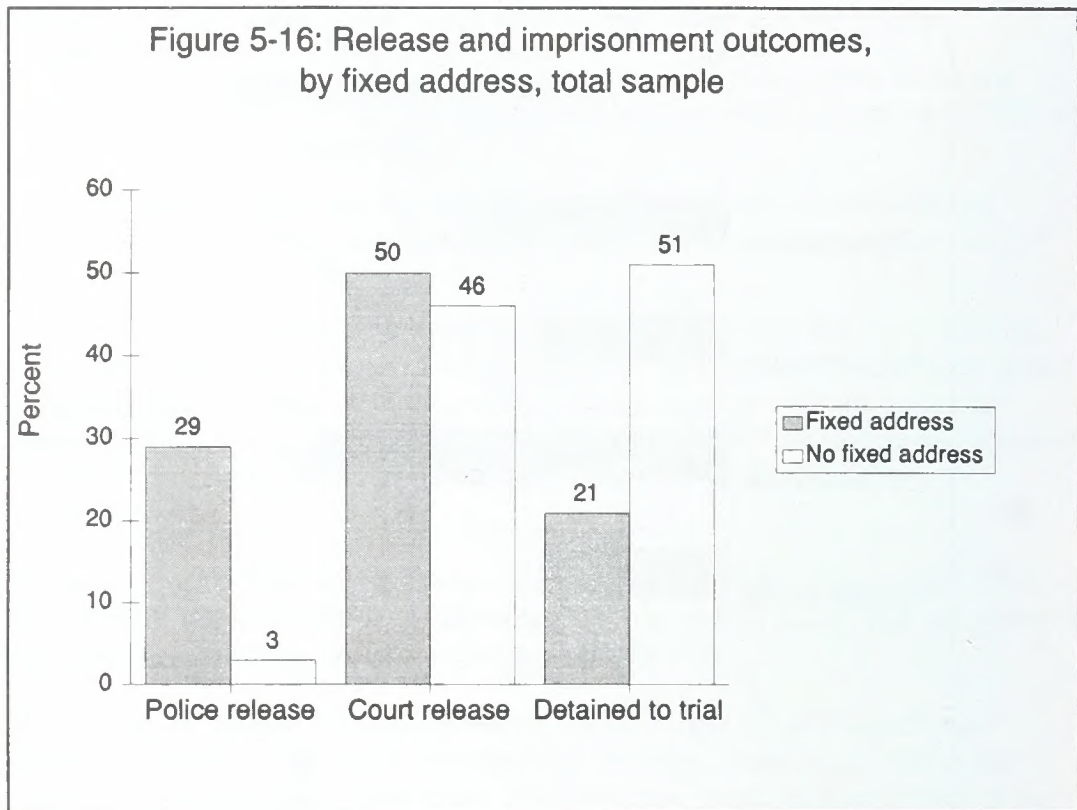


- a distinct racial difference in the proportions of accused with a fixed address among those charged with serious non-sexual assaults. The police recorded no fixed address for 12% of white and for 22% of black persons charged with serious non-sexual assaults.

### Single status

Single status may also influence bail decisions, inasmuch as these accused are seen as less “tied to the community” than accused who live with a partner of the other sex. We found that this personal characteristic did influence bail decisions, regardless of race. Only 22% of single accused were released by the police, while 30% of those recorded with partners were released at this stage. Moreover, single accused (30%) were twice as likely as those with partners (15%) to be denied bail.

- About four-fifths of both samples of black and white accused were single.
- Detention outcomes for single white and black accused showed a clear racial difference. While 27% of single white accused were released by the police, only 17% of single black accused were released at this point. Release on bail was denied to 33% of single black accused and 26% of single white accused.



- Release outcomes for white and black accused with partners revealed a similar pattern. The police released 36% of white accused, but only 23% of the black accused. Release on bail was denied to 12% of the white accused and 19% of black accused.

### ***Discrimination in detention decisions: the overall picture***

Detention decisions obviously do not involve consideration of each characteristic of accused persons in isolation. Instead, the decision-maker attempts simultaneously to take account of all relevant evidence. We therefore revisited the data using a type of analysis – multivariate analysis – that would show how the factors work together. This analysis enabled us to see whether race makes a discernable difference to release decisions over and above the different aspects of criminal history and “ties to the community.”\*

\* Further details can be found in our Technical Volume. See Appendix B.



The findings show that –

- across the total sample, race made a small but significant difference to imprisonment before trial. Specifically, black accused were more likely than white accused to be detained.
- for the separate categories of sexual assault, bail violation and robbery charges, race did not make a significant difference to whether the accused was imprisoned before trial.
- for serious non-sexual assault charges, race made a small but significant difference to likelihood of imprisonment before trial.
- for drug charges, race made a marked and significant difference to imprisonment before trial. Indeed, it appears to have had the strongest impact on differential outcomes of all the factors considered.

This analysis also indicates that employment status has a distinct effect on detention decisions. Specifically, the analysis shows that –

- across all five offences, employment status made a marked and significant difference to imprisonment before trial.
- for drug offences, bail violations, serious non-sexual assaults and robberies (that is, every offence category except sexual assault), employment status made a marked and significant difference to imprisonment before trial.

These findings about employment status are important, given the higher rate of unemployment recorded for black accused in the total sample, and in the drug charge and bail violation samples. They suggest, in particular, that racial inequality in labour markets may be transmitted into the bail process, where it contributes to racial inequality in imprisonment before trial.

### **Summary of findings**

This study of pre-trial detention of white and black persons charged with the same offence types reveals evidence of differential treatment across the entire sample. It also revealed differential treatment of persons charged with two categories of offence: drug offences and serious non-sexual assaults. Within the entire sample and the sub-samples, black accused were less likely than white accused to be released by the police and more likely to be detained after a bail hearing.

The differential is pronounced at the police stage of the process for the entire sample as well as for those charged with drug offences or serious non-sexual assaults. Consequently the bail courts saw a significantly higher proportion of the

total number of black accused than of the total number of white accused in these samples.\*

The courts granted bail to similar proportions of black and white accused who appeared before them, unless the accused were charged with drug offences. Within this sub-sample, white accused were more likely than black accused to be granted bail. Thus the differential in imprisonment after bail hearings reflect two distinct processes.

For the drug sample, differential decision-making by the police was compounded at court, with the result that the difference in pre-trial imprisonment of black (31%) and white (10%) accused is particularly large. For the entire sample and the serious non-sexual assault sub-sample, disparities in police decision-making affected the number of each group that appeared before the courts, but the courts then denied bail at similar rates to black and white accused. Because so many more of the black accused in the entire sample and serious non-sexual assault sub-sample were brought before the courts, however, the similar rate of denying bail resulted in larger proportions of all black accused being jailed before trial.<sup>†</sup> In effect, because the courts generally granted bail at about the same rate for white and black accused, the decisions simply transmitted the disparity created by earlier police decisions. Thus similar decision-making by courts applied to the results of differential decision-making by the police produced racial inequality in imprisonment before trial.

Strikingly, the existence, extent or severity of a criminal record does not account for the findings of racial inequality in the use of imprisonment, nor does length or seriousness of criminal record.

**Existence of a record does not account for the findings because –**

- across the sample as a whole, black accused were less likely to have a criminal record than white accused.
- in the drug charge and serious non-sexual assault samples, black and white accused were equally likely to have a criminal record.

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\* To recap: The police released 29% of white and 18% of black accused across all five offences, which meant that 71% of all white accused in the sample and 82% of all black accused in the sample were brought before a bail court. The police released 60% of white and 30% of black persons charged with drug offences, which meant that only 40% of all white persons charged with this offence type were brought before a bail court while 70% of all black persons charged with drug offences were brought before a bail court. The police released 37% of white and 24% of black persons charged with serious non-sexual assault, which meant that 63% of all white persons charged with these offences had a bail hearing, as compared with 76% of all black persons charged with these offences.

<sup>†</sup> For example, as noted above, 82% of black accused and 71% of white accused in the total sample had a bail hearing and about 43% of white as compared with 47% of black accused who had a hearing were denied bail. The latter difference is not statistically significant. Taking into account the effects of entire bail system on the sample – including those released by the police – the proportion of black accused ultimately imprisoned is much larger.



- across the entire sample of accused without prior convictions, and for the accused without previous convictions who were charged with drug or serious non-sexual assault offences, black accused were significantly more likely to be denied release than white accused.

**Length of criminal record does not account for the findings because –**

- across the sample as a whole, black accused were less likely than white accused to have a lengthy criminal record.
- in the drug charge and serious non-sexual assault samples, black and white accused were equally likely to have a lengthy criminal record.
- across the sample of accused with lengthy records, and also among those with lengthy records who were charged with drug offences, black accused were significantly more likely to be denied release than white accused.

**Seriousness of record does not account for the findings because –**

- black accused were less likely than white accused to have served a lengthy prison sentence prior to the current charge.
- offences on the records of black accused were no more serious than offences on the records of white accused.

While existence, length and severity of criminal record do not account for the findings of differential detention for black and white accused, offence track record, currency of record, and bail status at the time of charge likely contributed to racial difference in pre-trial imprisonment outcomes. But these factors do not explain all the difference. In particular, neither offence track record nor the time since the last conviction has any bearing on the racial difference in imprisonment of accused without prior convictions.

Accused without previous convictions may be on bail at the time of charge. The findings show that across the sample as a whole, and in the drug charge and serious non-sexual assault samples, black accused were more likely than white accused to be on bail when charged. But this difference between the two groups accounts for only a small part of the overall racial inequality in release outcomes.

Employment status, as described by the police, accounts for some of the racial inequality in imprisonment before trial, both for the sample as a whole and for the drug charge sample. But although it is clearly significant, employment status does not fully explain the findings of racial inequality. The other aspects of ties to the community that we examined – fixed address, and single status – also fail to account for what was found.

However closely we scrutinize the data, the findings disclose distinct and legally unjustifiable differences in detention decisions for black and white accused, across the sample as a whole and for some specific offences. The conclusion is



inescapable: some black men imprisoned before trial would not have been jailed if they had been white, and some white men freed before their trials would have been detained had they been black.

In effect, these findings are evidence of the state exercising discretion as if it has more compelling reasons to imprison black adult males before their trials than white adult males charged with the same offences. This bias may reflect explicit beliefs that black men cannot be trusted to appear for trial, or are more dangerous or criminal than white men. But it could also arise from more implicit and subtle assumptions, since important characteristics of the release process are likely to promote stereotypical decision-making.

As presently organized, the bail system demands fast decisions, sometimes made within minutes, and it expects both the police and bail justices to make predictions based on vague criteria and information that is often inadequate. These features obviously do not compel decision-makers to rely on racial or other stereotypes, nor in any way excuse such reliance. But they establish conditions in which reliance on stereotypes, perhaps subconsciously, may make decisions easier. For example, a justice who assumes that police testimony about drug charges is seldom mistaken and that most black males charged with drug offences sell drugs for profit may quickly conclude at a bail hearing that a specific black male accused is likely to offend before trial. By drawing on such assumptions, the justice avoids the more difficult task of attempting to predict the likely behaviour of that individual.

However, our findings do not reveal racial bias in the exercise of discretion for each offence type in the study. Instead, they show clear variations in release decisions within the range of offence types selected. This finding poses the question of the extent to which bail decisions about persons charged with other offence types would reveal racial bias in the exercise of discretion. The racial bias against black men documented in this study also raises questions about the treatment of accused from other racialized communities, as well as the treatment of black women and black youth.

The answers to these questions lie in future research. Clearly, however, action to eliminate the systemic conditions that permit unjust pre-trial imprisonment of racialized accused should not wait until more is known. It should begin immediately.

## **Moving forward: analysis and recommendations**

The Commission's findings provide clear and convincing evidence that the Ontario bail system unjustly imprisons black or other racialized accused before trials. Several aspects of the bail process contribute to the problem; while each taken alone may have only a limited effect, together their impact is devastating. The findings demonstrate clearly the need for remedial action throughout the bail system to enhance fairness, promote equality, secure accountability and ensure restraint in the use of imprisonment before trial.

Two fundamental principles underlie the Commission's recommendations. The first is the principle of the rule of law requiring no greater intrusion on the liberty of any individual than can be strictly and legally justified by the state. The second is that the law must reflect equality not only in its content and administration but also in its consequences.

### ***Arrest and police detention***

As the Commission's major study demonstrates, police actions may contribute significantly to racial inequality in imprisonment before trial. Most obviously, the police make the critical decision about whether to arrest an accused person, and in most circumstances they also decide to release or detain pending a bail hearing. In addition, the police prepare "show cause" reports that summarize information about the accused and the alleged offences. Crown attorneys generally use these reports when deciding if the state should seek imprisonment of an accused, and when making submissions to a justice at a bail hearing. This aspect of the police function, no less than the arrest and release powers, may be influenced by social constructions of black and other racialized people as more likely than white people to warrant detention before trial.

Exercise of the arrest power is highly discretionary and, except when the police obtain prior authorization in the form of a warrant, it is difficult to scrutinize. As the Law Reform Commission of Canada noted, this discretion and low visibility make the arrest power open to many types of abuse, including discriminatory treatment.<sup>12</sup> In recent years, Ontario judges have recognized the potential for racial bias in the exercise of the police "search and seizure" power, which frequently precedes arrest.\*

The arrest provisions of the *Criminal Code* are intended to limit the use of this highly coercive police power and to promote alternative methods of launching criminal proceedings. The Code also appears to require release from police custody unless the accused is charged with an indictable offence that carries a maximum sentence of more than five years. However, the law permits police detention if it is believed necessary to ensure that the accused attends court, or to promote the public interest in preventing crime or in investigating the incident that led to the arrest.

These laws – characterized as "unduly technical," "poor[ly] organiz[ed]," "incoheren[t]" and "too broad"<sup>13</sup> – may fail to provide clear guidance to the police about the proper use of the discretion to arrest. Given the general nature of the law, development of more detailed guidelines for working officers, with corresponding training to emphasize the principle of restraint, is clearly warranted. However, we have found little to assist officers in their daily work in Ontario. It was disappointing to learn, for example, that the *Policing Standards Manual* prepared by the Ministry of the Solicitor General and Correctional Services does not provide any

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\* See Chapter 10 for the Commission's findings of racial inequality in the use of discretion to stop people in cars and on foot.



guidelines, directives or standards for exercising the power to detain arrested persons.<sup>14</sup> Though some police services produce their own guidelines on the release process,<sup>\*</sup> they do not give officers clear and specific directives about deciding whether to detain arrested persons.

The officer training manuals used at the Ontario Police College and Metro Toronto's C.O. Bick College include materials on arrest and detention powers. These materials are comprehensive and accurately state the extent of police powers. They would assist officers even more if they gave more emphasis to the duty of the police to release arrested persons unless certain conditions are met.

The Commission's findings demonstrate that without adequate guidance and direction on exercising discretion, police detention decisions may too easily fail to conform to the principle of equality. There is an obvious need for comprehensive and consistent guidelines in police operating norms.

#### **5.1 The Commission recommends that –**

- a) the Ministry of the Solicitor General and Correctional Services, in consultation with interested community organizations, lawyers, police services and police associations, develop operating guidelines based on the principle of restraint in exercising powers to detain arrested persons and to impose conduct restrictions upon release. The guidelines should be made public.**
- b) police officer training materials and programs be modified and standardized to reflect the principle of restraint in exercising the arrest power and the duty to release arrested persons.**
- c) the Ministry of the Solicitor General and Correctional Services monitor operating guidelines and training programs to ensure that all materials on police detention and release reflect the principle of restraint embodied in the *Criminal Code*.**

Police use of the arrest power, like so much of their street-level discretion, is difficult to control without an effective monitoring system.<sup>†</sup> As a first step towards effective monitoring, it is essential to make decisions to arrest without warrant more visible. It should not be a great burden for the arresting officer to articulate the basis for exercising the discretion to arrest when the accused is brought to the police station.

Requiring the officer to record his or her reasons in writing would have the benefit of explaining how the discretion to arrest was exercised according to law. Moreover,

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<sup>\*</sup> Both the Metropolitan Toronto Police and the Hamilton-Wentworth Regional Police have procedural directives on this topic. Other urban police services we consulted reported that they do not maintain standing orders or directives on police detention.

<sup>†</sup> In Chapter 12 we set out our proposal for a comprehensive, system-wide mechanism to monitor and report on systemic racism in the criminal justice system. Monitoring the arrest power is an essential part of this mechanism.



written reasons would give the officer in charge a more explicit factual basis for exercising the statutory power of review. The reasons would also give accused persons clear explanations of why their liberty is being denied and afford them an opportunity to correct any factual errors or mistaken assumptions. In addition, the documentation could facilitate access to relevant information at a subsequent bail hearing. Finally, the process of articulating reasons should help prepare police officers to explain why they chose to depart from the important principle of restraint in exercising their arrest power.

The Commission proposes that both the arresting officer and the officer in charge should be required to give written reasons for detaining suspects. These reasons should be read to the accused, forwarded to the crown attorney responsible for the bail hearing, and disclosed to the duty or defence counsel who represents the accused at bail court. Accused persons should be given a specific opportunity to correct statements or assumptions made in the police explanation for detention. When possible, the police explanations and the responses of accused persons should be videotaped, and crown counsel and defence counsel should be told if a videotape recording was made.

#### **5.2 The Commission recommends that –**

- a) upon arrival at a police station with a detained person, an arresting officer be required to complete a form explaining why the accused has not been released. The form should be counter-signed by the officer in charge.
- b) an officer in charge who decides not to release the accused be required to record an explanation of the decision on the form used by the arresting officer. The officer in charge should also be required to explain the reason for detention to the accused and provide an opportunity to respond. Any response by an accused should be recorded on the same form as the reasons given by the police officers.
- c) crown attorneys at the bail hearing be required to disclose to defence or duty counsel the written police explanations for using arrest and detention powers, as well as the response, if any, of the accused.
- d) police explanations for detention and responses of accused persons be videotaped whenever possible. The existence of such a videotape should be disclosed in writing to crown counsel at the bail hearing, who in turn should be required to disclose it to duty or defence counsel.

### ***Conditional release by the police***

One reason the police have traditionally given for failing to release arrested persons is that they wanted to impose enforceable conditions on the accused. Though the *Criminal Code* permits an officer in charge to require financial guarantees that the accused will appear at court,<sup>15</sup> it has not, until recently, allowed the police to impose conduct restrictions before trial. The police maintain that conditions such as requiring the accused to stay away from a specific address are often sufficient to safeguard the public interest in crime prevention and the police investigation. It was suggested, therefore, that if the police were empowered to impose such conditions

they would release some or many accused whom they now detain solely in order to secure conditions at a bail hearing.

Parliament responded to these concerns by granting the police discretion, as of April 1, 1995, to release accused persons subject to certain restrictions on behaviour. These include: remain within a specified territorial jurisdiction; notify police of change of address, employment or occupation; abstain from communicating with named parties or going to certain addresses; and deposit passport.<sup>16</sup>

Since the police power to impose release conditions came into effect late in the Commission's mandate, we were unable to evaluate its impact. Given our other findings about police discretion, however, we are concerned that this new power be exercised with restraint. In particular, it should not be used to impose conditions on arrested persons whom the police would in past have released without conditions, but solely to promote release of accused people who would otherwise be held for a bail hearing. Again it would be desirable and have a restraining effect to require officers to articulate why they consider each release condition necessary.

### **5.3 The Commission recommends that –**

**a) upon deciding to impose conditions on the release of an accused, the officer in charge be required to complete a form explaining why each condition is deemed necessary.**

**b) an officer in charge who imposes conditions on the release of an accused be required to explain why and provide an opportunity for the accused to object. Any objection by an accused person should be recorded on the same form as the reasons given by the officer in charge.**

**c) any accused subject to police-imposed conditions be given a copy of the form explaining the reasons for each condition.**

The new law offers accused persons some protection against unreasonable or unfair conditions by allowing them to seek changes in conditions imposed by the police during any attendance in court. If this protection is to be effective, the accused has to be aware of the right to apply for a variation, and adequate legal advice and representation is required. Duty counsel must be attuned to the danger of the police imposing unnecessary or excessive conditions and be prepared to discuss with accused persons whether variations are appropriate.

### **5.4 The Commission recommends that –**

**a) release documents issued by the police contain printed advice that an accused may apply to be relieved of release conditions on any appearance in court.**

**b) duty counsel adopt the routine practice of asking accused persons whether they are aware of the right to apply to be relieved of release conditions imposed by the police. If requested by an accused person, duty counsel should assist in applying for relief.**



### **“Show cause” reports**

A “show cause” report is a written synopsis of the case and the background of the accused. Police prepare these reports to help crown attorneys decide whether to seek imprisonment of the accused or request conduct restrictions upon release. The reports should be factual summaries of what the police know about the alleged offence; any prior contacts with the criminal justice system of the accused; and information about the accused’s background, including employment status, residence and personal relationships. Show cause reports may also include any other information thought relevant to bail decisions, and police recommendations about whether an accused should be imprisoned or released subject to restrictions on behaviour until the trial is over.

Police officers sometimes use their total control over the content of show cause reports to comment on accused persons in a variety of irrelevant, and sometimes racialized, ways. Commission research shows, for example, that the police frequently record judgments about whether an accused is unco-operative or otherwise shows a “bad attitude” towards the police. Reasons given for recommending imprisonment sometimes consist of little more than mean-spirited and often stereotypical perceptions of an accused person. Thus sole-support mothers may be judged “irresponsible,” transients as “losers,” and immigrants as “only out to lie,” or, as this comment about a young person born in Laos illustrates, as ungratefully exploiting the system:

“The YOUTH has no regard for other people’s property and seems not to appreciate the life he has been handed in this country ... This YOUTH should be held in custody to ensure he does not deprive any more unsuspecting citizens of their rightfully owned property.”

Of particular concern is what appears to be a routine practice in some jurisdictions of recording and commenting on the accused’s immigration history and status or country of origin. In some circumstances, status in Canada may be relevant for crown attorneys to consider, but in most cases it is irrelevant. Nevertheless, show cause reports frequently contain considerable detail about the accused’s arrival in Canada and current immigration status.

Such information in show cause reports is often irrelevant because it is not linked to concerns that the accused will fail to attend court for trial or any other bail consideration. Why is such information included? Some officers may think, consciously or subconsciously, that foreign-born people alleged to have committed offences should be singled out. Another possibility is that the operating norms of policing may encourage officers to act as if foreign-born accused should be singled out even if the investigating officers do not themselves share this belief. Police officers may also include such information because they believe it may subtly influence the decisions of crown attorneys and justices even if it is not specifically tied to a recommendation. Clearly, racialization of accused persons for any of these



reasons is unacceptable and should no longer be tolerated by the criminal justice system.

Information about immigration status or history in Canada may also accompany police recommendations to detain an accused or attach conduct restrictions to bail. For example, one comment accompanying a police recommendation states, "... the accused is a newcomer to this country but quickly learned how to make a living without working for a living." Another describes the accused as having "everything to gain by lying and nothing to lose due to the fact that he is a visitor in this country ...". Even when the question of whether the accused ordinarily resides in Canada (or Ontario) may be significant to the bail hearing, there is no excuse for officers presenting the information in a derogatory manner, or using it to make judgments about the accused's character.

Racialization of accused people in show cause reports, and other unprofessional commentary about accused persons indicate a clear need for more guidance to officers about the purpose and appropriate content of these reports. The Ministry of the Solicitor General and Correctional Services should take the initiative by providing police officers with guidelines about factors relevant to show cause reports. Crown attorneys, as the recipients of show cause reports, can also help eliminate inappropriate commentary and references to irrelevant information that racializes accused persons. Whenever the relevance of such a comment or reference on a show cause report is not obvious, a crown attorney should ask the police to explain in writing why the information is included.

#### **5.5 The Commission recommends that –**

- a) the Ministry of the Solicitor General and Correctional Services, in consultation with interested community organizations, lawyers, police services and police associations, develop a checklist of information about an accused person relevant to show cause reports.**
- b) crown attorneys request the police to explain in writing the relevance of any reference to an accused person's immigration status, nationality, race, ethnicity, religion, place of origin or birth that is contained in a show cause report.**

Commission research also disclosed a problem with police sources of information that may harm refugee claimants from certain countries. Police officers usually obtain information about immigration status from the Canadian Police Information Centre (CPIC, a computer system shared by the police and other law enforcement agencies) or Citizenship and Immigration Canada. Since the police are not generally trained on the complexities of Canada's immigration regime, they may simply accept and transmit what they learn from these sources.

Sometimes, however, the information recorded on CPIC or provided by an immigration official does not give a true picture of a person's status. For example, all refugee claimants whose claims are denied are technically subject to deportation, and official immigration information may describe them as under a removal order.

But as a matter of policy Canada does not generally deport individuals to some countries.<sup>\*</sup> Thus, whatever is stated on the formal record, individuals who would be returned to one of these countries are not in practice subject to an effective removal order.

This difference in information is potentially a source of considerable confusion,<sup>†</sup> and may result in unjust imprisonment before trial. Police officers who faithfully record that an accused is "under a removal order," and crown attorneys and bail justices who receive this information, might view the accused quite differently if they knew that the immigration department has no intention of deporting him or her in the foreseeable future.

The solution to this problem lies in the police obtaining more accurate information about the status of refugee claimants whose claims are denied. There is no reason why the police cannot determine the true status of an individual said to be subject to removal. Lists of countries to which Canada does not deport are available.

**5.6 The Commission recommends that police not refer to an accused person as being under a removal order in show cause reports without verifying that Citizenship and Immigration Canada intends to remove the person from Canada.**

### ***Preparation for bail hearings***

As recognized in the *Canadian Charter of Rights and Freedoms*, prompt access to legal advice upon arrest or detention is a fundamental right.<sup>‡</sup> While this right is unrestricted, persons in police custody usually exercise it in anticipation of questioning by police. In practice they may have little further opportunity to consult a lawyer to prepare for a bail hearing. An accused person who remains in custody after questioning does not usually have another opportunity to consult a lawyer before arriving at bail court. As a result, many prisoners are wholly unprepared for their first appearance in bail court.

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<sup>\*</sup> At the time of writing, Canada was not generally deporting refugee claimants to Iran, Sri Lanka or Sudan, among other countries.

<sup>†</sup> In response to inquiries from the Commission, a Citizenship and Immigration Canada official acknowledged that "police ... misinterpretation of detailed explanations of current status is possible." (Internal memorandum dated Feb. 1, 1995, from Hallam Johnston, Director General, Enforcement Branch, National Service Sector, to Luke Morton, Counsel, Legal Services, Citizenship and Immigration [on file].)

<sup>‡</sup> *Canadian Charter of Rights and Freedoms*, s. 10(b). In Ontario, emergency legal advice is available to arrested persons 24 hours a day via a toll-free telephone line. All persons in police custody are entitled to use this service, or they may contact a lawyer of their choice if they are able to pay for advice. The police are constitutionally required to tell arrested persons about the right to consult a lawyer. Police officers must also tell arrested persons about the emergency service, and ask if the person would like to speak to a lawyer. (*R. v. Brydges* [1990] 1 S.C.R. 190).



Such unprepared prisoners tax the already overstressed duty counsel system. Duty counsel have no control over the rate at which prisoners are transported to courts. If large numbers of unprepared prisoners arrive at the same time, duty counsel may be unable even to interview them properly, still less to provide full advice or verify information about sureties, employment or residence. One consequence may be postponement of the bail hearing to obtain further information. Another is that bail conditions may be imposed that are beyond the financial means of the accused. In either event, the accused must be held in custody until a subsequent court appearance. In this way accused persons continue to be deprived of their liberty, and both the courts and prison systems incur unnecessary costs.

Often the period in police custody between completion of police questioning and appearance in court lasts several hours, which could be used to prepare for the hearing. For example, someone who could act as a surety (who guarantees to pay a sum of money if the accused does not appear for trial) could be called, or independent confirmation of employment or residence obtained. Unless accused persons have previous experience with the bail system, however, they are unlikely even to know what to do, and all accused persons in police custody find it difficult to make contact with other people.

Custodial remands due to lack of preparation are clearly undesirable because they significantly disrupt the life of accused persons. They are also extremely expensive for the justice system. Resources are wasted to incarcerate the accused and transport them between court and prison, and rescheduled bail hearings consume precious court time. Clearly, it would be better all around to minimize the number of bail hearings that are adjourned essentially because the accused is unprepared.

The problem could be alleviated if properly trained and supervised paralegals assisted accused persons prior to the initial interview with duty or defence counsel. Such "bail interview officers" could attend at police cells where accused persons are being held pending transportation to court. They would conduct initial interviews to determine whether the accused needs an interpreter, or verification of an address or employment, or if a potential surety is available. The paralegal could then inform defence or duty counsel which would facilitate counsel's bail interview with the accused.

#### **5.7 The Commission recommends that –**

- a) the Ontario Legal Aid Plan establish the position of "bail interview officer" to assist persons detained by the police to prepare for bail hearings.**
- b) legal aid area directors work together with members of the local bar, crown attorneys and representatives of interested community organizations to establish a training program for bail interview officers. The program should include working with interpreters and interviewing skills, as well as information on the bail system and anti-racism.**



c) legal aid area directors establish co-operation protocols with local police services to secure access to police holding cells for bail interview officers and to arrange for interviews to be conducted in private.

A more systemic solution to the problem of unprepared accused may be possible in densely populated urban areas: to extend the operating hours of bail courts. If, as in some United States jurisdictions, bail court were available 24 hours a day, all relevant information could be assembled and accused persons properly prepared before hearings proceed. While an accused person may have to wait some hours for a hearing, adjournments due to lack of preparation should be rare if bail court is in session at all times.

The Commission was pleased to learn of a pilot project in the Metropolitan Toronto area for an expanded bail court. The present plan is for bail justices to be available 20 hours a day to deal with uncontested bail matters, but there is no provision for duty counsel or crown counsel staffing, at least during the start-up phase. The expanded bail court could reduce unjust and costly remands into custody and should be fully supported.

## Judicial detention

Police decisions and the information that officers provide are highly significant to imprisonment before trial, but police officers do not determine what will happen at bail hearings. The principles governing judicial detention are established in the *Criminal Code*, which gives crown counsel and bail justices crucial discretionary powers. The availability of alternatives to imprisonment may also have a significant influence.

The Commission's recommendations concentrate on crown attorneys because they play such an important role in decisions to imprison people before trial. In the vast majority of hearings, which are governed by the standard presumption of release, the crown attorney determines whether the state will even seek detention. Crown attorneys also have significant control over the information about the offence and the offender that is placed before the court and how the information is presented.

### ***Bail rules: the reverse onus exceptions***

Since 1972, Canadian law has promoted the principle of restraint in the use of imprisonment before trial. To this end, the law generally presumes that an accused person will be released on bail and requires crown attorneys to "show cause" for release to be denied. It also presumes that accused persons will be released subject only to an undertaking – a promise – to attend court for trial, unless, once again, the crown attorney "shows cause" for a more stringent guarantee of appearance or restrictions on the accused's conduct.

Five "reverse onus" exceptions to the presumption of release, introduced into the law in 1976, deviate from the commitment to restraint in the use of imprisonment.

In these situations, the law presumes that accused persons will be imprisoned before trial unless they “show cause” for release. The law is intended to make release more difficult to obtain than under the standard presumption.

Three of the exceptions concern specific types of alleged offences. Thus when the charge is murder or other offences listed in s. 469 of the *Criminal Code*,<sup>\*</sup> bail violations, or *Narcotic Control Act*<sup>†</sup> offences of trafficking, possessing drugs for the purposes of trafficking, importing, or conspiring to traffic in or import drugs, the accused must show cause to obtain release. Another exception applies to persons charged with any indictable offence who are “not ordinarily resident in Canada.” Finally, persons charged with any indictable offence alleged to have been committed while they were on bail must also overcome a presumption of detention.

The Commission’s research suggests that in practice, the exception for charges laid under the *Narcotic Control Act* may be contributing significantly to disproportionate imprisonment of untried black accused.<sup>‡</sup> This exception arose out of a perceived need to strengthen law enforcement to combat the drug trade at the top of the drug distribution pyramid. In practice, however, the vast majority of trafficking and importing charges under the *Narcotic Control Act* are laid against minor actors in the drug trade. Most people charged with trafficking offences are petty “street traders” whose activities are a nuisance to local residents and business. A large proportion of persons charged with importing are small-scale couriers, often women, whose participation in the drug trade is likely limited. Because such people are easily replaced by those who control drug supplies, imprisonment of minor dealers and couriers has a negligible impact on the availability of illegal drugs to users.

In a decision released shortly before the Commission was established, the Supreme Court of Canada reviewed the justification for this reverse onus for charges under the *Narcotic Control Act*. Unfortunately, the majority decision accepts the conventional rationale for departing from the principle of restraint in these cases. Its basic assumptions about importers and traffickers are evident in this comment:

Most alleged offenders are neither wealthy nor members of sophisticated organizations. Drug importers and traffickers, however, have access both to a large amount of funds and to sophisticated organizations which can assist in a flight from

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\* The other offences are: treason, alarming Her Majesty, intimidating Parliament or a legislature, inciting to mutiny, sedition, piracy and piratical acts, accessory after the fact to high treason or murder, and bribing a judicial officer. Attempting or conspiring to commit any of these offences also creates a reverse onus presumption at bail.

† For equivalent charges concerning drugs regulated by the *Food and Drugs Act* the standard presumption of release applies.

‡ As noted above, the major study presented in this chapter does not reveal differences in the type of drug charge laid against black and white accused, but the study of charges laid by 5 District Drug Squad does show differences. In addition, the prison admissions data for 1992/93, reported in Chapter 4, show massive over-representation of black people charged with trafficking/importing offences.



justice. These offenders accordingly pose a significant risk that they will abscond rather than face trial.<sup>17</sup>

The majority opinion recognizes that some accused charged with trafficking offences do not fit this profile, and clearly expresses concern that such people not be inappropriately imprisoned before trial. But the majority justices believed that these accused, by proving they do not belong to an organized drug ring, can easily show cause for release. The majority reasons therefore conclude that the risk of inappropriate imprisonment of “small fry” dealers is not significant enough to outweigh the risk that “wealthy” and “sophisticated” traffickers and importers might be inappropriately released under the standard bail process.

By contrast, the dissenting opinion maintains that “small-scale” drug dealers are a different class of offender than the “prosperous drug lords.” It states, in effect, that rules that might be appropriate for the “drug lords” are quite unnecessary for the petty traffickers who dominate drug prosecutions:

Those charged with trafficking are often at the bottom of the chain [in the commercial drug world] and rarely provide a link to the top .... [I]t is far from apparent that the majority of those arrested for organized drug trafficking have large amounts of money or organizations which will assist them in escaping. The lowly street vendor, the person most likely to be arrested, cannot count on the distant drug lord to run the risk of stealing him out of the country.<sup>18</sup>

The dissenting opinion also asserts that the opportunity to show cause for release in a reverse onus bail hearing offers alleged petty traffickers insufficient protection against unfair – and unconstitutional – imprisonment before trial. In response to the majority view that petty dealers may avoid detention if they prove they do not belong to “a criminal organization engaged in distributing narcotics,” the dissent makes two points:

The first difficulty ... is that it is far from clear that a person charged with a more minor trafficking offence will be able to convince the judge that he or she is not connected to a drug organization. The argument would require the accused, presumed to be innocent, to prove the negative proposition that he or she is not part of a criminal organization. Criminal organizations, unlike unions and service organizations, do not distribute lists of their members. How is one to prove that one is not a member?

Second, the argument does not address the difficulty of the lower-level agent of a larger commercial trafficking organization. The street vendor, while criminally responsible, may not pose a special risk of pre-trial recidivism or absconding. Yet he or she may be unable to establish that they are in no way connected to organized crime. There is no just cause for denying bail in such a case, yet bail might well be denied on the criteria proposed.<sup>19</sup>

The Court appears not to have had access to current and accurate information on the operation of this reverse onus provision. The Commission’s more recent investigation suggests that the premises underlying the dissenting opinion are more



accurate than those of the majority. The practical effect of presuming detention for persons charged with trafficking or importing offences is to imprison small-scale offenders. Our findings also indicate an additional reason for serious concern about the reverse onus exception for *Narcotic Control Act* offences: its contribution to racial inequality in the imprisonment of untried accused.

Fairness and racial equality in the Ontario criminal justice system would undoubtedly be enhanced if Canadian law were to apply the standard presumption of release to persons charged with trafficking and importing offences under the *Narcotic Control Act*. Unfortunately, a recent federal government bill to amend drug legislation makes no attempt to address the injustices of the reverse onus exception for trafficking.<sup>20</sup>

Restoring the standard presumption of release to these offences would also remove the anomaly by which persons charged with trafficking in drugs regulated by the *Food and Drugs Act* are treated more favourably than those charged with trafficking offences under the *Narcotic Control Act*. The ordinary presumption of release applies to persons charged with trafficking – or any other offence under the *Food and Drugs Act* – no matter how large the quantity of drugs involved or the scale of the accused's (alleged) operations. But the reverse presumption of detention applies to all persons charged with trafficking or importing offences under the *Narcotic Control Act*, no matter how small the quantity.

We are confident that making the presumption of release standard would make little difference to bail hearings of persons charged with trafficking in or importing substantial quantities of drugs. In such cases, crown counsel should not find it difficult to argue for detention if that is deemed necessary.

**5.8 The Commission recommends that the Government of Ontario propose to the Government of Canada that it repeal the reverse onus provision of the *Criminal Code* for importing, trafficking and related charges under the *Narcotic Control Act*.**

### ***Crown counsel discretion***

The *Criminal Code* assigns crown attorneys considerable responsibility over imprisonment before trial. For the vast majority of charges, which are subject to the standard presumption of release, the Code authorizes crown attorneys to set the parameters for the justice's decision. It states that –

the justice shall ... order ... that the accused be released on his giving an undertaking without conditions, unless the prosecutor ... shows cause, why the detention of the accused is justified or why [any other] order should be made.

This provision gives crown attorneys the primary say concerning:

- whether an accused person may be released on consent;

- what reasons for detention are presented to a bail justice; and
- the extent of guarantees and conduct restrictions a justice is likely to impose as a condition of release.

In view of our findings of racial inequality in imprisonment before trial, crown attorneys need to be acutely sensitive to how their exercise of discretion may, perhaps inadvertently, contribute to this injustice. Of equal importance is the leadership role of crown attorneys in securing justice in the bail system.

The procedures governing Ontario crown attorneys at bail hearings are set out in the comprehensive *Crown Policy Manual*, which has been in effect since January 1994.<sup>21</sup> Many of its procedures should be of considerable assistance to crown attorneys as they strive to ensure racial equality in the treatment of untried accused. Some provisions, however, may adversely affect members of racialized communities or lead people to believe that crown attorneys act in a discriminatory fashion. Other elements of the manual's bail procedures could be strengthened to assist crown attorneys, as the introduction states, to "play an important leadership role in assisting to recognize and eradicate" various forms of discrimination.

There are three main problems with the bail procedures in the *Crown Policy Manual*. First, it unduly emphasizes immigration status as a significant measure of "ties to the community." Second, it fails to alert crown attorneys to the risks of inadvertent racial discrimination arising from considering factors such as employment history in bail submissions. Third, it generally lacks direction on crown attorneys' responsibility to reduce the risk of unfair detention.

### **Undue emphasis on immigration status**

The *Crown Policy Manual* includes a "checklist of considerations" regarding the crown's position at bail hearings. Among them is: "Accused not a Canadian citizen, no firm roots in the community (should his passport be seized)."

This provision confuses three unrelated issues: citizenship, "roots in the community" and ease of departure from Canada. No necessary connection exists between citizenship status and roots in the community. Some non-citizens are firmly rooted in the communities in which they live and work, while some lack strong community ties.

The same is true of Canadian citizens. Individuals who have recently moved to a new community are obviously much less strongly rooted there than those who have lived in the same place all their lives. Thus it is no more sensible to treat "immigration status" as a measure of community ties than it would be to list as a relevant factor "accused born in New Brunswick." Neither reveals anything about the accused person's present links to the local community. This true concern should be stated explicitly, which would avoid the currently unseemly spectacle of crown



attorneys in open court referring to the immigration status of persons who have spent most of their lives in Canada (see Chapter 7).

Ease of departure from Canada may be an issue in any bail hearing since the primary ground for detention is the risk of the accused fleeing the court's jurisdiction. But the merit of linking passport seizure to non-Canadian citizenship is questionable. Some non-citizens have well-established connections to other countries (and the resources to leave Canada hurriedly); many do not. The same is true of Canadian citizens, who face few restrictions on their ability to travel to other countries. Thus it is difficult to see why passport seizure should play a special role for persons who are not Canadian citizens.

The Ministry should formulate clearer guidelines to eliminate irrelevant references to citizenship or immigration status. These guidelines should identify specific aspects of residence and mobility that may be of concern to a crown attorney in deciding whether to oppose release.

### **Undue emphasis on other "ties to the community"**

The *Crown Policy Manual's* guidelines and checklists for bail hearings frequently refer to employment status and residence as indicators of "ties to the community," but fail to warn about the risk of inadvertent discrimination by relying on these factors. For example, under the heading "Preparation of the Crown brief for the bail hearing," the manual makes the sensible suggestion to develop protocols with local police forces respecting the provision of information and liaison for bail hearings. However, the suggested protocols include reference to "details of residence and employment history."

Similarly, under the heading "Crown preparation for the bail hearing," the manual suggests that in seeking a detention order, crown counsel should state "details of residence and employment history." Elsewhere, crown attorneys are directed to consider an accused person's education, residence, employment and capacity to obtain employment, and personal relationships with friends and family, without warning of the potential for discriminatory application.

Historically, including this type of background information in the show cause report was an attempt to limit arbitrary discretion by bail magistrates.<sup>22</sup> Information about the personal relationships, residence, and employment of an accused person was supposed to enable judges to make fair and rational predictions about the likely behaviour of that person if released on bail.<sup>23</sup> Over time, presentation of background information by a crown attorney has become routine at bail hearings.

The Commission's investigation suggests two distinct problems arise from how crown attorneys use this information.<sup>\*</sup> The first is that the information, which may be used in a discriminatory way, may be a poor predictor of the risk of flight. Second, crown presentation of the information during bail hearings usually makes it difficult for bail justices to separate consideration of the primary and secondary grounds for detention. Consequently, accused persons may be inappropriately detained on the secondary ground for reasons that do not establish a substantial likelihood that they will commit an offence before the trial.

A substantial body of research in the United States questions the value of basing bail decisions on personal information about an accused. These studies suggest that residential stability, employment and nearby family contacts are generally unreliable indicators of whether an accused person will appear for trial. Summarizing this research, Gottfredson and Gottfredson conclude that

“[while a] logical case may be made easily for the relevance of items presumably reflecting roots in the community or employment stability ... there has been ... no demonstration that the items used actually are predictive.”<sup>24</sup>

Even if information about employment history, residential stability and similar personal factors were useful in predicting the risk of flight, they indicate little about the risk of an accused person offending before trial or interfering with the administration of justice. While the *Criminal Code* clearly separates the two grounds for detention and requires a decision on the primary ground before the secondary one is even considered, in practice bail hearings are much less structured than these provisions would suggest. Crown counsel typically indicates at the outset if the state seeks to detain the accused, and, if so, on which ground. The crown then reads into the record extracts from the show cause report summary of the allegations, the accused's criminal record or bail status (if any), and the police assessment of the accused's roots in the community, often referred to as “the background of the accused.”

This procedure may be appropriate when the state seeks detention on the primary ground because the accused's roots in the community may be relevant to assessing the risk of flight. But it is quite unsuitable if the secondary ground is argued to seek imprisonment. In these cases evidence about the accused's roots in the community – such as length of residence, property ownership, education, homelessness or employment status – is almost never relevant to predicting whether that person is substantially likely to commit an offence or interfere with justice before the trial is over. But because all the information is presented to justices – even when crown counsel concedes that the risk of flight does not justify imprisonment – it is easy for

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<sup>\*</sup> The Commission's surveys show, for example, that 52% of provincial division judges and 38% of general division judges think employment status is “very important” or “important” to bail decisions; a further 30% of provincial and 54% of general division judges think it is “somewhat important”. Similarly, 65% of provincial division judges and 61% of general division judges think community ties are important or very important to bail, and a further 26% of provincial and 32% of general division judges think they are “somewhat important.”



justices to rely inappropriately on roots in the community to make decisions on the secondary ground. Thus individuals who do not have a criminal record, or whose criminal histories do not suggest a substantial likelihood of offending may be imprisoned, in effect because justices wrongly perceive their lifestyles or lack of employment as evidence of criminality.

### **Leadership in preventing unfair detention**

As well as avoiding inadvertently contributing to unfair detention before trial, crown attorneys should actively exercise their discretionary powers to secure justice. This leadership role, which is fundamental to restraint in the bail system, is reflected in how crown attorneys discharge their responsibility to “show cause” to detain an accused person, make release conditional on financial guarantees or impose conduct restrictions.

The Commission has identified four areas in which crown attorney leadership could significantly reduce the risk of racialized persons being unjustly imprisoned before trial. The first concerns apparent ambiguities about whether refugee claimants should be considered ordinarily resident in Canada, and so subject to a reverse onus presumption if charged with an indictable offence. The second concerns the risk of unfair detention when release is conditional on financial guarantees that the accused is unable to meet. Third is leadership to prevent unnecessary and overly intrusive conduct restrictions on accused persons who are released. Fourth is ensuring that bail orders are promptly varied if they contain unattainable financial guarantees or unnecessary conduct restrictions. The *Crown Policy Manual* should include clear direction in these areas.

### **Refugee claimants and the reverse onus presumption**

One exception to the standard presumption of release in the bail system applies to persons charged with indictable offences who are not ordinarily resident in Canada. We found considerable divergence of views about the meaning of “ordinarily resident,” especially as it applies to refugee claimants. A consultation with justices of the peace who regularly conduct bail hearings revealed that some believe refugee claimants are not ordinarily resident no matter how long they have lived in Canada. To these justices, the presumption of detention would apply to all refugees charged with indictable offences. Other justices of the peace believe, equally strongly, that almost all refugee claimants are ordinarily resident because the claim itself demonstrates a commitment to Canada and a desire to remain. To them, the standard bail presumption of release generally applies to refugee claimants charged with indictable offences. As participating justices themselves acknowledged, these divergent views are likely to produce unacceptable disparity in practice.

To promote consistency, the meaning of ordinary residence must be clarified. Refugee claimants are residing in Canada and have often established roots in their local communities. The decision to claim refugee status is obviously evidence of a desire to remain, and many refugee claimants are unable to return to their countries of previous residence because of a well-founded fear of persecution. Treating

refugee claimants as not ordinarily resident may contribute to unjust imprisonment before trial for racialized accused.

Crown attorneys should show leadership in preventing unjust treatment of refugee claimants charged with indictable offences. They may do so by assuming the responsibility of showing cause for detention of such accused. This position should be incorporated into the *Crown Policy Manual* as standard policy.

### Unattainable bails

Accused persons may be held in prison even after an apparently successful bail hearing. This occurs when release is made subject to financial conditions the accused is unable to meet, or guarantees the accused is unable to provide (unattainable bails). Imprisonment in these conditions is inherently unjust because the Crown has not shown cause for detention.

During our initial visits to prisons, many black and other racialized prisoners, especially in the youth detention institutions, said they had been granted bail but were waiting for sureties to be confirmed or other bail guarantees to be met. Prison staff in many institutions, together with defence and duty counsel, prisoner support groups and former prisoners confirmed that substantial proportions of racialized accused who are granted bail spend days, weeks or even months, in prison because they cannot meet the bail court's conditions for release. One duty counsel gave us this example:

"I had a client from Sri Lanka here as a visitor who was accused of sexually touching three children in the neighbourhood where he was living. He had no criminal record, no outstanding charges – a man here alone .... It was difficult to reach his relatives in his home country ... he was a man fleeing persecution. I ran the case by a couple of crowns, and all agreed in this situation they would release a person who was normally here without those circumstances on a security [a promise to pay if the accused does not appear for trial] of \$2,000 or \$3,000 – because it was a first offence. There was no pattern of [criminal] behaviour .... Bail was set at \$5,000 cash deposit and later reviewed to \$500. The client ended up staying in jail for three months. This was a prime example of systemic racism."

A "snapshot" study conducted by the Ministry of Correctional Services in 1992 supports concerns about interim imprisonment due to unmet bails – although these data did not include race. The study found that 35 percent of the 212 adults and youths aged 16 and 17 who had been granted bail by the first day of the study were still in prison seven days later.<sup>\*</sup> In a 1994 study, among prisoners who reported that they had been granted bail but were still in custody at the time they were interviewed (15.8 percent of the sample), two-thirds indicated that the reason for

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\* A "Bail Conditions survey" during December 16–22, 1991 asked all superintendents to identify "each offender who is in custody only because he/she has bail set, but not posted." The study monitored the status of these persons for the week following. The Commission has been advised that no analysis of the findings was prepared. We had access to a memorandum of instructions to superintendents, and to a survey sheet.



their continued detention was their inability to meet cash bail or provide an adequate surety.<sup>25</sup>

In most cases bail is unattainable because the accused person cannot find someone with sufficient financial means (a surety) to guarantee appearance at trial. Sometimes release is delayed despite the availability of a surety because the person cannot satisfy a justice of the peace that the specified amount will be paid should the accused fail to appear. In other situations sureties withdraw the offer of financial support, even after the bail order is made, when they understand more about the extent of their legal obligation. In each situation, an accused person whom the court has agreed to release on bail is detained until the condition of release is varied or an alternative, acceptable surety is found.

Changes to the provincial administration of the bail system would reduce the risk of persons being detained due to inappropriate surety bails. Much would be achieved by implementing our earlier recommendations to improve accused persons' preparation for bail hearings. At present, especially in the busy urban bail courts, duty counsel often do not have the time to conduct the probing but sensitive questioning required to elicit reliable information about potential sureties. If duty counsel had access to information obtained and verified by bail interview paralegals, however, they would be much more able to proceed with bail hearings.

Equally important is the role of crown attorneys in preventing detention due to unmet surety bails. Since crown attorneys establish the parameters within which the bail decision is considered and met, they are in practice responsible for the attainability of release conditions. As ministers of justice, crown counsel have a professional duty to apply the principle of restraint to protect accused persons against unjust imprisonment before trial, including when seeking to impose surety conditions.<sup>26</sup>

### Conduct restrictions

Many untried accused who are released after a bail hearing find that their pre-trial liberty is subject to a variety of controls or "conduct restrictions." Limits may be placed on freedom of movement by means of curfews and area restrictions. Consumption of alcohol may be forbidden. An accused may be ordered to report to a police officer at regular intervals or not to associate with friends and acquaintances. They may be required to carry bail papers – their "freedom tickets" – at all times.\*

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\* In some parts of Ontario the police began routinely to request this conduct restriction in the late 1980s, particularly for young persons, to facilitate monitoring of compliance with bail orders. Despite criticisms from defence counsel and community groups that orders to carry bail papers resemble "pass laws" in South Africa's apartheid regime, some bail justices regularly imposed such conditions. Others have always refused. In 1992, Vaillancourt Prov. Div. J. held that the requirement to carry bail orders is contrary to the *Charter of Rights and Freedoms*, stating, "The concept of persons having to produce their 'papers' to authorities on demand conjures up the image of a police state which is foreign to our country." (*R. v. Williams*, Sept. 14, 1992, Ontario Court (Provincial Division)). However, Judge Vaillancourt's attention was not drawn to *R. v. Shawn P.*, Sept. 13, 1990, an unreported decision in which the

Non-compliance with such administrative restrictions has serious consequences. Breach of bail conditions is itself a criminal offence<sup>27</sup> for which an accused may be arrested even without a warrant.<sup>28</sup> Once arrested, persons charged with this offence are jailed until a bail hearing is held. While release after a bail hearing is possible, the accused must first overcome a presumption of imprisonment.<sup>29</sup>

Our consultations and submissions disclosed serious concerns about unfairness in conduct restrictions, particularly for youths.<sup>30</sup> We were told, repeatedly, of large numbers of restrictions, many of which were said to be unnecessary, being imposed on black and other racialized accused. Lawyers and other community members also reported it is often difficult, if not impossible, for these youths to comply with restrictions such as orders to stay away from areas where they live. They had no doubt that conduct restrictions of this type contribute to unfair imprisonment of racialized youths before trials.

Commission surveys of judges and lawyers also revealed perceptions of racial inequality in conduct restrictions. One in five recently appointed judges of the provincial division, for example, thought that white accused are generally given fewer conduct restrictions than racial minority accused. When we asked defence counsel about specific conduct restrictions, 37 percent of respondents with a substantial racial minority clientele said racial minority accused are more likely than white accused to be required to carry bail papers at all times. About one-third of the same group of lawyers said racial minority accused are more likely than white accused to face three other limitations on freedom: report to the police at regular intervals, observe a curfew, and “comply with geographic restrictions.”

Participants in Commission focus groups emphasized the inappropriate use of conduct restrictions. Lawyers gave examples of black and other racial minority youth being given curfews when the alleged offences occurred during daylight hours, and being ordered to stay away from school when the alleged offences had no connection with their schools.

The requirement to carry bail papers at all times was identified as a particularly common conduct restriction for black and other racialized youths. Lawyers described this control, together with other inappropriate restrictions, as “simply a way of keeping tabs on the kids” and “setting them up to fail.” One lawyer stated emphatically that “the only reason for these bail conditions is to give the police control over individuals.”

The principles of fairness and restraint require that any conduct restriction imposed pending trial serve specific purposes relevant to the bail system. Undue and excessive restrictions may result in accused persons being subjected to arbitrary intrusions into their daily lives, which are often bitterly resented. Such restrictions

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Ontario Court of Appeal declined to rule on the constitutional validity of such a provision.



serve no social purpose and could lead to further charges, such as bail violations, that serve no real objective of the criminal justice system.

Leadership by crown attorneys is fundamental to just conduct restrictions. The tendency within our adversary system is to view defence and duty counsel as primarily responsible for safeguarding the rights of accused persons. In relation to bail, however, crown attorneys have an equally important obligation to prevent unnecessary encroachment on the liberty of the accused. Crown attorneys ought to request bail conditions only to the extent necessary to secure attendance at court, or to prevent commission of an offence or interference with justice before trial.

### ***Bail variation procedures***

The *Criminal Code* provisions with respect to bail attempt to protect accused persons from unattainable bails and unduly harsh conduct restrictions through procedures for varying bail conditions. Applications for variations may be processed in provincial division courts, with the consent of crown counsel;<sup>31</sup> or by formally requesting the General Division of the Ontario Court of Justice to review a bail order. In practice, however, the volume of work in many provincial division courts has meant that busy crown attorneys may refuse to consider applications on the day they are made. Instead, requests for even relatively minor changes to a bail order tend to be channelled to the general division, involving a more lengthy, complex and costly procedure. During the time necessary to prepare for proceedings in the general division, the accused person may be held in detention if bail is unattainable or continue to be subject to unfair restrictions if released.

The Commission is concerned that simple modifications to unattainable bails and onerous restrictions apparently cannot be handled expeditiously in all provincial bail courts. We are especially concerned that the referral to the general division should not, in practice, be required to deal with applications to vary restrictions imposed under the new police power (discussed above). Crown attorneys should treat expeditious processing of applications to vary bail orders as a high priority.

**5.9 The Commission recommends that the *Crown Policy Manual's* provisions regarding bail be amended to –**

- a) eliminate general and irrelevant references to immigration or citizenship status.
- b) warn of the potential for inadvertent discrimination inherent in relying on such factors as residence and employment history to predict whether an accused person will appear in court.
- c) warn crown attorneys that evidence relating to the accused's "roots in the community" generally should not be used to seek detention on the secondary ground.
- d) direct crown attorneys to treat refugee claimants as ordinarily resident for the purposes of bail hearings.
- e) require crown attorneys to ensure that an accused person is not unnecessarily detained because a surety bail is set too high.

f) require crown attorneys to ensure that conditions placed upon release are directly and substantially related only to securing the accused's attendance in court or to preventing the commission of offences or interference with the administration of justice while on bail. Unnecessary and intrusive conditions such as "carry bail papers" should be avoided.

g) direct crown counsel that expeditious processing of bail variation applications in provincial division courts be a high priority.

### ***Bail justices' discretion***

Bail justices decide whether or not accused persons should be imprisoned before trial, and whether to require financial guarantees or conduct restrictions of an accused who is freed. Commission findings show that black accused do not benefit from the exercise of this discretion to the same extent as white accused. Part of the problem may be due to the information presented to justices; another likely reason is how justices assess risk. While sensitive exercise of crown attorney discretion should reduce the likelihood that decisions are based on vague or irrelevant information or implicitly discriminatory criteria, bail justices have a distinct role to play in preventing unjust detention before trial.

As judicial officers, bail justices are formally independent of government bodies such as the Ministry of the Attorney General. Consequently they are not subject to government guidelines and procedures such as those we propose for crown attorneys. Increasingly, however, judges and justices of the peace undertake education and training programs. Commission findings suggest that among the highest priorities of such programs should be skills for identifying conduct in bail court that may unduly penalize racialized persons, techniques for avoiding reliance on unwarranted assumptions, and methods of recognizing subtle ways in which empathy and intuition may discriminate. Education and training programs should also include findings from research into reliable indicators of risk, potential discrimination in pecuniary release conditions and any specific difficulties that may arise from certain conduct restrictions.

**5.10 The Commission recommends that education for justices of the peace and judges regarding bail include training to –**

a) avoid assumptions that may subtly discriminate against racialized persons.

b) avoid discriminatory application of criteria related to community ties.

c) assess occupation, place of residence and cultural background of accused persons to ensure that financial release conditions do not impose needlessly onerous burdens.

d) ensure that conduct restrictions imposed upon release do not interfere with the lives of accused persons any more than is strictly required.



### ***Objective indicators of risk***

The exercise of discretion at bail hearings centres on predicting how an accused person would behave if released. However, the court generally lacks sufficient information about the accused. A more fundamental concern is raised by research findings cited above that indicate that the standard criteria used in these decisions are unreliable predictors of risk and likely to cause unjust imprisonment of poor and racialized people.

The Commission could not find any recent Canadian empirical research on the impact of current criteria in the bail system. Concerns about them, however, were raised in a background report by staff of the Law Reform Commission of Canada, and more recently in the unpublished *Barklay Report* commissioned by federal and provincial Ministries of the Solicitor General. The Law Reform Commission report, which stemmed from its study of Aboriginal people and the criminal justice system, notes that undue reliance in bail hearings on factors such as unemployment and stable residence may have a discriminatory effect. To overcome this problem it recommends research to develop “guidelines using empirically based indicators” that would “avoid potential unintended discrimination” in the bail system.<sup>32</sup>

Various jurisdictions in the United States and Europe have already created guidelines, risk profiles or “decision-enabling protocols” to help determine whether pre-trial release is appropriate.<sup>\*</sup> While apparently “objective” predictive tools may have potential to reduce unjust imprisonment before trial, they would have to be designed and used with caution. Predictive factors should be well defined, but capable of being flexibly applied to persons who do not fit into standard categories. Specialized training on the limitations as well as the appropriate uses and interpretation of risk profiles would be essential.

The Commission strongly favours development of race-neutral indicators of successful pre-trial release. However, it would be premature to apply such indicators in the form of a risk-profile instrument, or through decision-making presumptions and principles. Far more important at present is fundamental empirical research on existing court practices and comparative research on alternatives. Such research should be sponsored by the Ministries of the Attorney General and the Solicitor General and Correctional Services. It should address issues such as whether unemployment or lack of a permanent address are reliable, rational indicators of whether a person will attend trial or endanger the public if released. The research should be widely distributed and used in education and training programs for judges, justices of the peace, crown and defence counsel.

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\* To test the likely effect of predictive tools, Barklay Resources applied the “Pre-Trial Release Instrument” used in Marion County, Indiana, to data gathered through interviews with remand prisoners in Ontario. The findings indicate that two in every five persons detained in custody would have been eligible for release had the Release Instrument criteria been applied to the information reported by the prisoners. Importantly, this research found no evidence of racially different outcomes in the Release Instrument criteria. (“Awaiting Trial” [note 24].)

5.11 The Commission recommends that the Ministries of the Solicitor General and Correctional Services and the Attorney General sponsor research into empirically based indicators to assist the courts in deciding whether to grant pre-trial release.

### ***Bail supervision programs***

Bail supervision programs are community-based services that monitor untried accused persons. Their general goals are to –

- provide an alternative to detention of accused persons before trial;
- promote the accused's compliance with bail conditions and attendance at court through supervision and notification of court dates; and
- decrease possible re-arrests and increase the client's ability to use community services effectively.<sup>33</sup>

These programs assume responsibility, as directed by a bail court, for accused persons who might otherwise be imprisoned because of the risk of flight, and who are unable to provide a surety to guarantee appearance at trial. They have operated in Ontario since 1979 and are highly regarded by many judges,<sup>34</sup> lawyers and police officers.

The agencies currently engaged in bail programs are funded by the Ontario Ministry of the Solicitor General and Correctional Services. Chronic underfunding, however, has severely limited the amount of supervision they are able to provide. Depending on resources, bail programs provide some or all of the following services: verification, supervision, interviews, verification and offers of supervision at reviews of initial bail decisions (bail reviews), and counselling and referral.<sup>\*</sup> Although the number of funded services has risen, the total number of verification<sup>†</sup> and supervision cases has substantially declined in the past few years. The Ministry reports that in fiscal 1993/94, some 6,500 adults and 1,600 accused aged 16 and 17 participated in bail verification or supervision.<sup>35</sup> In fiscal 1992/93 the Ministry provided \$1.74 million to fund bail programs. The approximate cost per client per day is \$6, compared with \$140 per day for each accused person incarcerated pending trial.

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\* Bail programs are not designed to be professional counselling services, though guidance may be given by staff, many of whom have training in social work. In most cases, accused persons are referred to community facilities.

† In fiscal 1988/89 the programs completed 12,280 verification reports. By 1990/91, this had declined to 11,386. Projections for 1991/92 (the latest data available to the Commission) were that the programs would complete 7,156 reports, a substantial reduction (Ministry of Correctional Services, Youth and Community Corrections Branch, *Program Review: The Bail Verification and Supervision Program*, March, 1992).



Only some parts of the province have bail supervision programs.\* No such services are available for youths aged 12 to 15. Nor does any agreement with federal authorities provide for supervision of persons awaiting disposition of various types of immigration and refugee hearings.† Existing programs for adults and youths aged 16 and 17 operate on small budgets and may regularly be compelled, under their contracts with the Ministry, to “cap” the number of clients under supervision.

The Toronto Bail Residence, a separate entity with its own board of directors, runs a small residential facility, Galbraith Bail Residence, for adult and young offender males under supervision. No equivalent facilities exist for women, and no residential facilities are run by bail programs outside Metropolitan Toronto.‡

Commissioners visited the Ottawa and Toronto bail programs and corresponded with staff about the extent to which black and other racialized persons use them. Neither program keeps statistics by racial designation, but staff at the Ottawa program reported that it has served few racial minority or Aboriginal clients. At the Commission’s request, the Toronto program conducted a one-day “snapshot” count of its clients. According to the bail supervisors who reported client ethnicity, approximately 45 percent of clients served on June 14, 1994, by the Metropolitan Toronto§ offices were members of “visible minorities.”<sup>36</sup>

Bail program staff report a considerable increase in the numbers of persons who do not speak English among their clients. While the programs have few resources to employ interpreters they have attempted to overcome the communication barriers through recruitment of staff and volunteers, ad hoc arrangements for using court interpreters, and relying on clients’ friends and family. A welcome initiative on the part of the Toronto Bail Program is the creation of a manual for clients in some 20 languages.

A nagging worry about bail supervision programs is that they may “widen the net” if used for persons who would otherwise have been released subject only to conduct restrictions, rather than as a true alternative to imprisonment before trial. Thus instead of promoting restraint within the bail system, supervision programs may inadvertently result in increased control over accused persons awaiting trial.

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\* In 1980, the Bail Project became the Toronto Bail Program, soon emulated in Kitchener-Waterloo, Hamilton and St. Catharines. By 1991, Sudbury, Sault St. Marie, Brampton, Windsor, Barrie, Thunder Bay, Ottawa, Brantford and Newmarket had similar programs.

† Bail program contracts with the Ministry currently limit services to persons 16 years of age or over charged with criminal offences. Thus, persons detained in custody pending resolution of their status under the *Immigration Act* cannot be considered for bail supervision.

‡ The Ministry of the Solicitor General and Corrections permits persons on bail to reside in post-sentence halfway houses called “community resource centres.” Outside Toronto, this is common.

§ The program also maintains an office in a city approximately 30 kilometres outside Metro Toronto.

Concerns about costly and wasteful duplication of supervisory services have also been raised. A recent review of Ontario bail programs shows, for example, that more than one in three bail supervision clients was already reporting to the police or the provincial probation service at the time of entering the bail supervision program.<sup>37</sup>

Net-widening is obviously a serious concern, suggesting that the use of bail supervision by courts and its relationship to other community-based controls over persons on bail ought to be carefully monitored. Nevertheless the Commission believes that bail supervision can contribute to restraint in the use of imprisonment. The evaluation referred to above concluded that the bail program “is adding a humane dimension to the criminal justice system, and may be controlling to some extent the present growth in remand numbers.”<sup>38</sup> Even if bail supervision does no more than limit further growth in remand populations, it is still performing a valuable function.

The Commission believes that bail supervision programs should be guaranteed secure funding to enable them to improve their capacity to serve members of racialized and linguistic minority communities. An expanded program could reach out to racialized and linguistic minority communities that may have trouble obtaining access to their services. It could also develop supervisory programs closely tailored to the specific experiences and needs of different racialized and linguistic minority communities. Providing appropriate supervision services to youths aged 12 to 15, should be seriously considered.

Bail supervision programs should no longer be under the jurisdiction of the Ministry of the Solicitor General and Correctional Services, which appears to assign them a low funding priority.<sup>39</sup> Since bail supervision arises from the decisions of the bail court system, it would seem appropriate for the Ministry of the Attorney General to assume responsibility for the bail program.

**5.12 The Commission recommends that –**

- a) the Government of Ontario guarantee funding for existing bail programs and increase the number of bail programs to ensure adequate supervision services in all urban centres.**
- b) bail programs be funded to assist racial and linguistic minority communities and, in concert with interested individuals and community groups, develop culturally inclusive bail supervision.**
- c) bail programs be funded to retain interpretation services.**
- d) responsibility for bail programs be transferred to the Ministry of the Attorney General and include supervision of persons awaiting disposition of immigration and refugee hearings.**
- e) the Ministry of Community and Social Services, in concert with existing bail programs and interested community organizations, consider the feasibility of a bail supervision program for youths aged 12 to 15.**



## ***Access to interpreters***

Consultations, surveys and submissions revealed persistent and serious concerns that accused from racialized communities are unnecessarily detained because essential interpreter services are inadequate or unavailable. Every aspect of the bail process is affected by this problem.

Police officers told us of accused persons who would have been released had the police been able to communicate basic information about the charges and attending court. Duty counsel said that lack of interpreter services often means they are unable to elicit basic information essential to represent the accused at a bail hearing:

“We don’t have ready access to interpreters at all times .... A client may be in the [court] cells, but we can’t do anything because the only thing they can tell us is their name. Often the interpreter only comes when the person is brought up [into court]. Unless it’s going to be a consent release, [the accused] is screwed.”

Defence lawyers gave us examples of clients who would have been released if they could speak English being jailed until a bail hearing with a suitable interpreter could be held:

“Recently I had a Spanish-speaking client held ... on an alleged ‘theft under [\$1,000],’ value of about \$40, from Sunday to Tuesday on a holiday weekend – only because he spoke no English. He was a landed immigrant, employed, had sureties, no record, no other charges.”

“On a contested weekend bail hearing, court will proceed on the spot if the accused speaks English. Other language groups are adjourned in custody until Monday ... Non-Europeans will most likely have this language problem. Their right to a fair bail hearing is paid for by a weekend in jail.”

Interpreters stated that arrangements for using them in bail hearings are inadequate. They described bewildered accused being brought into court without any knowledge of “whether it is a trial, a bail hearing or whatever.” Within a few minutes of seeing the accused, an interpreter is expected to verify a common language or dialect, assess the accused’s vocabulary or level of understanding in the language, explain the purpose of a bail hearing, describe what is going to happen in the courtroom and obtain information for defence or duty counsel. Many of them spoke of accused persons being needlessly imprisoned because interpreters are given too little time to perform these complex tasks adequately.

Perhaps the most chilling evidence concerned linguistic minority accused held in jail who are unable to obtain legal advice that could result in their release. Lawyers told us of accused who “have been held for weeks at a time without getting legal advice in a language they can understand.” Similarly, a legal aid worker spoke of ten cases, known to him personally, “of Spanish-speaking and Vietnamese-speaking people who are sitting in jail without any access to legal aid because of lack of an interpreter.”

To prevent unjust imprisonment before trial of accused persons from linguistic minority communities, access to interpreter services must be greatly improved. Chapter 7 of this Report presents general recommendations on the use of interpreters in court proceedings. Of specific concern to bail courts are timely notification of the need for interpretation services and access to such services outside the courtroom to help defence or duty counsel communicate with linguistic minority accused.

Bail courts must strive to avoid even temporary detention of linguistic minority accused when English-speaking accused would be released. Timely notification of the need for interpretation services is fundamental to avoiding such injustice. At present such information is often included in the material that the police send to crown attorneys, but it may not be acted upon until the accused arrives at court, when it may be too late to secure appropriate interpretation services. A more effective approach is for court administrators to obtain this information from bail interview officers, the police, or crown attorneys early enough to arrange for the necessary services.

Within the courthouse, interpretation services should be available whenever duty or defence counsel or a crown attorney may need to speak with a linguistic minority accused. Access to interpretation services is obviously essential for duty or defence counsel to conduct proper interviews in court holding cells. It is also required when a crown attorney needs basic information before consenting to release the accused. Personal attendance of an interpreter in these situations should be provided whenever possible. If an interpreter cannot arrive in time to prevent unjust detention, however, interpretation services should be provided through three-way telephone communication.

**5.13 The Commission recommends that –**

- a) under the supervision of the local administrative judge, court administrators develop procedures to ensure early notification of the impending arrival of a linguistic minority accused for a bail hearing.
- b) wherever possible, interpreters be available to assist counsel and crown attorneys communicate with an accused person outside the bail hearing. If an interpreter cannot personally attend, telephone access to an interpreter should be available.

### ***Representation at bail hearings***

Though the liberty of accused persons is at stake in bail hearings, this stage of the criminal justice system has low visibility in comparison to the drama of contested trials or the tension of sentencing hearings. Recent trends such as the striking increase in the proportion of untried prisoners in Ontario institutions is evidence that the criminal justice system shows less concern about intrusions on liberty before trial than after conviction. Commission findings demonstrate that lack of restraint in the use of detention before trial particularly affects black and other racialized accused.



Limitations in legal services at bail may have contributed significantly to the problem. Even before the recent crisis in legal aid funding, legal aid fees for bail hearings were low and declining. That meant much of this work has been done by young and inexperienced lawyers, either in the traditional role of privately retained defence counsel or more likely as duty counsel hired per diem. Unlike the salaried duty counsel of Metro Toronto and Durham Region who quickly acquire the necessary skills and confidence for competent representation, per diem duty counsel receive no systematic training and may work without any assistance or supervision from senior counsel. Though bail court may well be a good venue for recently qualified lawyers to learn their trade, hone their skills, and develop confidence, over-reliance on such lawyers is unfair to them and unjust for accused persons.

Since the Law Society of Upper Canada and the Ontario Government established a committee to review and restructure the Legal Aid Plan during the final weeks of our mandate, we have refrained from making specific recommendations based on the current system. Whatever changes are made, however, high-quality legal representation must be provided at bail. In light of our findings, failure to provide such services would be tantamount to colluding in perpetuating racial inequality in the criminal justice system.

## Endnotes

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3. Canadian Centre for Justice Statistics, *Correctional Services in Canada: Highlights for 1993-94* (1995) 15(5) Juristat, Table 1.
4. Chief Justice Antonio Lamer in *R. v. Pearson* (1993) 77 C.C.C. (3d) 124 at 135-6, citing with approval D. Kiselbach, "Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1988-89) 31 C.L.Q. 168.
5. *R. v. Anderson* [1992] O.J. No.831 at 23.
6. A.K. Bottomley, "Prison Before Trial," Occasional Papers on Social Administration No. 39 (London: Bell, 1970); C. Davies, "Pre-Trial Imprisonment: A Liverpool Study," *British Journal of Criminology* 11 (1971), p. 32; United Kingdom, Home Office, *Criminal Statistics, England and Wales 1989* Cm.1322 (London: HMSO, 1990); Friedland, *Detention Before Trial* (note 2); Anthony Doob and Pamela Koza, "The Relationship of Pre-Trial Custody to the Outcome of the Trial" (1975) 17 C.L.Q. 391; John Hagan and C.P. Morden, "The Police Decision to Detain: a Study of Legal Labelling and Police Deviance," in *Organisational Police Deviance: Its Structure and Control*, ed. Clifford Shearing (Toronto: Butterworths, 1981); Anthony Doob and A. Cavoukian, "The Effect of the Revoking of Bail: *R. v. Demeter*" (1977) 19 C.L.Q. 196-202.
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8. *Ibid.*, p. 101.
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10. Law Reform Commission of Canada, *Compelling Appearance* (note 1), p. 28.
11. *R. v. Powers* (1972) 9 C.C.C. (2d) 533 (Ont. H.C.) at 541.
12. Law Reform Commission of Canada, *Compelling Appearance* (note 1), pp. 30-34.
13. Don Stuart, Annotation: *R. v. Tully* (1983) 35 C.R. (3d) 308.
14. Ontario Ministry of the Solicitor General and Correctional Services, Policing Standards Division, *Policing Standards Manual*, March 31, 1992, as amended (manuscript on file). Nor is such guidance found in any other documentation provided by the Ministry, such as "All Chiefs memos" which are circulated periodically.
15. *Criminal Code* ss. 499-500.



16. S.C. 1994, c.44, s.40.
17. *R. v. Pearson*, (1992) 77 C.C.C. (3d) 124, at 145.
18. *Ibid.*, p. 152.
19. *Ibid.*, p. 153-54.
20. Canada, House of Commons, Bill C-7, "An Act Respecting the Control of Certain Drugs, Their Precursors and Other Substances and to Amend Certain Other Acts and Repeal the *Narcotic Control Act* in Consequence Thereof," first reading Feb. 2, 1994.
21. Ontario Ministry of the Attorney General, *Crown Policy Manual*, January, 1994, Policy B-1: "Bail Hearings."
22. Friedland, *Detention Before Trial* (note 2), p. 191.
23. See United Kingdom, Home Office Working Party, *Bail Procedures in Magistrates Courts* (London: HMSO, 1974), paras. 10-17.
24. M. Gottfredson and D. Gottfredson, *Decision Making in Criminal Justice* (New York: Plenum Press, 1980), p. 120. A later study found no relationship between pre-trial crime or failure to appear and the seriousness of the charge for which the accused had been originally arrested. J.S. Goldkamp and M. Gottfredson, "Guidelines for Bail and Pretrial Release in Three Urban Courts," vol. 1, unpublished report (Philadelphia: Temple University, Department of Criminal Justice, 1988) cited in Barklay Resources, "Awaiting Trial: Accused Persons Remanded to Custody," August 1995 (unpublished).
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27. *Criminal Code*, s.145(3).
28. *Criminal Code*, ss.524(1) and 524(2).
29. *Criminal Code*, s.524(4).
30. John M. Gandy, "Judicial Interim Release (Bail) Hearings that Resulted in Detention Prior to Trial of Youths Charged Under the Young Offenders Act in Three Ontario Cities" (Toronto: The Policy Research Centre on Children, Youth and Families, 1992).
31. *Criminal Code*, s. 523(2)(c). See also the *Crown Policy Manual* (note 21), which says crown attorneys are to consider bail modifications in the provincial division courts "in the absence of unusual circumstances" (page B-1).
32. Law Reform Commission of Canada, "Bail," Research Report #2.18, unpublished, summarized in Brian Etherington, "Working Document - Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform" (Ottawa: Department of Justice, 1994).

33. Salvation Army, Governing Council of Canada, "Ottawa Bail Program Description," unpublished (manuscript on file).
34. David Scott and Neil Webster, "An Evaluation of the Toronto Bail Program – Part II – Judges' and Justices of the Peaces' Perceptions," November 1993, unpublished (on file).
35. Paul Fleury, Acting Director, Operational Support and Co-ordination Branch, Ontario Ministry of the Solicitor General and Correctional Services, memorandum (on file), Sept. 22, 1994.
36. Neil Webster, Director, Toronto Bail Program, letter to Commissioner Margaret Gittens (on file), June 16, 1994.
37. Ontario Ministry of Correctional Services, Youth and Community Corrections Branch, "Program Review: The Bail Verification and Supervision Program," March, 1992 (manuscript on file).
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39. *Ibid.* A previous evaluation conducted by the Ministry's Planning and Evaluation Unit in 1987 similarly concluded that "the bail programs have diverted a significant number of individuals from a growing number of remanded admissions."





## Chapter 6

# Charge Management

*[S]ound policy at the earliest stages has the greatest potential to enhance the reputation of the administration of justice among the broadest group of participants. Conversely, any shortcomings in the initial stages of the process will adversely affect more participants than anywhere else in the system .... [W]hile the administration of justice must be sound at every stage, nowhere is soundness more important than at the outset.*

– *The Martin Report*<sup>1</sup>

This chapter looks at the processing of criminal charges outside trial courts. It deals with decisions about laying and reviewing charges, diversion of charges away from court proceedings, procedures for resolving issues before charges are tried, including plea negotiations, and criminal justice services for accused persons, victims and witnesses. These procedures and services together make up a complex administrative system, which we term “charge management.”

The Commission’s Terms of Reference direct us to examine the exercise of discretion at important decision-making points in the criminal justice system for evidence of adverse impact on racialized people, and to consider access to justice services by racialized people. Discretion is the essence of charge management, starting with police deciding whether an incident warrants a response from the criminal justice system and crown attorneys deciding whether to prosecute and how to proceed. Later, informal and formal discussions between crown attorneys and defence lawyers – sometimes also involving judges – may resolve issues without a contested trial.

The discretionary powers exercised during charge management are, as the Martin Committee notes, “of superordinate importance” to the operation of the criminal system as a whole and to public confidence in its integrity. This is because charge management determines whether incidents of harmful or other socially undesirable behaviour are selected for processing by the criminal justice system rather than other social institutions. Because this system is “costly, blunt and potentially oppressive,”<sup>2</sup>



actual or perceived unfairness in its selection procedures may profoundly affect public confidence.

Also, intervention by the criminal justice system has a broad impact. Every individual directly affected by criminal charges – victims and other witnesses, as well as accused persons – must deal with charge management procedures during the early stages of the process. The number of individuals who experience trial proceedings is much smaller, and only some accused are exposed to punishment systems such as probation or prison. Since more people are affected by the exercise of discretion early in the justice process, any shortcomings in charge management may contribute to widespread perceptions of injustice (as well as produce unjust results).<sup>3</sup>

The Commission's preliminary consultations revealed two main concerns about systemic racism in charge management practices. The first is failure to exercise discretion in favour of racialized people as frequently or as significantly as for white people. During the early stages of criminal proceedings, police, crown attorney and defence counsel decisions are often made rapidly, based on limited information and hidden from public scrutiny. Racialized assumptions and stereotypes may influence decisions in various ways, some quite subtle, and decision-makers engaged in their daily routines may not recognize such bias unless they are constantly alert to the risk.

The second problem is that any failure of criminal justice officials to communicate adequately with racialized people involved in criminal management procedures may create or exacerbate perceptions of exclusion from justice. Victims of crime and accused persons in particular may feel bewildered, overwhelmed and even dehumanized by charge management proceedings. Strikingly similar experiences of charge management were reported to the Commission on behalf of victims and accused persons. These reports illustrated the view of a general division judge who, on a Commission survey, commented that the criminal justice system –

“is obviously set up to try and deal expeditiously with the caseload. Little or no concern is given to fundamental basic rights which citizens have. Everything is done to ‘please’ the system.”

The Commission received numerous complaints about police officers, lawyers or judges making important decisions without fully communicating what is happening to persons most affected by the decisions. The point, asserted repeatedly, is that even if charges are managed properly, a failure to explain the process or the reasons for decisions shows a lack of respect. When an affected person is from a racialized community and the justice official involved is white, this lack of respect may well be experienced as racist even if discrimination is not intended. That experience may in turn provoke suspicion about why information is being withheld. In short, lack of communication may be experienced as disrespectful and as indicating racialization.

In 1991, the Attorney General struck the Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, known as the Martin Committee. This Committee reviewed procedures at the early stages of the criminal justice process, and in 1993 proposed reforms to improve fairness, openness, integrity and accountability in the charge management system. Since many of these reforms were implemented during the Commission's mandate, we organized our research to complement rather than duplicate the Martin Committee's work. Specifically, while the *Martin Report* emphasized procedural changes, we concentrated on mechanisms for eliminating discriminatory treatment of members of black and other racialized communities.

We discuss, first, how the criminal justice system selects cases and determines how to proceed. We outline key decisions that police officers or crown attorneys make when laying, screening and diverting charges, and discuss their impact on accused persons from black and other racialized communities. We then examine whether the justice system provides sufficient access to legal services for black and other racialized accused persons.

Next we discuss the resolution process by which crown and defence counsel, sometimes with the assistance of a judge, may agree about the information and submissions to be presented in court if an accused person pleads guilty. This process, commonly known as plea bargaining, has a history of controversy, but its role in Ontario charge management is well established. Many accused persons, and sometimes victims, apparently prefer the speed and certainty of resolution agreements to a contested trial. However, among members of black and other racialized communities we found considerable mistrust of the procedure and of lawyers, especially white lawyers, who urge guilty pleas.

The chapter concludes with problems that victims – especially black and other racialized women victimized by male partners – may experience in the charge management system. We document concerns about the exercise of discretion and access to support services for those who participate in prosecution of the abuser.

## Selecting and processing charges

There are two stages in initiating criminal proceedings. The first is the decision to lay charges, which is usually made by the police (or sometimes by private citizens). This decision requires formal approval from a justice of the peace. At the second stage, a crown attorney reviews the charges to determine which should proceed.

Crown attorneys may have further administrative choices that affect the number and nature of prosecutions. One important choice is the option of placing suitable accused persons into a diversion program rather than proceeding to trial. Another arises when an alleged offence offers the state the option of proceeding by indictment or summarily.



### ***Police discretion to lay charges***

In law and in practice, the police generally have considerable discretion over whether to lay charges and which ones to lay. Ontario law maintains the principle of “constabulary independence,”<sup>4</sup> which means that police officers may decide to lay charges based on their perceptions of an allegedly criminal incident. Though officers are free to consider the wishes of victims or opinions of crown attorneys, the police retain the ultimate choice.

The legal test for laying a charge is that an officer or private citizen must have “reasonable and probable grounds” (evidence) to believe that the suspect has committed an offence. This standard is intended to prevent incidents being selected for criminal justice processing when the facts fail to indicate a reasonable basis for believing that the suspect has broken the law. However, police officers are not normally obliged to lay charges simply because of an honest belief that “reasonable and probable grounds” exist. Once this threshold is met, police officers still have discretion over whether to lay charges and, if so, which charge(s).

Even a simple situation may permit a choice among several charges of varying severity (as measured by the maximum penalty upon conviction). For example, a group of 18-year-old youths who are caught driving around in a car they have broken into could be charged with the following offences: theft over \$5,000,<sup>5</sup> possession of stolen property over \$5,000,<sup>6</sup> mischief to property over \$5,000,<sup>7</sup> taking a motor vehicle without consent,<sup>8</sup> or conspiring to commit any of these offences. The maximum penalties for these offences range from six months to 10 years of imprisonment. Of course, instead of laying a charge, an officer may decide to escort the youths to their homes, inform their parents and deliver a stern lecture.

In some circumstances, police officers no longer officially exercise discretion over whether to lay charges once they believe reasonable and probable grounds exist. For example, provincial and local policies now require Ontario police officers to lay charges when assaults occur within family settings.<sup>9</sup> Such policies significantly curtail police discretion in the charging system, but they have not eliminated it. Even in these instances police officers must determine whether reasonable and probable grounds exist.

### ***Findings about police charging discretion***

The Commission’s surveys and consultations revealed that many Ontarians do not believe that police always exercise their charging discretion fairly. For example, our public opinion survey of black, white and Chinese residents of Metro Toronto asked respondents if they think a black person who punches a white person and a white person who punches a black person are equally likely to be charged.\* Almost one in two (48%) black, more than one in four (29%) Chinese and one in five (21%) white

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\* The methodology of this study is summarized in Chapter 2 and described in more detail in our Technical Volume. See Appendix B.

residents think the black person is more likely to be charged. Almost no one believed that the white person is more likely to be charged.\*

Numerous complaints about police bias in charging were made during our public consultations. It was alleged that police officers are quick to charge racialized persons while they would not charge white persons in similar circumstances, and that charges against racialized persons tend to be more severe or more numerous than warranted. We also received several reports of incidents that were provoked or exacerbated by harsh police treatment and that resulted in charges against a racialized person.

Two examples recorded by Commission staff illustrate the problems. In both cases the accused person was eventually acquitted, but first each had to endure prosecution and trial on charges that were understandably experienced as abusive.

- N, a Chinese nurse, was driving from work with a co-worker on their way for a dinner break in Chinatown, when they were pulled over by a cruiser with one male and one female police officer. The officers took N's licence and ownership information back to their car for checking. They were taking a long time and giggling, and N was in a hurry, because she still had to eat before returning to work. N approached the police car to explain and ask for her licence back. She was thrown into the back of the cruiser by the police woman, suffering head and other injuries, and was sworn at when she tried to ask questions and stand up for her rights. The officers gave N a ticket for an expired licence sticker, told her she would be charged with disturbing the peace and assault, and took her to the station, where she was kept for several hours. With the support of the Chinese-Canadian community and women's groups, N was able to retain a lawyer and was acquitted on all charges. She later filed a complaint with the Public Complaints Commission, which was upheld by a board of inquiry.
- On February 19, 1993, P, an 18-year-old black male, was stopped by the police. He and his younger brother were coming from their church's youth basketball game and were standing at Birchmount and Finch [a major intersection in Metropolitan Toronto] when a police car drove by. By way of a dare he raised his left arm, gave the peace sign and shouted "peace out, copper." The car made a U-turn and stopped in front of them. Two officers came out of the car; one white, the other Asian. The white officer approached him asked what he'd said. P explained to the officer, who then said that P had picked the wrong officer to mess with. The officer then asked him for ID [identification]. P asked if he was being arrested, and his brother pointed out that P didn't have to show any ID unless he was being arrested, so P agreed with his brother not to show any ID. The next thing he knew was that he was being thrown up against the police car. There was a struggle, and the officer put handcuffs on him while P was yelling and screaming, "What's going on?" P was taken to the station, where he was

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\* No black residents and only 1 percent of white and Chinese residents report this view.



charged with resisting arrest, assault, mischief and disturbing the peace. At trial, P was acquitted of all charges. The trial judge concluded that “[t]he evidence of the Crown’s case through the officers suffered significantly from inconsistencies, which impacted on credibility ... the overall evidence of the police left me with a distinct impression that they were overreaching, and filling in the lacunae of their case.”<sup>10</sup>

The Commission received additional accounts of unfairness in police charging practices from some who work in the criminal justice system. A written submission from the Ontario Board of Parole (central region), for example, raised concerns about drug enforcement practices:

“We hear about people being ‘bugged’ by undercover officers until they agree to find drugs, and others who claim to have been subjected to illegal searches which produce drugs of suspicious origin. In other words, while the [Parole Board] sees those who actually do traffick drugs, we also meet individuals who are induced to traffick and those who don’t traffick, but may be charged anyway. There is some suspicion that drug-related cases are easier to prove in court and [charges] are more likely to be laid against [young black males], which both increases the likelihood of a conviction and helps to perpetuate the stereotype of black drug users/dealers.”

Two defence counsel who responded to the Commission’s survey stated that –

“Trumped-up multiple charges by the police ... are most common when dealing with street-level addicts who traffick in narcotics, especially crack. In my experience 75-80% of these clients come from a minority background.”

“In many cases I have had, I am sure the police would not have charged the person if the person was white. It seems to me the police are more willing to resolve disputes [that] could merit charges of assault, theft or ‘threatening’ without laying charges if the person is white.”

These accounts of explicit and more subtle forms of racial bias in charging practices are depressingly similar to those of previous reports documenting the experiences of black and other racialized Ontarians. Sometimes, however, such accounts have been discredited as mere anecdotes, unsupported by systematic evidence of differential outcomes. Resource constraints prevented the Commission from conducting a comprehensive study of the extent to which the police exercise charging discretion differently in response to similar behaviour by white and racialized people. But findings from related Commission research are consistent with perceptions of differential treatment.

For example –

- As documented in Chapter 4, recent prison admissions data indicate that black persons are most over-represented, relative to white persons, among untried prisoners whose most serious charge is drug trafficking/importing, drug possession, obstructing justice or a weapons offence. These charges generally

result from police initiative in seeking out criminal offences rather than from a complaint by a victim or another person.

- A study of 248 randomly selected Youth Bureau files, drawn from completed cases at two Metropolitan Toronto police divisions, indicates that black youths are over-represented among young persons whose charges are initiated solely by the police rather than in response to a complaint. The data show that 41% of the sample as a whole, but 52% of the youths whose charges are solely initiated by the police, are black. By contrast 40% of the sample as a whole, but only 29% of youths whose charges are solely initiated by the police, are white.<sup>11</sup>
- An observation study of 217 cases in Metro Toronto courts found that, proportionate to their number in court, black defendants are significantly more likely than white or other racial minority accused to face at least one drug or weapons charge.<sup>\*</sup> The study also shows that these types of charges are significantly more likely to have arisen from proactive than reactive policing. According to these data 77% of the cases resulting in at least one drug or weapons charge, but only 37% of other cases, stem from proactive police activity. Black accused in this study are no more likely than white or other racial minority accused to have been charged with other offences as a result of proactive policing.

These findings are only fragments of a larger picture. However, they tend to support oft-repeated complaints that the police scrutinize black Ontarians more closely than others and differentially select them for processing by the criminal justice system. Clearly, any such differential treatment is unacceptable.

As we document in Chapter 10, many Ontario police services appear to be seriously attempting to improve relationships with black and other racialized communities, largely by implementing community policing practices. Unless a commitment to racial equality is entrenched in charging practices, however, such efforts may do little to alleviate existing suspicion. Consequently, measures to secure and demonstrate publicly such a commitment should be a high priority in new policing systems.

One response to our findings would be to reduce police discretion over charging decisions. This could be achieved by, for example, decriminalizing or reducing the enforcement priority given to offences such as possession of a narcotic, developing and enforcing specific guidelines to govern police action, and increasing the powers of justices of the peace to stop charges from proceeding further ("refuse to issue process"). Such initiatives may have the important effect of clarifying what the criminal justice system expects of the police and of formalizing the procedures governing the selection of cases for criminal proceedings. The risk would remain,

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\* The study observed 217 court processes in various courts that serve parts of Metro with large black or other racialized communities. Details of this study are in the Commission's Technical Volume. See Appendix B.



however, that individual officers might ignore or manipulate procedural changes to achieve their charging objectives.

Another approach would be to maintain police discretion but provide officers with alternatives to criminal charges, such as formal procedures for diverting persons from criminal proceedings. While such procedures are common in other jurisdictions, they do not exist for police in Ontario. Here as elsewhere, police officers may choose not to proceed with charges, but no system guides the exercise of the discretion to avoid charges or encourages the use of this discretion.

Police diversion or "cautioning" systems in other jurisdictions vary considerably. In Britain, for example, government policy promotes cautioning as an alternative to laying charges, especially with young persons.<sup>12</sup> Simple criteria have been established to determine whether an individual qualifies for a caution, and cautions are officially recorded. However, officers are not required to caution everyone who fits the criteria,<sup>\*</sup> and disparity among police jurisdictions suggests substantial variation in local police practice.

Under the British system, issuing and recording a caution is the only official response to an offence diverted by the police. A more proactive version of police cautioning is the "enhanced cautioning" or "family conferencing" model adopted by a police service in New South Wales, Australia, which has attracted considerable interest among some police officers in Metro Toronto and other Ontario jurisdictions.

The family conference "is designed as a ritual in which victims, offenders, and those closest to them can deal with their shame and anger ... [and] then remove the labels of victim and offender."<sup>13</sup> This form of cautioning is developed from a traditional response of New Zealand's Maori people to unacceptable behaviour, in which the extended network of a young person's family and friends share responsibility for the person's misbehaviour and involve its victims in resolving the problem. As administered in New South Wales, the police convene a meeting of the young person and his or her supporters that also includes, if possible, the victim with his or her supporters. Everyone present at the meeting, which is facilitated by a trained and experienced officer, is given an opportunity to say how the offending behaviour affected them, and the young person is asked about the incident. Towards the end of the meeting the group develops a plan through which the young person may redress the harm caused.

Police proponents of the model describe it as a form of "reintegrative shaming"<sup>14</sup> that reduces both recidivism and the resources devoted to costly criminal justice

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\* The most significant criteria are that the police have sufficient evidence of the person's guilt to "give a realistic prospect of conviction," and that the offender admits the offence and gives informed consent to being cautioned (Home Office Circular, 59/1990 Annex B). In the 1994 revision of the guidelines, the Home Office for the first time prohibited police cautioning for very serious indictable offences and limited repeat cautions to the most minor offences (Home Office Circular, 18/1994).

processing. Enhanced cautioning draws on the sense of shame generated by social disapproval or disgrace because –

“... people are deterred less by the threat of official punishment than by the threat of public disgrace. The threat of a loss of status and affection is the really significant threat. And this is not a threat that can be made by state officials. It can only be made by those who have a significant personal relationship with the person whose behaviour is in question.”<sup>15</sup>

The purpose of enhanced cautioning is not to humiliate offenders but to reintegrate them into the community by developing their awareness of the harmful consequences of their behaviour and by reinforcing collective accountability for such behaviour. Drawing on their experiences, police trainers and advocates of family conferencing state:

An effective Family Conference ... threatens the young offender(s) with social disapproval. But in making the distinction between unacceptable behaviour and the potentially good young person or people responsible for that behaviour, the Conference offers the possibility of social reintegration .... A successful conference ... makes [young offenders] aware of the consequences of their behaviour .... Self-control is reinforced by supportive community control to minimize the risk of further offending. This strengthening of community control and collective accountability is preferable to a system that relies on increased state control to deter offending behaviour.<sup>16</sup>

Commissioners met with the police officer responsible for the enhanced cautioning system in New South Wales and were persuaded that this model could address many of the concerns of black and other racialized Ontarians about police charging discretion, especially in dealings with youths. Even a simple formal cautioning scheme, such as Britain’s, which reflects the principle of restraint in the use of criminal proceedings, could significantly reduce community anxieties about police charges. To be effective, however, any such scheme in Ontario would have to incorporate safeguards against practices that produce or are perceived to produce racial inequality.

This problem has been raised with respect to the British cautioning scheme. Recent research, based on the files of seven police jurisdictions, suggests that “Afro-Caribbean” (black) youths are considerably more likely than white youths to be charged with criminal offences by the police rather than cautioned.<sup>17</sup> Neither the type of offence committed nor previous criminal histories explained the significant difference in prosecution rates. The study identified only one possible non-racialized explanation for some of the discrepancy in one of the jurisdictions: Afro-Caribbean youths are less likely to admit the offence, and so are disqualified from the cautioning scheme. Any cautioning regime introduced in Ontario would need to protect against the risk that racialized judgments might influence police selection decisions.

Equally important is the need to guard against “net-widening.” A standard objection to creating new options within the criminal justice system is that the powers might



be used not to reduce the number of persons formally charged, but to draw more people into the system. Instead of cautioning persons who would formerly have been charged, for example, the police might end up cautioning people whom they would previously have informally warned.<sup>18</sup>

The risk of net-widening may be reduced, if not eliminated, by requiring the police to issue cautions rather than lay charges unless criminal proceedings are specifically justified, by monitoring the impact of new police powers and by scrutinizing how they are used. Consistent with the principle of restraint in applying criminal law, Ontario should establish provincial guidelines for a police cautioning system. Police officers should be required to use their cautioning power in preference to charges unless they account for a departure from cautioning in writing. In formulating the cautioning guidelines, the Ministry of the Solicitor General and Correctional Services should avoid incorporating systemic biases. The use of the cautioning power and its relationship to police charging practices should be monitored for evidence of net-widening and racial bias.

The Commission also proposes that Ontario police services establish an enhanced cautioning system. While the police should develop it in concert with interested community organizations and individuals, the Ministries of the Solicitor General and Correctional Services and Attorney General, should formulate guidelines for local schemes. Start-up and training costs for enhanced cautioning should be provided by the Ministry of the Solicitor General and Correctional Services.

Drawing on the New South Wales model, enhanced cautioning systems should include "community accountability conferences." These conferences should involve the offender and family members and friends, and the victim (if he or she wishes to participate) together with family members or friends. While participation by the victim is important to community accountability conferences, if the victim is unwilling, a modified conference should nevertheless proceed.

The police should convene the conference, and an officer trained in family conferencing techniques should facilitate it. Depending on local procedures, a trained community member may act as a joint facilitator. Interpretation should be available if needed by any participant in the conference. The enhanced cautioning system should be monitored for recidivism rates and satisfaction with the process, as well as for evidence of net-widening and racial or gender bias.

**6.1 The Commission recommends that –**

- a) the Ministry of the Solicitor General and Correctional Services establish provincial guidelines for a formal police cautioning system.**
- b) the guidelines require police officers to use the cautioning power instead of charges unless the need for charges is justified in writing.**
- c) the use of the cautioning power and its relationship to charging practices be monitored for evidence of "net-widening" and racial bias.**

## 6.2 The Commission recommends that –

- a) the Ministries of the Solicitor General and Correctional Services and the Attorney General develop general criteria for Ontario police services to establish enhanced cautioning systems that include community accountability conferences.
- b) Ontario police services, in concert with interested community organizations and individuals, establish enhanced cautioning systems that include community accountability conferences.
- c) the Ministry of the Solicitor General and Correctional Services provide start-up and training funds for enhanced cautioning systems.
- d) enhanced cautioning systems be monitored for recidivism rates and satisfaction with the process, and for evidence of net-widening and racial bias.

### *Crown attorney discretion to review charges*

The second stage of the charge selection process involves crown attorneys reviewing or screening charges to determine if prosecution is viable. Crown attorneys have always had discretion, independent of the police, to decide if charges should proceed. In this role, they have long been responsible for safeguarding the public interest in a fair and accountable manner.

Until recently, however, little was known about the formal principles used by crown attorneys in deciding whether to endorse, withdraw or modify charges laid by the police. With the implementation of the Martin Committee's recommendations on charge screening,<sup>\*</sup> this exercise of discretion by Ontario crown attorneys is now subject to comprehensive and publicly available guidelines.<sup>19</sup> While charges prosecuted by federal agents, such as those laid under the *Narcotic Control Act*, are not formally within the Ontario screening system, we understand that federal agents are generally directed to follow the charge screening criteria recommended in the *Martin Report*.<sup>20</sup>

The new Ontario screening system anticipates early scrutiny of all charges by a local crown attorney to determine whether to prosecute. Subsequently, charges that have been selected for prosecution are to be periodically reviewed to ensure that criminal proceedings continue to be viable. The review guidelines highlight three elements. First, crown attorneys must ensure that no "insuperable legal or jurisdictional" obstacles to successful prosecution exist. "Fatally flawed" prosecutions should be avoided because they expose accused persons and victims to needless stress and expense, and waste judicial and prosecutorial resources.

Second, crown attorneys are to assess whether the available evidence indicates "a reasonable prospect" of conviction. This test involves a decision, based on the quality of the evidence – which would include the credibility of key witnesses – and

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\* The Commission's research indicates that some regions systematically screened charges before the new guidelines were developed. So far as the Commission could determine, all Ontario crown attorneys offices had implemented the new screening system by the end of 1994.



its admissibility, together with any defences known to the state. By making this test objective, the guidelines seek to limit the influence of the personal views of crown attorneys and to promote close and independent scrutiny of the evidence gathered by the police. Whatever crown attorneys think about an accused person, prosecutions should not be launched or continued if the evidence indicates no reasonable prospect of conviction.<sup>21</sup>

The third review element, which is addressed only after a crown attorney concludes that a “reasonable prospect of conviction” exists, requires explicit consideration of whether prosecution is in “the public interest.” As the Martin Committee acknowledged, the “public interest in prosecution” is a broad standard that may require assessing a variety of factors. The starting point of the new screening system, however, is that the public interest generally favours prosecution whenever “a reasonable prospect of conviction” exists. This creates a presumption in favour of prosecuting accused persons once viable charges have been laid, even if the charge selected for prosecution differs from what the police originally chose. The presumption may be overcome if the public interest is likely to be better served by diverting the charge from a criminal prosecution.

Depending on the charges that emerge from the screening process, crown attorneys may have discretion over the prosecution procedure. A large and growing number of criminal offences offer the state the option of proceeding by indictment or summarily. When the Crown proceeds by indictment, the maximum sentence available upon conviction is much higher. In practice, sentences imposed tend to be higher when the Crown proceeds by indictment.

The choice of prosecution procedure also has implications for how a case is tried. All summary prosecutions under the *Criminal Code* and related federal legislation are dealt with by a judge of the provincial division of the Ontario Court of Justice. By contrast, if the crown attorney elects to proceed by indictment, the accused person may usually choose whether to be tried by a provincial division judge\* or in the general division by a judge and jury or by a judge alone.<sup>22</sup>

### ***Findings about the review of charges***

The Commission found considerable public confusion about the role of crown attorneys in charge management, and radically varying perceptions about racial injustice in their exercise of discretion. Some participants in Commission consultations said they do not understand what crown attorneys do, while others clearly believed that crown attorneys are lawyers for the police. Among those who correctly identified crown attorneys as independent of the police, there was suspicion that in practice many crown attorneys are too close to the police.

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\* Section 553 of the *Criminal Code* assigns some charges exclusively to the provincial division, no matter how the state elects to proceed.

This opinion was also held by some defence and duty counsel. They suggested that the working relationship between crown attorneys and police officers may lead to failure to review charges adequately or to scrutinize fully the evidence on which racialized persons are charged. Consequently, exercise of discretion carries a significant risk of transmitting bias against black and other racialized persons into the next stage of the criminal justice process.

Research into prosecutorial discretion suggests a problem in the extent to which crown attorneys rely on documentation prepared for them by the police.<sup>23</sup> A study based on empirical research in an urban jurisdiction in Ontario concludes, for example, that police control so much of the paper flow that in practice prosecutorial discretion over charges has been quite limited.<sup>23</sup> A recent British study also identified police control over information as a significant obstacle to truly independent judgments by prosecutors. The authors show that the police can and do pre-determine how crown discretion will be used by deciding what information appears on file and how that information is presented.

Examination of case files and discussions with officers indicate a broad awareness of the factors which militate for or against prosecution. However, for the police the relevance of these public interest factors is not in providing external criteria against which cases are to be judged. Rather, these public interest factors provide a resource upon which the officers preparing or reviewing cases can draw as a means of justifying the decision or recommendation made and of achieving the favoured outcome. The informal working rules of the police provide the reason for a particular decision, the formal guidelines provide the justification.<sup>24</sup>

Both crown and defence counsel, as well as community members, suggested that crown discretion may be subtly influenced by stereotypes associating racialized people with crimes. The next chapter documents ways in which crown attorneys, as well as judges and defence lawyers, expose themselves to this criticism by making irrelevant references to race in courtrooms. Less visible, but no less important, are unspoken assumptions that may influence prosecutorial discretion during charge selection. According to one defence counsel responding to the Commission's survey, for example –

“Assumptions are made by police, crowns and judges that certain racial minorities are more likely to be guilty of certain categories of offences, and discretion is exercised or restricted accordingly.”

Others we consulted insisted that the exercise of crown discretion to review charges, though sometimes flawed and often uneven, does not reflect systemic racism. Many crown attorneys forcefully expressed this view, and defence counsel and judges also generally supported it.

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<sup>23</sup> As shown in Chapter 5, some police characterizations of accused persons are extremely negative.



Because of the extensive changes to screening procedures during the Commission's mandate, we did not attempt to compare results from this type of prosecutorial discretion for persons from white and racialized communities. One of our major studies however, permitted a limited analysis of crown discretion to select the prosecution procedure. The study (described in Chapter 5) compares various criminal justice outcomes for white and black males charged with the same five offence types during 1989/90 by the Metropolitan Toronto Police. While some of the offences included in the study are indictable only, others – sexual assault, “assault peace officer,” bail violations and various drug charges – can proceed summarily or by indictment (hybrid offences).

Comparison of the outcomes of crown elections shows small but statistically significant differences favouring white accused across the entire sample of these offences, and for those charged with assaulting a peace officer and the hybrid drug offences. In the entire sample of hybrid charges, 37% of charges laid against white accused, compared with 31% of charges laid against black accused, were dealt with summarily. In the “assault peace officer” sample, 29% of charges laid against white accused and 12% of those laid against black accused were dealt with summarily. In the hybrid drug charge sample, 65% of charges laid against white accused, and 46% of those laid against black accused were dealt with summarily. No statistically significant difference appears in the choice of prosecution procedure for those charged with sexual assault or bail violations.

Of course, these findings are based on charge management practices in 1989/90, before implementation of the new *Crown Policy Manual*. Further, the samples are derived from a single jurisdiction and cover a limited number of offences, and details of the incidents that led to the charges are unknown. It is nevertheless striking that racial differences appear for two highly discretionary charges that are usually initiated by the police and have been strongly linked to racialized stereotypes about the supposed criminality of black people.

These findings highlight the need for vigilance by Ontario crown attorneys. While all would undoubtedly agree that “racism, sexism, and other forms of discrimination have no place in the administration of criminal justice,”<sup>25</sup> stereotypes and implicit assumptions may still influence the routine exercise of discretion in subtle ways. Heavy reliance on information presented by police, for example, exposes crown attorneys to the risk that their decisions may inadvertently incorporate transmitted bias.

Another concern is the large caseloads of many crown attorneys, which promote rapid decision-making that is vulnerable to the influence of stereotypes such as “unsettled” lifestyles, “notorious” residential areas, and “cultural propensities to crime.” Such influences may result in a crown attorney exercising discretion against those who are perceived to fit the stereotypical description.

Crown attorneys should be alerted to specific ways of avoiding the influence of racialization on the exercise of prosecutorial discretion. The present *Crown Policy Manual* provides only general guidance through its introductory statement. It asserts that in exercising a discretionary power, crown attorneys “need to be aware of its context so that discriminatory stereotypes do not influence ... decision-making.” Crown attorneys are directed to be aware of systemic discrimination, which is defined by reference to a leading case in the Supreme Court of Canada on “adverse discrimination” and to the 1993 Canadian Bar Association’s *Report on Gender Equality in the Legal Profession* (the Wilson Report). They are also reminded that as key participants in the criminal justice system, crown attorneys “can play an important leadership role in assisting to recognize and eradicate” various forms of discrimination.<sup>26</sup>

These principles are intended to govern all the individual policies and procedures contained in the manual. In practice, however, busy crown attorneys may find it difficult to identify subtle biases or examples of systemic discrimination in the day-to-day exercise of their own charging discretion or that of the police. Many people in Ontario, however, have considerable experience with and expertise in helping others to apply anti-discrimination principles to institutional policies and practices. The Commission urges that these skills be utilized in the ongoing revision of the *Crown Policy Manual*.

**6.3 The Commission recommends that the Ministry of the Attorney General establish a committee that includes crown attorneys and other Ministry officials, defence counsel, and representatives from racialized communities to advise on revisions to the *Crown Policy Manual*.**

### ***Discretion to avoid court proceedings***

In some circumstances crown attorneys have discretion to dispose of charges without a trial that they might otherwise prosecute. Offenders who avoid prosecution in this way are required to perform acts of contrition or redress.\* Once the conditions are fulfilled, the crown attorney normally withdraws or stays the charges and the person avoids a criminal conviction.

The most extensive diversion program in Ontario, the Alternative Measures Program, was established under the *Young Offenders Act* for youths aged 12 to 17. Another important program serves adult Aboriginal persons charged with various offences.<sup>27</sup> Some Ontario jurisdictions maintain diversion programs for adult offenders of any heritage who are charged with a small number of minor offences. Legislation recently passed by the federal government formally authorizes the

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\* Within the informal programs for adults, the act of contrition is often a charitable contribution of a fixed amount. The formal programs have more options. They may, for example, require the diverted person to write a letter of apology, pay compensation or make restitution, or perform community service. Some programs also permit crown attorneys to seek referrals to a social or mental health agency, or require a diverted person to attend a counselling program.



provinces to introduce equivalent programs for adults as for youths,<sup>28</sup> and a more systematic diversion program for adults charged with a range of offences is planned for the spring of 1996.

The Alternative Measures Program establishes guidelines for the exercise of crown discretion in diverting young persons from criminal prosecution. Diversion is restricted to those who admit responsibility for the incident that led to the charge, and certain offences are excluded. For example, young persons charged with offences such as sexual assaults, serious non-sexual assaults, drug and firearms offences are ineligible for the program. Conversely, for some types of charges, diversion may be presumed. For example, youths charged with minor property offences are eligible for diversion if they accept responsibility for the offence and freely consent to participate.

Within such guidelines, crown attorneys are responsible for approving admission to diversion programs and determining whether diverted persons have met the conditions. Depending on the program and the offence, these decisions may be straightforward or may require complex judgments. Diversion of an adult accused of shoplifting, for example, requires a crown attorney to do little more than ascertain that the person admits the offence and is willing to enter the program. By contrast, decisions regarding youths charged with offences that are neither excluded from Alternative Measures nor presumptively diverted should take account of the youth's needs and circumstances, any prior offences, the community interest and the victim's wishes. Crown attorneys may also consider "other behavioural patterns" of the young person, including his or her attitudes to authority, school, friends, acquaintances and family.

Once a crown attorney has approved a young person for the Alternative Measures Program, discretion is temporarily passed to a community-based agency involved in the program. Such agencies supervise persons referred to them, much like probation offices do for convicted persons. Their particular task is to formulate suitable measures for their clients, which may include counselling or therapy, and acts of contrition or redress, and to monitor performance of the stipulated measures.\* Only if the young person and the agency agree does the young person enter the program.

A supervising agency is obligated to notify the crown attorneys' office whether the youth has completed the measures satisfactorily. Then the crown attorney must decide whether or not to proceed with the charges against the youth. If the youth has co-operated with the agency and fully completed the stipulated program, the

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\* Among the choices available to the probation officer are requirements that the young person apologize to the victim, orally or in writing, compensate, make restitution or perform personal service for the victim, contribute a specific sum to charity, participate in counselling or peer mediation, or perform community service.

decision is straightforward.\* The decision is more difficult when the agency reports partial or non-performance, especially if the young person maintains that the measures required were overly burdensome or otherwise unfair.

The Commission found no evidence that crown attorneys are perceived to select youths for Alternative Measures in a racially biased manner. However, inadequate access to Alternative Measures and low participation rates for racialized youths were raised frequently. Some duty counsel and defence counsel who responded to the Commission's survey maintained that these problems reflect arbitrary guidelines or unwillingness by crown attorneys to divert charges. Others blamed the police for failing to tell young people of the program and how to apply, or to use opportunities to recommend youths for Alternative Measures. Many lawyers criticized the limited range of charges qualifying for Alternative Measures before the 1995 amendments to provincial policy that established the categories of charges outlined above.

The Commission could not assess the impact of these amendments because they came into effect late in our mandate. Our review of existing policies, however, raises an important systemic issue: the exclusion of all drug charges from Alternative Measures. The massive over-representation of black people among persons imprisoned for drug charges (documented in Chapter 4) suggests that this exclusion adversely affects black youths to a significant extent.

Primary responsibility for this problem lies with the federal government – whose agents prosecute drug charges in Ontario – which does not have a systematic youth diversion program. By contrast, in some provinces where drug charges are prosecuted by provincial crown attorneys (Newfoundland, Quebec and Alberta), youths charged with drug possession may qualify for diversion. Diversion for drug offences should be included in the provincial Alternative Measures program. Ontario should attempt to establish a protocol similar to that between the federal Department of Justice and the Aboriginal Legal Services of Toronto.<sup>29</sup> This should permit diversion of young persons charged with a range of drug offences away from criminal proceedings and into the Alternative Measures Program.

**6.4 The Commission recommends that the Ministry of the Attorney General establish a protocol with the federal Department of Justice to allow young persons charged with drug offences to be diverted from the criminal process and into the Alternative Measures Program.**

## Accused persons' access to legal services

Access to legal services for accused persons is among the most pressing issues for the Ontario criminal justice system. While those with adequate financial means may purchase any legal services they want, many people depend on the Ontario Legal

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\* These measures should be completed within three months of the young person's acceptance into the program, and the crown attorney then has nine months to decide whether to stay the charge(s).



Aid Plan to fund some or all of the legal services they need. Late in the Commission's mandate, a crisis in legal aid funding erupted publicly. Drastic changes in the system have been proposed, most of which would reduce access to traditional legal services, particularly representation in court.

Even before the crisis, however, the Commission found serious concerns among racialized Ontarians about legal aid services. Virtually every community group that made submissions documented problems with access to legal aid. They recommended expansion of services and measures to ensure that all Ontarians know about the legal aid system and understand their rights to apply for assistance. Lack of information in their languages about legal aid is a particular concern among linguistic minority communities. Community organizations also expressed disappointment that the Ontario Legal Aid Plan does not use their organizations to distribute materials about the plan and its services more widely.

Broad questions about the funding, control or future of publicly funded legal services are outside the Commission's mandate. Consistent with the Government's directive to address systemic problems, however, we recommend enhancing access to legal services that appear to be most needed by racialized accused persons. However the current crisis is eventually resolved, black and other racialized persons should face no greater barriers than other Ontarians in obtaining legal services from the criminal justice system.

Accused persons may need three types of legal services. The first is emergency advice to arrested or detained persons during police interrogation and processing. The second service, which may be required once charges are laid, is basic, comprehensible and timely advice about the system's procedures and what to expect at each stage of the process. The third service is legal representation during court proceedings and in negotiations about resolving issues outside the courtroom. Accused who hire a lawyer privately may obtain all three services from that lawyer. Within the publicly funded system, access to each service is a significant issue.

### ***Access to emergency legal services***

To obtain emergency legal services, persons held in police custody must know their rights and be able to exercise them effectively. The *Canadian Charter of Rights and Freedoms* gives arrested persons rights to speak with a lawyer and to be informed of this right.<sup>30</sup> In Ontario, individuals needing such advice who do not have their own lawyer may use a 24-hour toll-free telephone service, which is staffed by lawyers acting as duty counsel.

To advise arrested persons of their rights to emergency legal services, the Ministry of the Solicitor General and Correctional Services has provided police officers with a form of wording – a “caution” – to be read to all arrested persons.<sup>31</sup> Information, however, does not necessarily produce understanding, especially when the officer is unable to communicate in the language used by the arrested person. Thus in a 1987 decision, the Ontario Court of Appeal held that the right to speak with a lawyer was

infringed when the caution was read to the accused in English, but the officer knew that the accused was French-speaking.<sup>32</sup>

Police services in urban Ontario draw on a variety of interpreters, including multilingual police officers and civilian employees, court interpreters, community volunteers, and friends or relatives of accused persons. Twenty-four hour telephone interpreter services are also available in some places. Police services in the Greater Toronto Area can call the AT&T Language Line, based in the United States, which employs interpreters for more than 140 languages. Northern cities such as Thunder Bay and Kenora have interpreter programs with 24-hour service. Most police services rely on more than one interpretation source, but apparently only one urban police service, in Guelph, routinely uses paid professional interpreters.

Superficially, this array of services may seem adequate. In practice, however, most police services give officers little or no guidance on when to use an interpreter or how to communicate effectively through an interpreter. Most police services do not have formal policies on the use of interpretation services, but rely on ad hoc arrangements. Working with interpreters is not a priority in police training, even in areas with large multilingual populations. Few Ontario police services allocate training resources to teaching officers to identify linguistic needs and secure appropriate services.

In general, we found that many police officers are unhappy with existing policies and practices. They recognized that communication barriers may prevent linguistic minority accused from exercising their rights. A police sergeant, expressing the frustration we heard from others, told the Commission, "if you want to see the justice system work fairly, provide the interpreters."

With linguistic diversity growing in Ontario, the fundamental legal right to speak with a lawyer diminishes unless information about it is communicated in a language the accused person understands. Police officers should make every effort to identify the most appropriate language in each case and to convey the formal caution in it. They should also be trained to identify subtle communication barriers that may impede understanding. Of particular importance is the ability to recognize when a person with an apparently competent surface grasp of English does not fully understand the language of the caution.

#### **6.5 The Commission recommends that the Ministry of the Solicitor General and Correctional Services:**

**a) translate the formal caution given to a suspect on detention or arrest into the principal languages spoken in various Ontario police jurisdictions.**

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\* Research concerning linguistic minority students in Ontario, for example, suggests that "basic interpersonal communications skills" in English are usually achieved within two years of arrival in Canada, but more sophisticated language skills may require five to seven years. James Cummins, "Age on Arrival and Immigrant Second Language Learning in Canada: A Reassessment," *Applied Linguistics* 2, pp. 132-149.



b) direct police services to provide this caution to suspects in the appropriate languages before questioning them.

**6.6 The Commission recommends that police personnel receive training about the dangers of assuming competence in English when an arrested or detained person from a linguistic minority community has a surface grasp of English.**

An arrested or detained person who needs an interpreter to understand the right to obtain legal advice while in police custody also needs such assistance to communicate with the lawyer. The right to legal services assumes that lawyer-client communications are and are perceived to be private and privileged. Thus, this service should be provided by an interpreter who is independent of the police. The Legal Aid plan that funds the 24-hour toll-free line should be responsible for providing interpretation services for linguistic minority accused who want access to emergency legal advice. This service should be delivered through three-way telephone technology.

**6.7 The Commission recommends that the Ontario Legal Aid Plan be funded to establish three-way telephone communications to allow accused persons from linguistic minority communities who are in custody to speak with duty counsel through an interpreter.**

### ***Access to basic legal advice***

Access to comprehensible and timely advice about the criminal justice process is a major concern in many racialized communities. Many racialized accused neither know how the system works, nor understand their rights as accused persons or their responsibilities within the process. They may be unable to make informed choices about available options, such as diversion programs or plea resolutions, because they do not understand what is being offered or the implications of their decisions. Though some participants in our consultations emphasized the plight of linguistic minority accused persons, most insisted that those whose first language is English also need more information and advice than is currently available.

Better access to advice and information shortly after charges are laid would undoubtedly alleviate anxiety and enhance confidence in the fairness of the charging system. Since the advice that an accused person needs mostly concerns legal procedures, the ideal would be to ensure that all accused persons can hire a lawyer if they wish. In practice, however, the ongoing crisis over funding the Ontario Legal Aid Plan suggests that extending full legal services to all accused persons unable to pay for a lawyer is not possible in the foreseeable future. But the likelihood that most accused will be able to hire a lawyer from their own resources is even more remote. Nevertheless, the principle of equality requires increased access to legal advice and information. Legal advice, even if falling short of full representation, is clearly needed.

Three services currently offered by the Ontario Legal Aid plan could be expanded to improve access to basic legal advice and thereby build confidence in the charging system. The first is the court-based duty counsel service for accused persons who do not have a lawyer. Duty counsel may do their best to answer questions if approached outside the courtroom, but their first responsibility is to represent persons appearing before a judge or justice of the peace. Especially in busy multi-court facilities, duty counsel seldom have time to give full explanations and advice even to those they represent in court, still less to others charged with criminal offences. Due to this workload, in-court duty counsel often recommend that accused persons apply for legal aid just to obtain answers to a few routine questions.

The frustration of accused persons and duty counsel in court could be considerably reduced if a duty counsel was available to provide basic advice at these court facilities. Making advice available in this way would also reduce the burden of applications for legal aid when the accused simply wants basic advice.\*

The second service that could expand is that provided by community-based duty counsel clinics.<sup>†</sup> These clinics, located in facilities such as libraries, community centres and hospitals, make lawyers available for a few hours each week to provide general advice and assistance. At present, none of these clinics specialize in assisting charged persons, but we understand that lawyers are sometimes asked about the criminal justice process.

Currently, this service is too modest to cope with the influx of new clients that would likely follow from more systematic attempts to help accused persons. But where local demands on legal aid are significant but insufficient to justify a full-time duty counsel to give advice at the courthouse, a duty counsel clinic appears to be an appropriate model to deliver basic advice. We recommend testing this model in pilot projects developed in consultation with legal aid clinics and community groups, which should also be involved in evaluating them. The location and range of services should respond to changing community needs around the province.

The third service model is the legal advice certificate, which Legal Aid area directors may issue to accused persons to consult lawyers of their choice for up to three hours.<sup>33</sup> This mechanism appears well-suited to meet accused persons' needs for basic advice about the criminal justice process. The legal advice certificate also enables those who may be sureties or assume other responsibilities for persons freed on bail to obtain advice.

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\* Advice could also be provided to family and supporters of accused concerning sureties or other legal issues involving them.

† The Ontario Legal Aid Plan's 1992 report lists 35 such clinics across the province.



### 6.8 The Commission recommends that –

- a) the Ministry of the Attorney General allocate additional funding to enable the Ontario Legal Aid Plan to have a duty counsel available to give advice in multi-court facilities. Such “advice duty counsel” would not generally appear in court, but would be available in private offices in or near the courthouse to provide immediate advice to accused persons, their supporters and family members.
- b) the Ministry of the Attorney General make provision to expand duty counsel clinics in response to changing community needs, after broad consultation and subject to review.
- c) where “advice duty counsel” or duty counsel clinics are not available, Legal Aid area directors publicize the availability of and issue legal advice certificates to accused persons and their families or supporters who request legal advice in criminal matters.

### *Access to legal representation*

Legal advice is important, especially immediately after charges are laid. But an accused person often needs much more extensive counselling than advice schemes can provide. Such needs are recognized to some extent in the right to counsel guaranteed by the *Canadian Charter of Rights and Freedoms*. The crucial issue, however, is funding such services.

Basic in-court representation at bail and sentencing hearings in the provincial division of the Ontario Court of Justice are available free of charge to accused persons, through the duty counsel program. For contested trials and many out-of-court counselling services as the case progresses through the system, an accused person who cannot afford a lawyer may apply for a legal aid certificate.

Obtaining a legal aid certificate involves passing eligibility tests relating to the seriousness of the charges, the likely consequences of conviction and the financial resources of applicants. Once eligibility is established, the local area director issues a certificate to the accused, who may choose any lawyer on the legal aid panel who will take the case.

The Commission found that many applicants from black and other racialized communities are confused or poorly informed about important aspects of the Legal Aid Plan, such as the location of offices and the relationship between the plan and obtaining a lawyer’s services. For example, many applicants are disappointed not to find lawyers at the legal aid office. As a result, they may feel frustrated and badly served, which may contribute to anxiety in dealing with the criminal justice process.

The application process was the subject of further criticism. We received complaints that legal aid staff appear unaware that extended families are common in many racialized communities. Many applicants reported that questioning of their precise financial responsibilities for dependent relatives was insensitive and intrusive.

Reports from Commission researchers who observed legal aid eligibility interviews suggested that officials seem generally sympathetic to applicants and do not treat black and other racialized persons worse than white persons. But they are required to ask highly intrusive questions, especially about financial circumstances. For example, even the most obviously indigent applicants were usually asked if they owned real estate, RRSPs (personal pension funds), GICs (investment certificates) and the like.\* While some applicants laughed at these questions, others were embarrassed and some clearly did not understand the questions.

This research also reveals ways in which communication between intake officers and applicants from racialized communities may result in misunderstandings, confusion, increased stress and potentially unjust denial of applications. Three general patterns appeared.

First, some applicants clearly required interpreter services. Since Legal Aid does not usually provide interpreters and these applicants typically could not afford professional interpreters, they tended to rely on family or friends. Sometimes legal aid staff had difficulty communicating with such an interpreter. Even when communication appeared effective, however, this solution was quite unsatisfactory given the sensitive nature of the questions.

Second, some applicants with functional English were obviously unfamiliar with the vocabulary used in the interview. Often the applicant attempted to struggle through the process, and tried to be co-operative by answering "yes" whenever possible. But as the following example shows, communication can still be ineffective:

Interviewer: "Do you have your charge screening form?"

Applicant: "Yes."

Interviewer: "Where is it?"

Applicant: "Where is what?"

Interviewer: "The form the police gave you."

Applicant: "What form?"

The third pattern involved English-speaking applicants whose accents or dialects were unfamiliar to the interviewing officers. These applicants were frequently asked to repeat their answers, often several times for each question. Though interviewers obviously did not intend to be harsh or disrespectful, these interviews often resembled interrogations.

The Commission is satisfied that legal aid staff responsible for processing applications generally deliver a professional service, without discriminating against black and other racialized persons. However, the system for handling legal aid applications can be insensitive to the needs of these clients. No mechanism exists for implementing the Ontario Legal Aid Plan's stated objective to be "aware of and

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\* A few interviewers seemed embarrassed to pose these questions; some skipped them as the answers were obvious.



responsive to the needs of groups with special needs or interests including ... ethnic, racial and linguistic minorities [and] ... native people."<sup>34</sup> We found no evidence of sustained outreach to ethnic, racial and linguistic minority communities, nor did we find any procedures for evaluating the plan's performance regarding this objective.

Not surprisingly, members of black and other racialized communities feel uninformed about legal aid, and this lack of information has an exclusionary effect. One consequence is that the legal aid plan is experienced as perpetuating systemic racism.

**6.9 The Commission recommends that the Ontario Legal Aid Plan –**

**a) make linguistic and cultural interpretation services available during application interviews.**

**b) prepare and widely distribute brochures and videos in the principal languages served by each area office that explain the range of services available through the plan, and the purpose and likely content of interviews to be conducted by staff.**

Once an applicant obtains a legal aid certificate, the next step is to find a lawyer. Though Ontario lawyers may advertise their services, such publicity provides little useful information about what matters most to many racialized accused persons, such as the lawyer's record, experience, skills, or professional empathy with members of their communities. All Legal Aid offices maintain a list of lawyers who accept certificates, and the list indicates if a lawyer speaks a language other than English. Otherwise, the Legal Aid office provides no details about factors that concern many applicants.

The Commission received many complaints about the difficulties racialized accused experience at this stage. The paucity of information available at Legal Aid offices led many applicants to try to question staff. Clients' frustration was obvious when staff members correctly explained that they could not give detailed information or make referrals to specific lawyers.<sup>35</sup>

Obviously, many white legal aid clients have no better formal sources of information about lawyers than clients from black and other racialized communities. Differences in past experiences of white and racialized applicants, however, may significantly affect their reaction to what they may perceive as unhelpful behaviour by service providers. Many black and other racialized Ontarians experience racism throughout their lives, and are particularly apprehensive about dealing with powerful authority systems such as the criminal justice system. They find that white people are often unaware of subtle racial factors that may influence criminal justice processes. Their experience of being racialized may be dismissed or denied. Even worse, sometimes white persons in positions of authority appear to harbour racialized assumptions and stereotypes.

Given this background, black and other racialized accused persons may be particularly anxious to find lawyers who accept and understand the problems of living in a racialized society. Sometimes this concern is expressed as a preference for a lawyer of the same racial origin. More often, however, black and other racialized accused persons simply wish to hire a lawyer, of any racial origin, who understands racism.

The Legal Aid Plan's capacity to address this problem effectively is limited. A system in which lawyers proclaim their professional empathy or anti-racism credentials is hard to envisage, but the problems that some racialized accused may face in finding a lawyer they trust should not be ignored. Useful initiatives could probably be developed by community-based agencies, which could maintain their own referral lists and informally share information with those persons who need a lawyer.

The Ontario Legal Aid Plan could help, however, by being mindful of the experience of racism when racialized clients apply to change their lawyers. At present, because a change in lawyers may be expensive, the Ontario Legal Aid Plan makes it difficult. Applicants are warned that change is permitted only in exceptional circumstances, one of which is when –

a client indicates that there is a complete breakdown of his or her relationship with counsel, and this is confirmed by counsel. The parties will be encouraged to reconcile, but if such an attempt is made and fails, then a change of solicitor will be permitted. Mere dissatisfaction will not be regarded as a complete breakdown.<sup>36</sup>

By requiring an accused to attempt reconciliation, the Ontario Legal Aid Plan may inadvertently exacerbate tensions over perceived racism. A racialized person who believes a lawyer acts in a racist manner may well view this requirement as disregard for concerns about racism. In such circumstances, attempted reconciliation is unlikely either to mend the relationship with the lawyer or to build confidence that the criminal justice system seriously opposes racism.

An official commentary on the policy regarding changing lawyers in non-family law cases directs Legal Aid area directors to take account of some special needs. For example, area directors are “to adopt a flexible approach for persons facing charges that upon conviction would result in a significant loss of liberty,” and must be “mindful of the vulnerability of refugee clients and the serious consequences of the refugee determination process.” We propose a similar approach for dealing with requests from accused who perceive the relationship with their lawyer to be tainted by racism. Area directors should be mindful of the subtleties of racism, and reconciliation should not be required where it would be pointless.

**6.10 The Commission recommends that the Ontario Legal Aid Plan direct area directors to take a flexible approach to requests for a change of lawyer if the client maintains that racism has caused the relationship with the lawyer to break down.**



## Pre-trial resolution – plea bargaining

Crown attorneys have discretion to reach agreements with defence counsel about how some matters arising from charges, such as a proposed sentence, will be presented to a judge. Typically, these agreements are based on an accused person giving up the right to make the state prove guilt at trial. In return for the accused's willingness to admit guilt in court on at least one charge, a crown attorney may, for example, agree to withdraw other charges against the accused or a co-accused, accept not guilty pleas to other charges, or propose jointly with defence counsel a less severe sentence than the accused is likely to receive if convicted after a trial.

Deep distrust of the system of resolution agreements, or plea bargaining as it is commonly known, was among the most recurrent themes of the Commission's public consultations. Parents alleged that some defence counsel either make no effort to investigate whether accused young people have plausible defences, or quickly seek to resolve cases without giving the accused time to consider the implications of a guilty plea. Representatives of linguistic minority communities, particularly those supporting victims, complained that criminal justice professionals too often seem concerned only with getting through the list of cases. They had little confidence that the resolution process entails careful consideration of all relevant factors to ensure justice. Accused persons reported concerns about police officers involved in a case entering the trial judge's office while defence and crown counsel were discussing pleas with the judge. Prisoners in several institutions insisted that sentences (if not trials) are orchestrated by crown and defence counsel, with the police playing a considerable role through overcharging (laying more charges than are warranted, or more serious charges, to encourage the accused to plead guilty to a lesser charge). Everywhere we went in the province, we found cynicism and pessimism about a process that many believed should be abolished.

Such opinions reflect the controversy that has always surrounded plea bargaining. Critics have attacked its secrecy, the risk that accused persons may be (implicitly) pressured into pleading guilty, the lack of procedural protections against coerced guilty pleas, and the potential for discrimination in outcomes. "The merits of the case take second place to the bargaining strength and skills of the parties," a Law Reform Commission working paper points out.<sup>37</sup>

Proponents of plea bargaining, by contrast, believe it is inherently desirable and benefits both the accused and the criminal justice system. Making this point, the *Martin Report* approvingly quotes a United States Supreme Court summary of the benefits of plea bargaining:

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct while on pre-trial release; and by shortening the time between charge and

disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.<sup>38</sup>

Having endorsed resolution discussions and agreements as useful, the Martin Committee made several recommendations to promote them.<sup>\*</sup> It proposes, for example, that crown attorneys and defence counsel have a professional obligation to meet and attempt to reach agreements. The Committee also recommends that crown attorneys should not set dates for preliminary hearings or trials before resolution discussions are held, unless the accused is in custody or the case is lengthy or complex. Again as part of the thrust to promote resolutions, judges are encouraged to participate in pre-trial conferences with crown and defence counsel<sup>†</sup> to reach agreements about any issue raised by the charges, including pleas and possible sentences.<sup>39</sup>

The official response to the *Martin Report* indicates that the Ontario criminal justice system is fully committed to the plea resolution process.<sup>40</sup> The problem remains, however, that accused persons excluded from the discussions may be highly suspicious of “deals” struck on their behalf. To many black and other racialized accused, such exclusion is one more reason to believe that the criminal justice system is attempting to hide mistreatment of them.

Three aspects of the resolution system are of particular concern. First, unrepresented accused offered a plea resolution may have little understanding of the case against them or how the evidence may affect a resolution proposal. Without full comprehension of the crown’s case, unrepresented accused are severely disadvantaged.

The second problem is the exclusion of accused persons from resolution discussions, especially the pre-trial conference where agreements may be reached affecting their fate.<sup>‡</sup> Obviously, the accused must assent to any such agreement before it is presented in court. In practice, however, many accused persons feel their lawyers attempt to “sell” the terms of an agreement that was drawn up without them. They complain that they do not know what transpired during negotiations, and feel they have little choice but to agree.

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\* Most of the recommendations concerning crown attorneys’ discretion are implemented as guidelines in the *Crown Policy Manual* released in January 1994. Many other recommendations, such as those involving judges, who are constitutionally independent of the Attorney General, or that require a *Criminal Code* amendment by the federal government, are being adopted in practice even if formal policies and procedures have not changed.

† Two types of pre-trial conferences can be found in the Ontario criminal justice system. One is mandated by s. 625.1 of the *Criminal Code*, which requires a pre-trial conference with a general division judge prior to any jury trial. The other is based on Rule 28.05 of the *Criminal Proceedings Rules*, which authorizes judges to conduct such conferences with the consent of the prosecutor and counsel for the accused.

‡ In the interests of promoting a frank exchange among the crown attorneys, defence counsel and judge, the Martin Committee chose not to recommend the presence of the accused, a court reporter or any other person in these meetings.



Third, serious concerns persist that accused persons have not always understood the nature or implications of a resolution agreement they are asked to accept. Such incomprehension has been widely reported by and on behalf of accused who have a lawyer, and is likely even more prevalent among unrepresented accused.

### ***Negotiating on a level playing field: full disclosure***

Accused persons have a constitutional right to disclosure of all relevant information the Crown has about the charges, whether the case is disposed of by trial or plea. Represented accused exercise this right through defence counsel, who obtain disclosure on their behalf, evaluate the information and determine whether a guilty plea is advisable. Unrepresented accused, by contrast, may not even know that the right to disclosure exists, still less how to obtain information from a crown attorney or how to assess it.

Even before the recent crisis in Legal Aid funding, both the proportion of unrepresented accused and pressure to use the resolution system were increasing. In particular, implementation of charge screening has considerably increased the number of charges dealt with summarily rather than by indictment. Because Legal Aid officials generally assume that conviction of a summary offence is unlikely to pose a serious risk to a person's "liberty or livelihood," fewer accused are being granted legal aid certificates.\* This change has also increased pressure to resolve pleas and other issues arising from summary prosecutions efficiently so that court and human resources may be released for the more serious charges prosecuted by indictment. This drive for efficiency might, for example, discourage use of the courts to decide issues that could be clarified or resolved by earlier discussion.

Many unrepresented accused are uninformed about the value of resolving anything and may not understand what issues require clarification. Disclosure of the Crown's case may help, but only if accused persons know how to use the information effectively. Clearly, most unrepresented accused will simply not be able to do so.

The Ontario Legal Aid Plan has responded to this problem by making duty counsel available as needed to assist unrepresented accused persons obtain disclosure. This service should be expanded and formalized. In particular, once approached by an accused, duty counsel should be responsible for securing disclosure from the crown and reviewing the information with the accused person, explaining the resolution process and summarizing the accused's options.

Information about duty counsel's ability to obtain disclosure should be communicated in the appropriate language to accused persons. Careful monitoring and evaluation of this service are necessary to ensure that unrepresented accused receive timely disclosure. As part of its monitoring, the Legal Aid Plan should

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\* Legal Aid officials have estimated that in some parts of Ontario the number of legal aid certificates issued has decreased by some 15 percent since the Martin recommendations were implemented.

solicit the views of accused persons as well as the perceptions of duty and crown counsel.

6.11 The Commission recommends that –

- a) the Ontario Legal Aid Plan be specially funded to ensure that duty counsel is able to assist unrepresented accused persons to obtain disclosure of the case against them.
- b) information about such duty counsel services be included in all official documents given to accused persons. This information should use plain language and be available in a variety of languages that reflect Ontario's linguistic diversity.
- c) Legal Aid area directors work together with local court administration committees and interested individuals and community groups to ensure that unrepresented accused obtain disclosure in a complete and timely fashion. The views of unrepresented accused persons should be surveyed, and an annual report should be published as part of the Legal Aid Plan's annual report.

### ***Attendance at pre-trial conferences***

When the accused is represented, the process for reaching a resolution may entail several preliminary discussions between crown and defence counsel. Towards the end of that process, the lawyers may be joined by a judge for a pre-trial conference that attempts to reach an agreement to present in court.\*

Generally, crown and defence counsel meet privately with a judge at a location that varies according to local resources. Some conferences are held in the judge's office (usually called "chambers"), some in a "motions" court, others in a courtroom outside regular court hours and without the public or a court reporter.

Accused who have counsel do not attend pre-trial conferences. The primary rationale for excluding them is that their presence may inhibit the informal and free-ranging discussions that are deemed the hallmark of productive pre-trial conferences.<sup>41</sup> The interests of the accused person are considered fully represented by defence counsel, who may arrange to have the accused available in the building for consultation. Other reasons sometimes given for exclusion of accused persons include security concerns and the need to exchange information that should remain confidential to protect an accused or someone else.

The strength and bitterness of community concerns about secrecy and allegations of betrayal during plea bargaining suggests that the traditional exclusion of accused persons should be re-thought. In practice, if not in law, a pre-trial conference is part of the trial. Moreover, at pre-trial conferences required by the *Criminal Code* – before jury trials – arrangements are made for the attendance of the accused in the

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\* Unless the parties agree otherwise, the judge who conducts a pre-trial conference is not the judge who ultimately conducts the trial or hears a guilty plea.



rare instances when the accused is unrepresented. Since justice requires that the accused be present throughout the trials, it would seem also to entail the right to attend the pre-trial conference.

However, the *Martin Report*, after extensive consultation with judges, lawyers and other criminal justice professionals, did not agree.<sup>42</sup> While the Commission believes that attendance of accused persons, if unreservedly adopted, could considerably enhance public confidence in the justice system, this is unlikely if legal professionals are not committed to it. Accordingly, as a preliminary measure, we suggest pilot projects that extend participation in pre-trial conferences to accused persons.

Such projects could be established across the province and could employ different types of inclusive pre-trial conferences. One pilot project might, for example, conduct all or part of the conference in open court; another might let accused persons be accompanied by a courtworker. Some projects should be attached to youth courts and provide for the attendance of a parent or guardian with or in place of the young person, unless the parent would be excluded from court proceedings under the *Young Offenders Act*.

Participants in the pilot projects should be regularly surveyed for their experiences and views. The projects should be fully evaluated after two years and successful models should be replicated across Ontario.

**6.12 The Commission recommends that –**

- a) pilot projects in which accused persons attend pre-trial conferences be established. Interpreters should be present if necessary.
- b) in cases involving accused persons charged under the *Young Offenders Act*, parents or guardians be entitled to attend such conferences, unless the Act would exclude them from court proceedings.
- c) surveys of all participants in these pilot projects be regularly conducted. Outcomes of these surveys should be reviewed by a consultative committee, which should report to the Attorney General after two years.

In some jurisdictions, a police officer involved in a case accompanies the crown attorney to the pre-trial conference. The standard justification for this practice is that the officer is usually in the best position to provide up-to-date information, such as explaining why full disclosure has not yet been made, or reporting the availability of witnesses or condition of the victim. Although the attendance of the officer may be benign, an accused person may perceive injustice in such a private meeting.

**6.13 The Commission recommends that a police officer connected with a prosecution should not participate in pre-trial conferences unless the accused person is present.**

### ***Plea comprehension inquiries***

When accused persons plead guilty, they waive the right to compel the state to establish guilt beyond a reasonable doubt. They may do so hoping their co-operation will be rewarded by a reduced sentence, because of remorse or a wish to take responsibility for an offence, to conclude the criminal process, to reduce the time spent in prison before conviction, or for many other reasons. Accused persons may also waive the right when they do not fully understand the implications of admitting guilt, are intimidated by the process, or because they feel pressured.<sup>43</sup>

As advocates for the accused, defence counsel are responsible for ensuring that their clients understand the nature and consequences of a guilty plea and freely consent to waive their right to a contested trial. When accused persons are not represented by counsel, responsibility for fair treatment of the accused passes to the judge. In this role, the judge is expected to satisfy herself or himself in open court that the accused understands and voluntarily consents to the plea.

Despite these protections, complaints that accused persons do not understand the implications of pleading guilty, or feel coerced into making a guilty plea are reported by and on behalf of represented as well as unrepresented accused. The Commission received several accounts of racialized accused being unduly pressured to plead guilty by the police, by various well-meaning but badly informed advisers, and by defence or duty counsel anxious to resolve the charges quickly. Many of these accounts echoed the findings of a Canadian Sentencing Commission study of the views of 129 Quebec prisoners about plea resolution:

These inmates indicated that in their view the outcome of any particular case was “fixed” in advance of the sentencing hearing. The sentencing decision was orchestrated by the police and crown attorney who worked in collaboration with defence counsel. These inmates were so concerned about the inability of defence counsel to protect their interests in all or most cases that they recommended the appointment of an independent third party to represent their views during plea negotiations.<sup>44</sup>

We also found concerns that many racialized accused are too bewildered or intimidated to speak up if they do not understand court proceedings. This problem is particularly widespread among accused from linguistic minority communities, but may also be experienced by English-speaking accused. Again, we found that the presence of defence counsel does not necessarily guarantee that accused persons understand the implications of pleading guilty or feel protected against injustice.

The Martin Committee proposed greater openness in court proceedings, recommending that crown attorneys should normally announce in court that resolution discussions took place and that an agreement was reached. The facts of a case should be fully presented at a plea or sentencing hearing after a pre-trial conference, it said.

As a further safeguard, the Committee proposed that judges conduct a “plea comprehension inquiry” in open court whenever a guilty plea is made.<sup>45</sup> This inquiry



is intended to ensure that the plea is voluntary and that an accused person understands the nature and consequences of a guilty plea and that the court is not bound by any resolution agreement. Importantly, the Committee recommended making such an inquiry even if an accused is represented by counsel.\*

The Commission fully endorses the plea comprehension inquiry whenever an accused pleads guilty. The inquiry should be conducted in language appropriate to the language skills, education level and age of an accused, and the questions should address three aspects: the accused's comprehension, voluntariness and understanding that the judge is not bound by any agreements. Young persons should also be asked if they have had an adequate opportunity to discuss the proposed plea with a parent or guardian in private; where appropriate, the parent or guardian should be asked the same questions.

Questions should be carefully designed to elicit signs of confusion or misunderstanding. To facilitate the development of clear and effective inquiries, the Ministry of the Attorney General should collect examples of inquiries used in Ontario and other jurisdictions, and submit them for rewriting into plain language and translation into a variety of languages that reflect Ontario's linguistic diversity. Inquiry questions in plain language should be made available to judges, and translations should be given to court interpreters.

#### **6.14 The Commission recommends that –**

- a) before accepting any plea of guilty, the presiding judge conduct an inquiry to ascertain the accused's comprehension of the nature and implications of the plea, voluntariness and understanding of the independence of the judge. This plea comprehension inquiry should be conducted in language appropriate to the age, education level and linguistic skills of the accused.
- b) the Ministry of the Attorney General collect written examples of plea comprehension inquiries for rewriting into plain language, and translate standard questions into various languages that reflect Ontario's linguistic diversity.
- c) the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to conduct a plea comprehension inquiry whenever an accused pleads guilty, regardless of whether the accused is represented by counsel.

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\* The *Martin Report* noted that when an accused is unrepresented, many judges were already making inquiries similar to those it recommended. Provincial Division Judge Ian A. MacDonnell has suggested questions that judges may use to ascertain voluntariness, comprehension of the plea and understanding of the judge's independence. (Ian A. MacDonnell, "Selected Sentencing Issues," paper prepared for the January 1994 Toronto Regional Seminar of the Ontario Court of Justice (Provincial Division) [on file]).

## Victims and charge management

### *Mandatory charging*

The dominant issue raised during our investigation into victims' concerns about charging practices was mandatory charging policies in family violence cases. These policies, now in effect at federal, provincial and local levels, respond to women's struggles to ensure that violence in the home is taken seriously. They generally direct the police to charge, and crown attorneys to prosecute, those who commit violent offences in a family setting. While exceptions are permitted in unusual circumstances, the policies are intended to reduce or eliminate both police discretion to handle such incidents informally and crown attorneys' discretion to withdraw charges or otherwise abandon prosecutions. Of particular importance is the directive that charges should be laid and prosecutions proceed even against the victim's wishes.

Many people view official recognition that the criminal justice system should play a significant role in the struggle against violence in the home as essential to realizing women's rights to live free of violence. Some advocates of victims who participated in the Commission's consultations made this point forcefully, although they also insisted that criminalizing abusers is only one aspect of a long-term solution. Services for women subjected to abuse, treatment of abusers, public education and prevention initiatives are all necessary to eliminate violence in the home.

Other advocates for abused women from racialized communities strongly supported those other initiatives, but were highly critical of mandatory charging policies.<sup>46</sup> Far from increasing the safety of women, they indicated, mandatory charging may be driving family abuse underground and so increase the danger for racialized women and their children. These advocates report that mandatory charging policies have reduced women's options, and that the policies lack credibility among many racialized women. These problems were said to make many racialized women even more vulnerable to abuse than if discretion were exercised.

Mandatory charging is perceived to have made women believe they have no choice or voice in charging and prosecution decisions. The danger is that women who do not want the abuser prosecuted may decide not to call the police when intervention is essential.

Many racialized women do not see the criminal justice system as an ally, but as an overly intrusive and destructive force. Though they might, at times, wish to call the police for assistance in calming a violent or potentially violent confrontation at home, they also want some control over the consequences of doing so. They want in particular to limit their subsequent involvement in the criminal justice system, which they may perceive as alien, overwhelming, and a source of yet more problems. A shelter worker put it this way:

"There is definitely an increase in the incidence of domestic violence in our society .... However, it would appear that women from the black and minority communities are less



protected, because there is also the added fear of turning to the police when they feel threatened. They are not only afraid for themselves, but they feel that their children could lose their father forever and that the situation could escalate into a much bigger problem.”

A joint submission from three women’s organizations took a wider view:

“Wife assault and violence against women need to be addressed in the context of racial oppression and police violence against marginalized communities .... The strategy of ‘wife assault as a crime’ is not responsive to the complexities of violence against women in the context of a racist society. We must carefully consider the consequences of calling for increased police involvement in ‘domestic violence’ situations and whether this will lead to a greater presence of the police in our communities and an increased risk of racist violence in the poorer, marginalized communities, such as public housing projects. We cannot afford to minimize or deny one form of violence women experience for the sake of another.”

But not all women (or women’s advocates) from racialized communities are sceptical of mandatory charging. Indeed, some suggested that the most serious problem is that directives to charge and prosecute are still not treated as mandatory. They said police officers may easily avoid charges in family violence cases by, for example, classifying incidents as breaches of the peace or causing a disturbance, and crown attorneys may abandon family violence prosecutions despite official policy.

The Commission believes that laying charges in cases of domestic violence should continue to be mandatory. The general principle behind mandatory charging is well motivated and appears to be working successfully in many communities. However, rigid adherence to this policy in the prosecutorial stage may have adverse consequences. When a woman decides that proceeding with prosecution will harm her, this decision should be respected.

**6.15 The Commission recommends that whenever crown attorneys are satisfied that a woman has decided voluntarily, and not as a result of coercion by the accused or others, that prosecution of an assault charge will harm her, her decision should be treated as constituting “exceptional circumstances” requiring withdrawal of the charges.**

### ***Justice services for victims and witnesses***

Many victims say that a vigorous response by the criminal justice system to loss or injury they have suffered would help restore their sense of dignity and well-being. Often, however, victims find their encounters with the criminal justice system a traumatic experience that intensifies anxiety and amounts to “secondary victimization.”

Victims complain about receiving little information about the progress of investigations or charges. If they are not required to appear as witnesses, no one

may bother to tell them when a suspect has been found. They may not even be informed of a prosecution or its outcome.

Victims who will appear as witnesses may also have unsatisfactory experiences. Inconvenient court dates may force victims to take time off work or make expensive child-care arrangements. Many victims arriving at court are confused. Court buildings are mysterious places, often crowded with people who seem too busy to help them find the right room or explain what will happen. Once inside the court, victims who have endured considerable stress in preparing themselves to give evidence may be disconcerted by repeated adjournments or last-minute guilty pleas. Above all, trials are often devastating for victims or witnesses who seek recognition of their suffering, because, as one noted expert states –

... it is the business of the defence ... to make [prosecution] witnesses appear so inconsistent, forgetful, muddled, spiteful or greedy that their words cannot safely be believed. Victims and defendants, prosecution and defence witnesses alike face accusations of mendacity, impropriety, and malice. Victims who come to court supposing that a trial will be an assertion of [the wrongs done to them] will discover that it is their probity that is at issue as well. In a contested trial they will almost certainly be exposed to a bruising interrogation in which there is no presumption that they are the injured party. At best they will be the alleged victim.<sup>47</sup>

In response to this problem of secondary victimization, Ontario has developed the Victim/Witness Assistance Program.<sup>\*</sup> This program is intended to make the criminal justice process less daunting and more responsive to victims who will appear as prosecution witnesses.<sup>48</sup> Its staff provide direct services to victims after charges are laid and until the court case concludes.

The Victim/Witness Assistance Program is funded from allocations to the Ontario Women's Directorate for its Sexual Assault and Wife Assault Initiatives, which has significant implications for the program's services. While Victim/Witness Assistance Program workers give basic information to any victim who contacts the program, its assistance and counselling services are intended primarily for victims of wife assault, sexual assault and child abuse offences.

The Victim/Witness Assistance Program provides victims with information and support during the charge management process, and prepares them for a contested trial. These functions typically include explaining charge management procedures and court practices, assisting communications with the crown attorney, and informing them of progress in a case.

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\* The program, which began in 1987, was initially funded through the Family Violence Initiatives of the Ontario Women's Directorate, and piloted in ten crown attorney's offices: Ottawa, Hamilton, Windsor, Kingston, Kenora, Sudbury, London, Pembroke, North York and Etobicoke. In 1989, services were extended to Scarborough and Newmarket.



The program has fared well in external program reviews. Its staff are viewed as empathetic, knowledgeable about the justice system and committed to their clients. The service is perceived as cost-effective, and surveys of both clients and professional groups indicate high levels of satisfaction.<sup>49</sup>

Missing from reviews of the Victim/Witness Assistance Program, however, is a substantial focus on its performance in meeting the needs of black and other racialized victims. Our investigation revealed two major concerns. First, as program staff themselves recognize, the Victim/Witness Assistance Program generally does not appear to be reaching many vulnerable women in black and other racialized communities. Second, arrangements for interpreter services are frequently ad hoc, so many women and children from racialized communities are less well served than English- and French-speaking clients.

The primary access barrier for black and other racialized victims is lack of information about the program. Previous reports have consistently found low levels of awareness of the Victim/Witness Assistance Program among racial minority organizations and individuals.<sup>50</sup> Program staff we interviewed admitted, "it is difficult to know if the message is getting through to the people who need it."<sup>51</sup> Commission research suggests that although information is reaching some women from racialized communities, more needs to be done.

While some community agencies serving racialized women reported that they received information about and made regular referrals to the Victim/Witness Assistance Program, most said they knew very little about the program and that their clients did not use it. Many commented that they had neither received information about the program nor been contacted by local program staff. Among those who had heard of the Victim/Witness Assistance Program, there was suspicion about its role. It was suggested, for example, that the program functions as an "arm of the government" and that it would primarily represent the interests of the justice system, if necessary at the expense of the victim.

We recognize that the Victim/Witness Assistance Program staff and many of their clients would vigorously contest such perceptions. We report the comments to illustrate the program's lack of credibility among black and other racialized women due to its low profile in their communities.

Many of the program's staff are aware of its failure to reach black and other racialized communities, and have begun to address the problem. Leaflets are now available in ten languages other than English and French, and some program co-ordinators, on their own initiative, have become active in organizations serving local racialized communities. To foster public education, head office staff and co-ordinators make themselves available to speak to community organizations.

To a large extent, however, the success of these efforts in reaching black and other racialized people depends on the imagination and drive of individual co-ordinators.

Groups that do not know of the Victim/Witness Assistance Program, for example, would not ask program workers to speak to them. Unless the Victim/Witness Assistance Program is funded to undertake a more active and systematic outreach, its services to victims from black and other racialized communities will likely continue to be unsatisfactory.

Since communication is the essence of the Victim/Witness Assistance Program, we were surprised to learn that its official mandate does not provide for cultural interpreter services.<sup>52</sup> Instead, each local office appears to make its own arrangements, according to the co-ordinator's perceptions of need and the services available. At some sites, the program co-ordinator has access to well-trained cultural interpreters. But at others, workers rely on volunteers from local agencies or court interpreters. Volunteer interpreters cannot be expected to be available whenever their services are needed. In addition, there is no guarantee of confidentiality and the quality of interpretation when volunteers are used. Such an essential service should not depend on volunteers.

Availability is also a problem at program sites that rely on court interpreters, whose primary responsibility is to assist proceedings inside the courtroom. At these sites, court interpreter assistance is available only when their services are not required by the court.

Many Victim/Witness Assistance Program staff recognize the specific needs of racialized women from linguistic minority communities, and attempt to accommodate them. But a more systematic response is required. Research into the linguistic needs of victims and witnesses in each region should be conducted, and deficiencies in service delivery should be identified and corrected. Since the crown attorney's office deals with a wider range of victims and witnesses than those who are referred to the program, the regional senior crown attorney should be responsible for this research and evaluation.

- 6.16 The Commission recommends that regional senior crown attorneys –**
- a) conduct annual surveys of local crown attorneys, staff and users of the Victim/Witness Assistance Program to determine linguistic needs of victims and witnesses in each region and identify deficiencies in the provision of translated information.**
  - b) work with the Victim/Witness Assistance Program, community-based agencies and the police to expand the distribution and dissemination of information about the program to racialized communities.**

Finally, like others who have examined the Victim/Witness Assistance Program, the Commission is impressed with the quality of its services. Victims and witnesses throughout Ontario should be able to use these services.



**6.17 The Commission recommends that the Victim/Witness Assistance Program be expanded to serve all of Ontario's trial courts and to include cultural interpretation services.**

## Endnotes

1. Ontario Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, chair, G.A. Martin ("*Martin Report*") (Toronto: Queen's Printer, 1993), p. 13.
2. *Ibid.*, p. 19
3. *Ibid.*
4. In addition to assigning police officers the duty of laying charges, the *Police Services Act* provides that "a police officer has the powers and duties ascribed to a constable at common law." R.S.O. 1990, c. P-15, s. 42(3).
5. *Criminal Code*, s. 334, as amended by S.C. 1994, c. 44, s. 20.
6. *Criminal Code*, s. 355, as amended by S.C. 1994, c. 44, s. 21.
7. *Criminal Code*, s. 430(1)(c) as amended by S.C. 1994, c. 44, s. 28.
8. *Criminal Code*, s. 335.
9. Ontario Ministry of the Solicitor General, "Police Response to Wife Assault," *Policing Standards Manual*, Jan. 19, 1994.
10. *R. v. Paul P.*, unreported reasons for judgment of Otter Prov. Div. J., Dec. 12, 1994 (on file).
11. Province of Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System, "Racial Minority Youth Processing in the Criminal Justice System," draft internal report, Feb. 21, 1994 (on file).
12. John A. Ditchfield, *Police Cautioning in England and Wales* (HMSO, 1976); Howard Parker, Maggie Cosburn and David Turnbull, *Receiving Juvenile Justice* (Oxford: Basil Blackwell, 1981); Jim Dignan, "Repairing the Damage," 32 *B.J. Crim.* (1992) 453; J. Mott, "Police Decisions for Dealing with Juvenile Offenders," 23 *B.J. Crim.* (1983) 249.
13. James M. McDonald, Terry A. O'Connell, David B. Moore and Edward Bransbury, *Convening Family Conferences: Training Manual* (Sydney, Australia: New South Wales Training Academy, 1994) p. 5.
14. The theory of reintegrative shaming is developed in John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).
15. *Ibid.*
16. *Ibid.*



17. Commission for Racial Equality, *Cautions v. Prosecutions: Ethnic Monitoring of Juveniles by Seven Police Forces* (London: 1992); see also, Roger Evans "Comparing Young Adult and Juvenile Cautioning in the Metropolitan Police District" [1993] Crim. L.R. 572.
18. See note 12; see also, Andrew Sanders, "The Limits to Diversion from Prosecution" (1988) 28 B.J. Crim. 513.
19. Ontario Ministry of Attorney General, *Crown Policy Manual*, January 1994.
20. Joseph de Fillipis, Federal Department of Justice (Toronto Region), letter of May 13, 1994, to Bruce Durno, president of the Criminal Lawyers Association (on file).
21. *Martin Report* (note 1), pp. 60–74; *Crown Policy Manual* (note 19), Policy C.S.1 (charge screening).
22. *Criminal Code*, ss. 536(2), (4), 555, 561(1). Under the Code, the state may also require a trial by jury, even if the accused objects (s. 568).
23. J.A. Osborne, "The Prosecutor's Discretion to Withdraw Criminal Cases in the Lower Courts," (1983) 25 Can. J. Crim. 55.
24. Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London: Routledge, 1991), p. 136.
25. *Martin Report* (note 1), p. 91.
26. *Crown Policy Manual* (note 19), p. 3.
27. "Protocol (Community Council Project)" agreement between the Department of Justice Canada (Toronto Regional Office) and Aboriginal Legal Services of Toronto, signed February 1994 (on file).
28. C-41, S.C. 1995 c. 22, Royal assent given July 13, 1995; not proclaimed in force as of this publication.
29. See note 27.
30. *Canadian Charter of Rights and Freedoms*, s. 10(b).
31. In *R. v. Bartle* (1994) 92 C.C.C. (3d) 289 and *R. v. Pozniak* (1994) 33 C.R. (4th) 49, the Supreme Court of Canada held that the form of caution issued to Ontario police officers in 1992 was constitutionally sufficient.
32. *R. v. Vanstaceghem* (1987) 36 C.C.C. (3d) 142. See also *R. v. Pozniak*; *R. v. Bartle* (1993) 81 C.C.C. (3d) 353 (Ont. C.A), which concerned English-speaking suspects who said they had not fully understood their rights after the police officers had read the caution. The Ontario Court of Appeal held that it is only "when there is something in the circumstances that indicates the accused did not fully understand his rights that further information must be imparted" (at 357).

33. R.S.O. 1990 c. L-9, s. 13(d) and Schedule 6 of the Legal Aid Regulations R.R.O. 1990, Reg. 710.
34. Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report* (Toronto: Law Society of Upper Canada, 1992), p. 4.
35. R.R.O. 1990, Reg. 710, s. 84(1). Under the Legal Aid Regulations (note 30), duty counsel face similar restrictions.
36. Ontario Legal Aid Plan, "Change of Solicitor in Non Family Law Cases," December 1994 (on file).
37. Law Reform Commission of Canada, "Criminal Procedure: Control of the Process: Working Paper No. 15" (Ottawa: Supply and Services, 1975), p. 46. By contrast, a working paper 15 years later stated that "... it would be a mistake to dismiss plea negotiation as a distasteful practice made necessary only by the unhappy reality of an overburdened criminal justice system. Plea negotiation is not an inherently shameful practice; it ought not, on a theoretical level, be characterized as a failure of principle." Law Reform Commission of Canada, "Plea Discussions and Agreements, Working Paper No. 60" (Ottawa: Supply and Services, 1989), p. 4. Since both views are expressed only in working papers, neither represents the Commission's official view.
38. *Santobello v. New York*, 92 S. Ct. (1971) 405 at 498, quoted in the *Martin Report* (note 1), p. 290.
39. *Martin Report* (note 1), recommendation 70.
40. Ontario Ministry of the Attorney General, *Community Policy Manual*, January 1994, Policy R-1: "Resolution Discussions."
41. *Martin Report* (note 1), pp. 357-361.
42. *Ibid.*
43. *R. v. K. (S.)*(1995) 99 C.C.C. (3d) 376 (Ont. C.A.).
44. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach – The Report of the Canadian Sentencing Commission* (Ottawa: Supply and Services, 1987), p. 409.
45. *Martin Report* (note 1), recommendations 55 and 56.
46. For a helpful presentation and insightful analysis of such views see, Dianne L. Martin and Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-criminalization of Wife Abuse," (1995) 8 *Canadian Journal of Women and the Law / Recherche Femme et Droit I.*"
47. Paul Rock "Witnesses and Space in a Crown Court," (1991) 31 B.J. Crim. 226, p. 267.
48. Ontario Ministry of the Attorney General, *Victim/Witness Assistance Program* (Toronto: Ministry of the Attorney General, Oct. 15, 1991).



49. Jamieson, Beals, Lalonde and Associates in collaboration with R.R. Ross Associates, *The Victim/Witness Assistance Program: A Client User Satisfaction Survey* (Toronto: Jamieson, Beals, Lalonde and Associates, 1987); A.R.A. Consulting Group, *Review of Appropriate Service Delivery Models to Meet the Needs of MAG Clients* (Toronto: A.R.A. Consulting Group, December 1991); Ontario Ministry of the Attorney General, *Report of the Social Justice Review Committee* (Toronto: Ministry of the Attorney General, 1992).
50. Ibid.
51. A summary of interviews of program staff and community members is in a Commission background research paper, *Victim/Witness Assistance Program – Research Report* March 1994 (on file).
52. *R. v. K. (S.)*(1995) 99 C.C.C. (3d) 376 (Ont. C.A.) (as per note 43).

## Chapter 7

# Court Dynamics

*[W]hether ... negative perceptions are well founded or not, we cannot be content to wring our hands and think it is all unfair. We must meet the challenge of those perceptions and, address them. We must be ever vigilant, constantly inquiring into our own conduct, and where bias exists, we must seek to eliminate it.*

– The Honourable Charles L. Dubin, Chief Justice of Ontario<sup>1</sup>

This chapter reports on courtroom dynamics and practices that cause people to experience or perceive racial injustice. Such perceptions are significant because the Ontario legal tradition has long held that public confidence is fundamental to an effective criminal justice system. Nowhere is this confidence more important than in the courts, where the entire criminal justice system's commitments to openness, accountability and equality are most visible.

The Commission's research indicates that many Ontarians perceive courts to be unfairly biased against black or other racialized persons.\* It also shows that judges and lawyers are generally aware of these views, at least insofar as they are held by racialized persons. More than eight in ten defence counsel and five in ten general division judges surveyed by the Commission, for example, recognize that racialized persons perceive unfairness in the courts.†

In recent years, judges of the Ontario Court of Appeal, and the Supreme Court of Canada have also acknowledged perceptions of racial injustice in courts (as well as systemic biases in practices).<sup>2</sup> For example, one reason Mr. Justice Doherty,

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\* See Chapter 2 regarding the Commission's survey of black, white and Chinese residents of Metro Toronto, which found that significant proportions of all three groups think judges treat black or Chinese people worse than white people.

† We asked defence counsel if they agree or disagree that "racial minorities often *think* they are treated unfairly by the courts." Ninety-one percent of lawyers with substantial racial minority clienteles and 83 percent of other lawyers agree or strongly agree. General division judges were asked explicitly to compare the perceptions of white and racial minority persons. Fifty-three percent agree or strongly agree that "racial minorities think they are treated unfairly by the courts more often than white people."



speaking for the Ontario Court of Appeal, gives for permitting a black accused person to question potential jury members about racist attitudes is that –

[m]any blacks perceive the criminal justice system as inherently racist. A refusal to allow a black accused to even raise the possibility of racial discrimination with prospective jurors can only enhance that perception. By allowing the question, the court acknowledges that the accused's perception is worthy of consideration.<sup>3</sup>

As our findings reported in Chapter 2 show, however, many Ontario trial judges and lawyers do not share the Ontario Court of Appeal's respect for and willingness to address perceptions of systemic racism in the courts. Some react instead by insisting the perceptions are groundless, not widely held or insignificant because they are based on anecdotes. Comments by two general division judges surveyed by the Commission illustrate what we heard from many other lawyers and judges:

"I strongly disagree with those who allege there is systemic discrimination and racism in the court system in Ontario. There will always be anecdotal evidence to this effect, but the hard evidence is exactly to the contrary. My extensive experience is that judges, lawyers and court personnel treat all people coming into conflict with the law in the same way."

"I anticipate that the Commission, driven by the force of political correctness, will find that racism is rampant in the justice system – a conclusion that will not be based on hard evidence but, like Stephen Lewis's letter, on anecdote and unsubstantiated complaint. Failing all else, the Commission will find invisible racism – visible only to the commissioners."

Defensive reactions such as these may reflect a view that systemic racism exists only where decisions about white and racialized accused in similar circumstances consistently produce different results, and a belief that no such differences occur in the Ontario criminal justice system. Evidence of such differences is obviously important for identifying discriminatory practice, which is one important form of systemic racism. As we show in other chapters, evidence exists of racial discrimination in the Ontario criminal justice system.

But to treat differential outcomes as the sole valid indication of systemic racism is to overlook the significance of the *appearance* of injustice to users and observers of the court system. Beliefs about injustice in courts are sustained by how individuals experience the court system and how they report their experiences to others. Thus the appearance of injustice is largely formed by perceptions and fed by anecdotes.

Clearly, the public's knowledge and experiences of courtroom dynamics – as expressed in anecdotes and perceptions – are drawn from limited information. But they are not, for this reason, invalid. Nor are they less worthy of respect than the knowledge and experience of criminal justice professionals, which are limited in a different sense. Persons who regularly work in the courts have greater exposure to courtroom dynamics and practices than individual accused persons, victims,

witnesses, and their friends and families. More exposure, however, may not help professionals to understand the problems and injustices that users and observers notice. Familiarity with court routines may dull awareness of their impact and block awareness of how courtroom environments and procedures are experienced by persons subjected to them.

Others have documented community perceptions of injustice in courts;<sup>4</sup> the Commission's task is to suggest remedies. Mindful of this goal, we organized our research to identify courtroom practices and interactions that contribute to the appearance of racial injustice. To this end we observed court proceedings, conducted surveys, reviewed submissions, analyzed transcripts of trials, sentencing and bail hearings, and consulted with crown attorneys, defence and duty counsel, justices of the peace, interpreters and representatives of community agencies active in criminal justice issues.

We begin by documenting a problem that we found with surprising frequency: judges, justices of the peace and lawyers referring to the foreign origins of accused persons (and sometimes also of victims or other witnesses) in open court. Sometimes the reference is obviously intended to be benign, in some instances it is linked to a legally relevant issue. More frequently, however, it is hard to discern any legitimate purpose – and occasionally, foreignness is an explicit reason for a harsh decision about an accused person. This tendency for some judges and lawyers to act as if a person's origin matters to the criminal justice system when it should not, results in a sense of exclusion amongst members of racialized communities and a lack of confidence that the system treats everyone equally.

We then turn to various ways in which racialized persons experience courtroom practices and dynamics as exclusionary, emphasizing communication failures and other barriers to understanding. This section also addresses the image of justice as a white institution, conveyed by under-representation of black or other racialized persons among jurors, judges and lawyers. The chapter closes with discussion of the court ceremony that is used to “bind the conscience” of witnesses: the oath or solemn affirmation.

Our focus throughout is the systemic aspect of practices that alienate or exclude. While we illustrate specific problems with examples of individual behaviours, our concern is the extent to which the system shows that racism is not tolerated and actively demonstrates commitments to inclusion and racial equality. In taking this approach, we adopt the views of senior judicial officials of England and Wales that judges and lawyers must treat what other people think of their conduct with the utmost seriousness. As the Lord Chancellor recognized –

Offence may sometimes be caused not because we are prejudiced but amongst people of goodwill it is much more likely that in many situations we are totally unaware that others view our particular actions as prejudiced. We need to inform ourselves on these matters as well as we can.<sup>5</sup>



And as the Lord Chief Justice of England and Wales recently stated, ensuring that courts are experienced as fair and inclusionary may require an active commitment to learning:

I am quite sure that all judges would wish to treat everyone who comes before them, in whatever capacity, on equal terms. But I suspect there is a perception by judges, just as by others, that to treat ethnic minorities fairly needs no more than good manners and patience.

In fact, there is a great deal more to understanding the feelings and concerns of ethnic minorities than simply being polite and patient. There is a good deal of knowledge which is not generally understood about the culture, the language (by which I mean both oral and body language) and the sensitivities of various ethnic minorities. Much of this knowledge cannot be picked up merely through [judicial] experience.<sup>6</sup>

## Uses of foreignness in Ontario criminal courts

The tendency for judges, justices of peace and lawyers to refer to individuals' foreign origins or ethnic background is a significant cause of perceptions of racial injustice in the courts. Upon hearing or learning of such references, racialized persons assume that origin must matter to the criminal justice system – or else the statements would not be made – but it is hard to know what legitimate goals are served by reference to it.

In many cases, it would not be easy for justice professionals to explain why they feel the need to talk about “foreignness.” Only in the most limited circumstances does the *Criminal Code* treat citizenship or place of origin as relevant to criminal proceedings. Nor does the legislation define immigration status as directly relevant to decisions. Even where, as in the bail system, status is raised indirectly, the legally relevant issue is residence, not foreign origins.\*

### ***Basic findings about references to foreignness***

Despite the *Criminal Code's* silence on the relevance of citizenship, immigration status, place of birth or origin to criminal proceedings, our research shows that these matters are routinely raised in court. We found that references to foreignness are not restricted to persons whose residential status in Canada is questionable, nor are they limited to bail court. A study of proceedings in Metro Toronto courts, for example, found that references to country of origin, immigration status, years in Canada and

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\* Persons charged with indictable offences who are not “ordinarily resident” in Canada are subject to the reverse onus bail procedure, in which they must “show cause” for release. In the standard procedure, a crown attorney must show cause for detention (see Chapter 5). In addition, any person who is not ordinarily resident in Ontario, (or within 200 km of the court) may be required to deposit a sum of money as a condition of release on bail, but cash deposits are otherwise unusual.

other indications of “foreignness” occurred in a third of non-bail hearings involving black or other racialized accused and 28 percent of bail hearings.\*

A small minority (3%) of the references to foreignness observed in non-bail hearings were clearly negative; these were about as frequent in cases involving white accused persons as black or “other racial minority” accused persons. References to foreignness classified as “neutral or positive” occurred in 44% of cases involving “other racial minority” accused persons, 21% of cases involving black accused persons and 9% of cases involving white accused. These references are frequently gratuitous. They might take the form “Mr. X has been gainfully employed since he came to Canada 20 years ago,” or simply mention the accused person’s place of birth or years in Canada. Though apparently benign, they may lead listeners to wonder why information about an accused person’s origins matters to the criminal courts.

Findings of the Commission’s surveys of judges and defence counsel also suggest that references to foreignness are more common in cases involving racialized accused persons than white accused. We asked defence counsel and provincial division judges if “in general racial minority accused are questioned about their immigration status and country of origin more frequently than white accused.” More than four in five defence counsel with a substantial racial minority clientele<sup>†</sup> and two-thirds of other defence counsel agree with this statement, as do half of the provincial division judges. General division judges and crown attorneys were asked the same question, specifically with regard to bail hearings.<sup>‡</sup> More than two in five general division judges at least somewhat agree that during these hearings, racial minority accused are questioned about immigration status and country of origin more frequently than white accused.

Crown attorneys clearly do not have the same perception as judges or defence counsel. Only one crown attorney (0.5%) agrees that a difference in frequency of questioning exists while 82% disagree, most of them strongly.

The Commission conducted a more detailed examination of references to foreignness in all 101 bail review and variation applications made in January 1994

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\* The study observed 217 court processes in various courts that serve parts of Metro with large black or other racialized communities. The researcher coded the accused as a white person in 113 proceedings (52 percent), as black in 56 (26 percent) and as a member of another racial minority community in 48 (22 percent). Details of this study are in the Commission’s Technical Volume. See Appendix B.

† We define a substantial racial minority clientele to mean 40 percent or more of the defence counsel’s clients.

‡ The question focused on bail hearings as a result of discussions with general division judges assigned to facilitate the Commission’s work. Their concern was that unless general division judges were asked specifically about bail, they might draw on experiences with extradition hearings, where questions about origin are commonly asked. The final version of the crown attorney survey simply adopted this version of the question.



to the Ontario Court (General Division) in Metro Toronto.\* This study shows a different pattern of comments from the court observation. Of the 92 transcripts that were available, 62 (68%) contained references to foreignness. Within this sample, bail hearing transcripts for four out of five "Asian" accused persons, but only one out of ten "South Asian" accused, had such a comment.† Transcripts of bail hearings involving black or white accused were in the middle; references to foreignness were made in about half the cases for both groups.

Many of these references appear to be informational, such as a crown attorney or defence lawyer simply stating that the accused "is a landed immigrant" or that the accused "was born in ..." (another country or non-Canadian city). The relevance of the information in most of these cases is unclear, and sometimes the reference seems bizarre. One transcript notes, for example, the foreign birth of an accused person whose family moved to Canada when he was two years old, more than 40 years before the incident responsible for his court appearance. Another transcript shows a justice of the peace asking an accused person who had lived in Canada for 24 years why he was not yet a Canadian citizen.

Perhaps the most troubling transcripts show lawyers referring to the immigration status of black or other racialized *Canadians*. In one case a crown attorney said of a young Asian male: "He was born in Winnipeg. His immigration status is ... he is a citizen." Another transcript records the following exchange between defence counsel and young black accused:

DEFENCE COUNSEL: What is your status in Canada?

BLACK ACCUSED PERSON: I'm a Canadian, well ... I was born here...

In both examples, the lawyers' words create doubt, however momentarily, about the Canadian identity of the accused person; and in the second example, that doubt appears to be communicated to the black client. Statements such as these, whatever their motives, send subtle and unpleasant messages to black and other racialized Canadians. They suggest that the speaker, who represents the justice system to them, believes persons who are not white are outsiders whose rights to belong to the Canadian community must be established. Equally troubling, both lawyers implied that citizenship is, in some unexplained way, relevant to bail decisions.

These studies leave no doubt that lawyers, judges, or justices of the peace regularly refer to the supposed "foreignness" of accused persons from racialized communities

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\* In most cases, a transcript of the bail hearing was filed as part of an application for review or variation of the decision. We added information about each accused, the offence charged, the outcome of the original hearing, the result of the application, any references to place of birth/origin, citizenship, immigration status, or other indication of foreignness. If such references occurred, we also noted whether the crown attorney, defence or duty counsel, or bail justice made them.

† We describe as "Asian" accused persons whom the Metropolitan Toronto police had classified as "yellow." We describe as "South Asian" accused persons whom the police had classified as "brown."

in irrelevant or inappropriate ways. Why are these references made? What are their underlying purposes?

### ***Explanations of references to foreignness***

The Commission's research discloses three basic patterns, which we describe as "bad apple," "hidden agenda" and "apparently benign" uses of foreignness:

- "Bad apple" cases involve references to an accused person's foreignness that are obviously hostile, suggesting bias, bigotry or plain stupidity. We found the most blatant examples of this problem in the reasons for sentence given by a few judges.
- "Hidden agenda" uses of foreignness are more subtle and mostly appear in crown attorneys' submissions or questions, although they may also be used by defence counsel. In these cases, lawyers refer to foreignness in hopes of prompting an adverse reaction to an individual on the part of a judge, jury or justice of the peace.
- "Apparently benign" references to foreignness seem sympathetic to an accused person and are generally intended to justify a favourable outcome. They may be made by judges, justices of the peace or crown attorneys, but are mostly found in the submissions and questions of defence or duty counsel.

### **"Bad apple" cases**

Blatantly hostile references to foreignness or ethnicity and other racist comments made by a judge do great damage to public confidence in the criminal justice system. More than any other legal professionals, judges represent the criminal justice system to the wider public and epitomize its values. When a judge speaks of a racialized person as different and unequal to a "real," "proper," "ordinary" or "white" Canadian, the comment threatens the integrity of the entire criminal justice system.

Three examples, drawn from transcripts made available to the Commission, illustrate comments likely to have this effect. In the first two examples the Commission has no evidence about what provoked the judge's remarks. The third example shows the judge reacting to a crown attorney's apparently innocuous reference to the offender's country of birth.

#### **Example A**

THE COURT: It is said on behalf of one of the accused that there are no aggravating factors to be considered. I respectfully disagree. A sexual assault itself, the sexual nature of it, is a very aggravating factor. Three male persons overpowered the victim. They did so at night. *They did it to a stranger and not one of their own, and when I say one of their own, somebody they knew or a member of the – or a person who was a person of the group of the ethnic origin of both the accused.*<sup>7</sup> (emphasis added)



In this shocking example, the judge clearly suggests that ethnicity matters to seriousness of the crime, and hence to the sentence. It is hard to know, however, exactly what he had in mind. Does the judge mean that the sexual assault would have been less serious if the men had preyed on a woman of their own ethnicity? Or is he saying that sexual assaults of women who belong to that particular ethnic group are generally less serious than sexual assaults of women of other ethnicities? Either interpretation is strange, both suggest that an explicitly racist criterion influenced the judge's sentencing decision.

### Example B

THE COURT: In Toronto, in these courtrooms, sometimes I send young men from Vietnam to jail rather severely on offences. They've been in Canada a short time, they've been in Canada a year or two or three, and I have to work out a kind of sentence that appears to have no bias. We're supposed to treat everyone in front of us the same way. Again and again I have to lay out – thankfully not again and again – but often I have to lay out sentences trying to make it clear in the circumstances of recent immigrants' arrival into Canada, on a charge of threatening or extortion, that's sometimes connected with Vietnamese gangs and sometimes with not too much evidence in front of me on a sentencing hearing. I lay out some severe sentences that perhaps wouldn't apply in the same set of facts with someone who'd been in Canada 20 or 30 years.<sup>8</sup>

Again, the judge's comment is shocking. Does he really mean that offenders who have recently immigrated from Vietnam should be sentenced more harshly than other offenders? Such a sentencing principle could not possibly be lawful, but appears to be exactly what the judge is saying.

### Example C

An offender with a prior conviction for "possession of burglar's tools" was charged and convicted after the theft of four hub caps from a car. He had moved to Canada at age six, 13 years before the incident that had brought him before the court. His lawyer had not brought this fact out during the trial, because he "thought it was irrelevant." But the crown attorney, while proposing jointly with defence counsel that the offender be fined and placed on probation rather than incarcerated, mentioned that the defendant was born in China. The judge seized on this passing reference to justify a prison sentence:

THE COURT: The most recent report I had [about criminal proceedings in China] was of a gentleman convicted in Beijing for putting white wine in the mai tai bottles and selling it. You know what the penalty he received was. Prostitution among other crimes have been similarly punished. So perhaps Mr. Ho's at the stage where he'll have to learn that even our society is not quite as weak as he thinks it is ....

He's from China, I understand that, but it is still Canada .... People have to obey the law ....

[TO THE DEFENDANT]: You come from Canton, you were born there and you've lived long enough to know what the law is like there. [In] the most recent reported case that I've found ... a gentleman put white wine in the mai tai bottles and sold it as mai tai. The penalty that he received was that of execution by a bullet in the back of the neck. So, you know what the rules are there, and I'm sure that you're thinking that you've come to a very soft society and will just get a slap on the wrist. Now, we don't deal with criminals in the same way, but you've still got to be dealt with as a criminal because that's what you are ...

You've brought dishonour on your father's name and you know the cruellest form of oath in China .... You have got to learn, sir, that this is a country where the laws must be obeyed. You will be given credit for the time you spent in pre-trial custody, namely six days ... You will be sentenced to a period of incarceration of nine days.<sup>9</sup>

It is obvious from these comments that the accused, who had grown up in Canada, was sentenced to jail because he was presumed to be foreign. Indeed the judge explicitly used this presumed foreignness to justify disregarding the sentence proposed by the crown attorney and defence counsel. While judges are not required to accept joint sentencing submissions, they are expected to take them seriously.<sup>10</sup> Generally, judges accept such sentencing proposals unless they believe a submission overlooks an important fact about the crime or the accused. Based on the judge's remarks, it appears that he considered the accused's presumed foreignness a factor that justifies a more severe sentence than normal.

Responses to the Commission surveys, and experiences recounted during consultations with lawyers, confirm that a small minority of judges are known to be what we term "bad apples." We were told repeatedly that indications of presumed foreignness such as race, culture, colour and country of origin routinely result in adverse comments or decisions by these judges.

- A duty counsel who participated in a Commission focus group said:

"I've had problems with one particular judge on a number of occasions. For example, I had a young Vietnamese client who was charged with theft. The judge proceeded to comment that he had read in a New York paper how Vietnamese gangs were taking over the streets. There wasn't a suggestion that this young person was in a gang, or that he was a member of a Vietnamese gang, or that he came from New York ... This judge makes comments like that quite frequently."

- Two crown attorneys who responded to the Commission's surveys stated:

"As a woman and a member of a religious minority ... I have experienced some very glaring examples of overt racism and sexism from judges .... But these individuals are in a minority; most people are very aware of the special needs of minority persons and are not racist. Most racist behaviour, unfortunately, stems from the bench."



“Judicial conduct needs to be better scrutinized. Where judges or justices of the peace make inappropriate comments, etc., the matter should be dealt with. At present, although certain individuals are notorious, nothing is done by the system. By tolerating their behaviour, it is condoned, continues and increases.”

- Defence counsel who responded to the Commission survey stated:

“Most criminal defence lawyers know of judges who have a reputation for holding racist views, and being biased against certain groups (Jews, blacks, etc.) ... If you have a non-white accused, you may do everything to avoid a particular judge, or to work out a joint submission with a crown on a plea or be careful to preserve avenues of appeal on a trial.”

“Most judges do not see colour but some do. Get rid of the bigots!”

“The most overtly racist judge in Ontario is Judge X. He should be told to stop or be fired. Most judges want to do the right thing, but they don’t always know how.”

The significance of racist remarks made by judges in court, even if infrequent, cannot be over-emphasized. While many people find such remarks offensive, racialized persons who experience or hear about them may feel outrage and shock, a deep sense of injury and, sometimes, fear. They tell their friends, families, colleagues and neighbours about what happened. Stories circulate quickly and gain force as they are told and retold.

This classic human response highlights two important points. First, though members of racialized communities may generally believe that courts, like other social institutions, are systemically racist, they do not expect to encounter explicit racism in an Ontario courtroom. They relate their experiences, which are then circulated within the community, precisely because explicitly racist behaviour is *not* supposed to occur in court. In effect, the stark contrast between expecting fair treatment and experiencing a racist remark causes such judicial comments to have a profound and pervasive impact.

Second, it is not so much the frequency of racist incidents in courts as the criminal justice system’s reaction – or lack of reaction – that sustains perceptions of systemic racism. Few Ontarians believe that all judges routinely make explicitly racist comments in open court. But many are concerned that the criminal justice system seems to accept or tolerate such behaviour when it occurs.

People may conclude that the court system accepts explicit racism in its operations when no public reaction to racist remarks occurs. They may believe the system tolerates explicit racism if lawyers or judges suggest such incidents are so rare they should be ignored. Perhaps some judges privately attempt to speak to their offending colleagues, and lawyers likely develop strategies for minimizing the harm that judges with racist views might do. Unfortunately, however, members of the wider

community have no means of knowing about private responses and successful avoidance strategies. Instead, they experience the justice system as denying or disregarding, and hence tolerating, inexcusable conduct.

One problem is that the criminal justice system's response to judicial misconduct relies entirely on complaints. Unless a formal complaint is filed with a judicial council, even a blatantly racist act elicits no institutional response. Indeed, no such complaint was filed in any of the three examples cited above. It is not sufficient simply to refer to the existence of a complaints process when such conduct is allowed to continue. The failure of the victim of a racist act to complain does not end the problem, since the act reflects badly upon all those within the criminal justice system – no matter how many are acting with fairness, diligence and integrity – as long as it is unopposed.

Commission consultations convinced us that the system's perceived failure to react to explicit racism in the courts has a devastating impact on public confidence. No right-thinking member of the bar or bench condones or excuses judges making racist, bigoted or biased remarks in court. However, the criminal justice system must have a process for demonstrating publicly that racism will not be tolerated wherever on whenever it occurs.

Such a process must have three main elements, all of which must be widely publicized within the community. These elements are standards of judicial behaviour; mechanisms to report judges who fail to meet the expectations; and effective procedures for responding to inappropriate judicial conduct.

For some time, the court system has had procedures to deal with individual complaints about provincial and general division judges, but these procedures are not well known. For example, the Commission's population survey asked white, black and Chinese residents of Metro Toronto if they had ever heard of "the Canadian or Ontario Judicial Council that investigates complaints against judges." Responses show that less than half of white (44%) and black (45%) residents, and only a fifth of Chinese (21%) residents even know that these complaints bodies exist.\*

Recent reforms to the legislation governing provincial division judges, implemented partially in response to ongoing public complaints about inappropriate conduct by some judges, may improve public confidence in the court system. These changes empower the chief judge of the provincial division, with the approval of the Ontario Judicial Council, to establish and publicize standards of judicial conduct and

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\* Awareness of complaints mechanisms concerning the police was considerably higher among all three groups: 71% of white respondents, 62% of black respondents and 39% of Chinese respondents report having heard of "the Public Complaints Commission that investigates complaints against the police in Metro Toronto." A high proportion of white respondents (71%), but not black (42%) or Chinese (29%), report awareness of the Law Society of Upper Canada, which handles complaints about lawyers.



appraise performance.<sup>11</sup> One of the stated goals of the standards is “ensuring judges’ conduct is consistent with the respect accorded to them.” Another is “enhancing equality and sense of inclusion in the justice system.”<sup>12</sup> To the extent that action based on these provisions informs the public of the standards expected of judges, they should contribute significantly to public confidence.\*

Public evidence that in practice the system upholds its standards is also fundamentally important. Again, recent changes in the procedures for handling complaints against provincial division judges are a considerable improvement. In particular, the new system significantly expands lay membership of the Ontario Judicial Council. It also mandates the Council to publicize widely information about itself and the complaints procedure, and to assist those who need help with written complaints. The Council is responsible for overcoming cultural and linguistic barriers that might otherwise preclude potential complaints.† Full implementation of the new system should enhance public confidence that users’ complaints about provincial division judges will be taken seriously.

We are concerned, however, that the existing complaints systems may be inadequate to deal with even explicitly racist judicial conduct. These systems rely upon the offended person or a third party to file a written complaint. Defence counsel may view filing a complaint on behalf of a client as time-consuming and potentially jeopardizing future cases before the judge in question and, possibly, some of the judge’s colleagues. Crown attorneys may well have similar views. Other judges may be the last to hear of problems and, in any event, may be unwilling to file a complaint against a colleague. Accused persons may view a judge’s racist comments as being low on the scale of problems they face, and their court experience may leave them too intimidated to challenge a judge’s conduct.

Nevertheless, it is crucial to the integrity of the criminal justice system that every racist act by a judge be taken seriously. An adversary system often leaves one side or the other unhappy with interim rulings, the adjudication of guilt and any sentence. A “loss” may generate a feeling of unfairness or suspicion of favour to the other side. Indeed, the vast majority of complaints about judges relate to perceived errors (as opposed to misconduct) for which the proper remedy is an appeal.

However, racist (as well as sexist) conduct falls in a different category. The inherent threat to the integrity of the criminal justice system reported in such allegations demands a more welcoming and proactive approach. A model more related to human rights legislation is desirable. An office should be available to investigate

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\* Draft standards have been circulated for commentary.

† The amendments to the *Courts of Justice Act* also create statutory procedures for investigating and deciding on complaints (ss.51.3–51.6), increase the range of dispositions available when a complaint is upheld (ss.51.6 and 51.8), and require the chief judge of the Provincial Division to establish (and the Judicial Council to approve) a plan of continuing education for judges to maintain and develop professional competence, social awareness and personal growth (s.51.10).

allegations of racist conduct on the part of judges and lawyers in order to determine whether a formal complaint should be filed with the Canadian or Ontario Judicial Council or the Law Society of Upper Canada. The parties directly affected, other observers or even other members of the community should be able to initiate such investigations.

The public should be informed that complaints may be filed anonymously or confidentially. As our examples demonstrate, an investigation may require no more than an examination of the transcript or listening to a tape of the proceedings. Where there are potential disputes of fact, however, anonymous complaints would have to be dismissed. In the case of confidential complaints, the person initiating the process should have the option of personally filing the complaint with the appropriate body (thereby foregoing confidentiality) or having the investigation terminated without such a formal complaint.

When judges make racist comments in open court, the public might wonder what they say in private to their colleagues or to others. The vast majority of judges who do not make or condone such racist comments should exert peer pressure on their offending colleagues, wherever possible, to make such conduct simply unacceptable. The same applies to lawyers. Indeed, it would be desirable for the Law Society of Upper Canada to establish an ethical obligation, together with practical guidelines, to govern lawyers' conduct when they observe racist acts.

Also, the Ministry of the Attorney General should establish similar guidelines for other court employees. The basic principle is that no participant in the criminal justice system should tolerate misconduct on the part of other participants that damages the integrity of that system.

#### **7.1 The Commission recommends that –**

- a) the Law Society of Upper Canada establish a complaints office where anonymous or confidential complaints about racist conduct by judges or lawyers may be filed.**
- b) this office informally investigate such complaints and, where they are confirmed, file a formal complaint with the Ontario or Canadian Judicial Council in the case of a judge, or initiate disciplinary proceedings in the case of a lawyer.**
- c) the confidentiality of the complainant be protected. When a factual dispute arises the complainant should be advised that further processing of the complaint requires filing it directly with the appropriate body.**
- d) lawyers be under an ethical obligation to report to the complaints office any racist conduct they observe on the part of a judge, lawyer, other officer or employee of the courts.**
- e) all other officers and employees of the courts also be encouraged to report any racist conduct to the complaints office.**



**7.2 The Commission recommends that the Law Society widely publish information about itself and the complaints mechanism, including information about how to obtain assistance in making complaints. In providing such information, the Law Society should strive to eliminate cultural and linguistic barriers and, where necessary, help members of the public in preparing formal complaints.**

**7.3 The Commission recommends that –**

**a) the Law Society of Upper Canada establish an ethical obligation, together with practical guidelines, to govern lawyers' conduct when they observe racist acts.**

**b) judges and lawyers take every available opportunity to counsel any colleagues who make racist comments, even outside the courtroom, that such statements are unacceptable and reflect badly on the Ontario criminal justice system.**

### **“Hidden agenda” cases**

Some uses of “foreignness” in courts reflect a more subtle motive than the explicitly racist examples above. In these cases, lawyers draw attention to a person’s (often presumed) foreignness in hopes of eliciting an adverse reaction to the individual from a judge, jury or justice of the peace. These “hidden agenda” references to foreignness are typically used by crown attorneys about accused persons, or sometimes about witnesses.

Lawyers consulted by the Commission said this type of reference to foreignness is much more common than what we term “bad apple” cases, and is also harder to control. Crown attorneys and defence counsel who use foreignness in this way are not likely to admit it, they point out, nor are many judges or justices of the peace likely to talk about these attempts to manipulate them. Sometimes the “hidden agenda” is unmistakable, however, as a duty counsel explained during a Commission focus group:

“We have all experienced the same scenario – anyone who has had any length of experience in the criminal justice system knows about it. For example, Jamaican males who are landed immigrants are presumed to have a certain lifestyle. They are such an easy target for a crown attorney. The crown attorney is aware that the [justice] making a decision, who they want to [obtain] a detention order from, has these values of nuclear family – support, obligation, stability [in] a particular residence for a long period of time.

“What the crown can do is simply exploit that factor. If the person is sending money to Jamaica to support children or other family, immediately the question arises: ‘where is your money coming from?’ If they don’t send money to support relatives or family, then immediately the question is ‘why not? Where is your moral responsibility to your family?’ The question is meant to suggest that the accused lacks something in his character that the court should be concerned about.”

Another duty counsel, also commenting on the uses of “Jamaican” ethnicity by some crown attorneys, spoke of other adverse interpretations:

“The crown will ask things like ‘have you got any kids?’, and the accused may have kids who don’t have the same mother. Then the crown may use the term ‘baby mother’ and you watch the JP sneer. There is a perception that this guy is running a harem and is totally irresponsible.”

“The other perception is that people who have kids back in Jamaica and are sending money home are a flight risk. The crown will jump to the conclusion that the accused is going to go back to his kids and so seek detention.”

Duty counsel also talked about crown attorneys who draw attention to foreignness through gestures:

“Some crown attorneys display apparent disgust over responses from someone who has a cultural accent or for whom English is not the first language. If they don’t get the response they want quickly, they throw up their hands to indicate, obviously, to the justice of peace that this person is not responding to the crown attorney’s questions truthfully.”

Occasionally judges recognize and even expose attempts to pursue a hidden agenda in court. Duty counsel reported these two examples of such judicial reactions:

“I was doing a sentencing ... for a Somalian man on a basic shoplift [offence]. The crown said that this person was new to the country and had to learn what our laws are about. The judge jumped on it and asked the crown what was meant by it. The judge said it doesn’t matter if someone has been in this country five months or five years or five generations; they should all be treated the same.”

“I once represented a Chinese woman. The crown became angry when the accused would not look her straight in the eyes when being cross-examined. The crown inquired if it was a cultural thing .... Fortunately the presiding judge had a better understanding of the accused’s racial background, including her mannerisms.”

More frequently, however, these uses of foreignness seem to pass unchallenged. One duty counsel described frustration at her inability to respond effectively to crown attorneys’ inappropriate references to foreignness:

“You really wish you could stand up and say, ‘Excuse me, Madam Crown, tell me what relevance does that have to the show cause hearing. Are you suggesting, perhaps, that cultural or racial differences are relevant to the primary or secondary grounds [for detaining someone before trial]?’ I have to think about why I can’t – or why I haven’t – said that: it enrages me because I do think those comments are clear-cut racism.”



The lawyer seemed to feel that the intervention she would like to make would be perceived as inappropriate. The Commission's view is that such an intervention is not only appropriate but should be an obligation for all counsel who encounter irrelevant references to race in the courtroom.

At first glance, these "hidden agenda" uses of foreignness might appear driven by pure racial bias, indicating more "bad apples." But such a diagnosis likely overlooks the real motivation. In most instances of what we call hidden agenda, the true function of comments about foreignness is to help lawyers win cases. In effect, a crown attorney assumes, rightly or wrongly, that the justice is more likely to decide against the accused if the accused is portrayed as "foreign." Whatever the specific motivation or result, the comment is no less racist (see Chapter 3).

Such a portrayal of a black or other racialized accused person is one of many ways of suggesting to the court that the accused is not "one of us." References to other attributes, such as lifestyle, unemployment or welfare status, transience or where the accused person lives may have much the same effect. Whatever the attributes chosen, the point of referring to them is to distance the decision-maker, as well as the speaker, from his or her common humanity with the accused person.

Once this distance is created, the element of empathy that is so crucial to the exercise of discretion is likely absent. If the judge or justice of the peace does not feel empathy for an accused person, the crown attorney would have achieved the underlying goal in raising these factors. As a defence counsel who responded to the Commission's survey stated, "Judges are less likely to believe non-white participants in the criminal justice system because the empathy and identification factors are missing."

If crown attorneys think their objective is to win cases, it is scarcely surprising if they use every available tactic to increase their chances of success. Drawing attention to immigration status or other signs of foreignness of racialized accused persons may well be effective. For example, the Commission asked provincial division judges if judicial perceptions about racial minority immigrants adversely affect racial minority accused. Half of the judges who answered this question indicate that perceptions about racial minority immigrants at least occasionally have adverse consequences for racial minority accused.\*

However, for Ontario crown attorneys to be motivated by notions of "winning" and "victory" is highly improper. Crown attorneys have strong professional and ethical obligations to ensure just results. Their task in the courtroom is to present the case for the state effectively, but always within the framework of a fair trial. It is a serious departure from this principle deliberately to introduce race in order to

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\* Percentages for recently appointed and longer-serving provincial division judges are opposite, i.e., 75% of recently appointed judges said at least occasionally and 25% said never, while 25% of longer-serving judges said occasionally and 75% said never.

prejudice an accused. In short, as the Canadian Bar Association's *Code of Professional Conduct* states –

... when engaged as a prosecutor, the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately.<sup>13</sup>

A crown attorney who responded to the Commission's survey described the demands and values of the role in this way:

"... [a] crown counsel's role in [criminal] proceedings is that of a minister of justice. The crown does not win or lose a case. The crown's role is to prosecute charges where the evidence suggests that there is a reasonable basis for concluding that the accused is guilty of the offence and will be found guilty. The crown's duty is to put all relevant evidence, whether it be inculpatory or exculpatory, before the court, so that the court may determine if the accused is guilty of the offence charged."

Presumably, crown attorneys who fully understand their responsibilities as "ministers of justice," and conduct themselves accordingly, refer to an accused person's immigration status only in the limited circumstances when it is relevant to the proceeding. Such crown attorneys would never refer to foreignness in order to distance a judge, justice of the peace or jury from an accused person. Conversely, we can only assume that crown attorneys who persist in exploiting foreignness in pursuit of a "hidden agenda" have a poor grasp of their job.

In general, the current guidelines for crown attorneys appear adequate. The *Crown Policy Manual* reminds them to ensure that discriminatory stereotypes do not influence their decision-making, and warns them to beware of "institutionalized practices or policies that have an adverse effect on particular groups." No crown attorney who strives to meet these standards could possibly justify using references to foreignness simply to win a case.

Guidelines alone do not guarantee integrity, however. As one crown attorney surveyed by the Commission notes, "any deceitful crown with a modicum of imagination can always conceal an improper motive behind an acceptable justification." Given the generally satisfactory policies and procedures in the *Crown Policy Manual*, the answer to this problem is not more guidelines, which could also be evaded. Instead, the emphasis should be on giving crown attorneys a well-grounded understanding of their responsibilities, and an effective appraisal system to evaluate performance.

As suggested by the examples above, judges and justices of the peace have a vital role to play in discouraging "hidden agenda" references to foreignness, since they are usually the intended audience. They can show they are not influenced by such references. More importantly, they may publicly call to account any lawyer who



unnecessarily draws attention to the foreignness of an accused person, victim or other witness. Opposing counsel also should be vigilant in insisting upon articulation of the relevance of such references where none is apparent.

**7.4 The Commission recommends that judges, justices of the peace and counsel adopt an approach of scrupulously identifying the relevance of any reference to race before it is introduced in court.**

### **“Apparently benign” uses of foreignness**

The Commission found that references to foreignness are sometimes used neutrally or in an attempt to portray accused persons favourably. Apparently neutral references – such as simple descriptions of a person’s place of birth or date of arrival in Canada – may be made by judges, crown attorneys or defence or duty counsel. Typically, defence or duty counsel have the strongest incentives to make favourable references, but crown attorneys and judges may also do so.

Favourable references to foreignness might be used to –

- explain factors that might otherwise reflect badly on an accused person. For example, a lawyer may note a refugee claimant’s to explain why the person has no Canadian work record. Sometimes the lawyer describes the individual’s work record in the country of origin.
- reduce the damage from a previous hostile or negative reference to a person’s foreignness. For example, a defence or duty counsel may supportively question an accused person about education or work in another country after a crown attorney used origin to portray the accused negatively.
- mitigate culpability by showing that an immigrant is unfamiliar with Canadian laws. For example, a lawyer may refer to different customs of the accused’s country of origin to demonstrate that the person did not know that his or her conduct would be a criminal offence in Canada.
- mitigate a sentence by showing respectability. For example, a lawyer may refer to the accused’s years in Canada to demonstrate a long crime-free history in this country.
- highlight drastic consequences of a registered conviction for a non-citizen accused. A criminal conviction may, for example, result in delay or denial of landed immigrant status. To avoid these additional penalties, a lawyer may refer to the accused’s status and propose a discharge.

Benign uses of foreignness may be acceptable in some circumstances, especially if they help avoid imposing additional penalties on non-citizens that would not be imposed on Canadians convicted of the same offences.<sup>14</sup> But obvious dangers exist of misuse or conveying the impression that “foreignness” is generally relevant to court proceedings. Even though reference to race may appear neutral, the accused may still ask: “why are they talking about my race?” Again, the relevance of any

reference to race should be scrupulously identified before permitting it to be used in court.

## Experiences of exclusion

The experience of being excluded from court proceedings is a significant reason why black and other racialized persons report lack of confidence in the criminal justice system. Two main problems are identified. First, the speed, complex language and often mystifying procedures of the courts mean that even accused persons who speak fluent English (or French in a trial conducted in French) often feel that they are not really participating in proceedings that may have profound consequences for them. Those who rely on interpreters feel even more excluded. The second problem is that the absence of racialized persons in positions of authority and on juries in Ontario courts conveys powerful and negative images of the criminal justice system as a “white” and exclusionary institution.

### *Court proceedings*

A 1990 report on community perceptions of the justice system found that –

... the majority of racial minorities (and others, one presumes) lack important knowledge about their civil and legal rights. They do not understand court and legal procedures, the nature of the laws themselves, how to find legal counsel, the role of community legal clinics and many other aspects of service delivery.... While this problem is particularly acute for the youth, and especially Black youth, it applies to adult members of racial minority groups as well.<sup>15</sup>

Black, Aboriginal and other racialized Ontarians described the court process to the Commission as bewildering. They reported feeling confused by the procedures, shocked by the rapid pace, mystified by the language and intimidated by the formal rituals of courts.

Few accused from these communities felt adequately prepared for the experience. Many said they had been given almost no idea of their roles or responsibilities. Almost all reported a stark contrast between the ease with which justice professionals functioned in the courtroom and their own lack of familiarity with the process, which created a profound sense of being excluded.

These experiences crossed age and gender boundaries, and were shared by victims and other witnesses, as well as accused persons. Although factors such as recent immigration, lack of English or French language skills, or low levels of educational achievement tended to intensify the sense of disadvantage, they do not entirely account for it. A large part of the problem lies in the organization and administration of court proceedings themselves.

For example, even a highly educated accused person whose first language is English may find it difficult to understand what is being asked when a court official in a busy court hurriedly recites:



You-have-an-option-to-elect-to-be-tried-by-a-provincial-court-judge-without-a-jury-and-without-having-had-a-preliminary-inquiry-or-you-may-elect-to-have-a-preliminary-inquiry-and-to-be-tried-by-a-court-composed-of-a-judge-and-jury-if-you-do-not-elect-now-you-shall-be-deemed-to-have-elected-to-have-a-preliminary-inquiry-and-to-be-tried-by-a-court-composed-of-a-judge-and-jury-how-do-you-elect-to-be-tried?\*

Even an accused person who has been forewarned of this ritual of trial election and its consequences is unlikely to feel he or she is actively participating in the exchange. Of course, white people may also feel confused and intimidated in the courtroom. Since expertise, formality and legal ritual are built into the criminal process, most people, regardless of race, are likely to find the proceedings at best difficult to understand; at worst, traumatic.

As a Nova Scotia judge notes in a recent essay, "most accused persons [and victims or other witnesses] do not know what is going on in the courtroom except for the fact that they are forced to be there." The judge adds:

That which is commonplace to the judge is often foreign and terrifying to accused persons. They do not understand why they cannot state what someone told them or why lawyers object or raise questions of admissibility or relevance. Many accused are terrified by just being in the middle of an alien legal world and they are fearful of what will happen ....<sup>16</sup>

Many white and racialized persons may experience the court system in similar ways in that the main sources of fear and intimidation are the same: inequalities of knowledge, power and authority between themselves and those who administer justice. But there may also be important differences in experiences of the court system. Factors such as unfamiliarity with Canadian cultural norms and institutions or linguistic barriers, for example, may intensify the apprehension felt by some racialized persons. In addition, many racialized persons feel profoundly disadvantaged in courts because of their previous experiences with what the federal Government has referred to as the "'silent' discrimination or 'polite prejudice' in our institutions and in daily Canadian life."<sup>17</sup>

Constant exposure to the consequences of what the Ontario Court of Appeal terms the "racism, and in particular, the anti-black racism [that] is part of our community's psyche"<sup>18</sup> creates a sense of vulnerability in dealings with powerful, alien and seemingly "white" institutions, such as courts. This sense of vulnerability to racial injustice may exist even amongst racialized persons who have not personally had

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\* s.536(2) of the *Criminal Code* requires this choice to be put to all accused except those whose charges must, by law, be tried in a specified division of the Ontario Court of Justice. While the courts may recognize that this question is difficult for an accused person to understand, they generally assume that an accused represented by counsel understands the nature and implications of an election. See generally: *R. v. Matheson*, (1979) 50 C.C.C. (2d) 92 (Man. C.A.); *Korpony v. Attorney-General of Canada* (1982) 65 C.C.C. (2d) 65 (S.C.C.); *R. v. Bennett*, (1993) 83 C.C.C. (3d) 50 (Ont. Ct., Prov. Div.).

negative experiences in courts. It arises and is sustained because the court system is seen as a part of a systemically racist society.

Current demands on courts leave little scope for a day-to-day response to this problem, especially in busy provincial division courts. We understand, for example, that some courts that process initial appearances may face lists of up to 500 charges, and that some bail courts process more than 100 cases per day. In these courts at least, it is scarcely surprising if the primary concern of judges, justices and lawyers is to get through the list. Equally understandable is the dehumanized feeling that accused persons, victims or other witnesses may experience when they are caught up in a system that is too often driven by expediency.

By far the most effective response to this problem is greater restraint in the use of scarce criminal justice resources. As policy-makers and judges have noted repeatedly, many social problems and conflicts that are treated as criminal offences may be handled more effectively by other social institutions.<sup>19</sup> If many of the relatively trivial charges now clogging the machinery of justice were removed from the court system, the remaining serious cases could be managed with greater dignity and respect for everyone involved. Such a change would significantly improve both the appearance and the practice of justice in the courts.

In Chapter 6 the Commission endorses the recent expansion of programs to divert charges away from the criminal justice system and recommends using them to the fullest extent possible. Our findings about the dynamics of Ontario's court system reinforce this recommendation.

Courtworker programs of information and support for accused persons and victims/witnesses (see Chapter 6) are another mechanism for improving comprehension of court proceedings. Courtworkers may answer general questions that a lawyer is too busy to address, counsel clients and prepare them for court hearings, refer them to community agencies, and ensure that relevant information is brought to the attention of appropriate officials.

The first Native courtworker programs in Ontario began in the 1960s as experiments in three urban areas: Toronto, Kenora and Thunder Bay.\* They were designed to assist and support Aboriginal persons who appeared to be particularly disadvantaged in the criminal courts. There were serious concerns that Aboriginal people tended to plead guilty even if a defence was available, and that mitigating circumstances were not always drawn to the court's attention.

The contemporary Native Courtworker Program is formally described as –

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\* Originally, courtworker programs were funded by municipal and provincial agencies. Federal funding began in 1969, and the Ministry of the Attorney General became the provincial partner in 1977.



... a program of counselling other than [on] matters of law delivered ... to Natives charged with an offence under any federal or provincial statute or municipal by-law, in order that such persons may receive information about court procedures, be appraised of their rights, and be referred to legal aid or other resources.<sup>20</sup>

While activities vary to some extent at different Indian Friendship Centres (co-sponsors of the programs), their most important activities are explaining legal aid, and referring clients to legal aid offices and lawyers.\* Other out-of-court activities include contacting family members, counselling, and promoting cultural awareness. In-court activities include sensitizing court officials to Native concerns, providing input into pre-sentence reports, or speaking to sentence.

Native courtworkers whom we met acknowledged their considerable formal and informal role as cultural interpreters. As their presence becomes more familiar to court personnel, they are increasingly asked to facilitate cross-cultural communication. Evaluations conducted in Ontario and elsewhere<sup>21</sup> consistently report satisfaction among criminal justice professionals with Native courtworker programs.

In 1993 a pilot project to provide courtworker services to black accused and their families began at four Metro Toronto courts. A recent external evaluation of the African Canadian Court Worker Program found that the program met important needs and could accomplish even more if its future were secure. The review recommended stable funding "until the African Canadian community is found to be free of the barriers and vulnerability that formed their view of unequal treatment."<sup>22</sup>

Constant uncertainty about continued funding hampers effective planning and efficient delivery of courtworker services. Recent correspondence between the Ministry of the Attorney General and the organization that runs the African Canadian Court Worker Program is vague on the Government's commitment to adequate funding for such programs. Rather than curtail existing programs, the Government should expand them and extend such services to other communities. During the early stages of developing such programs, opportunities should be provided for sharing information and experiences, perhaps through conferences or workshops held by the Ministry.

Court worker services for youths are particularly important. Young people are often even more bewildered than adults by the court system and are likely to benefit considerably from the advice and support of courtworker services. They may also be disadvantaged relative to adults in practical matters such as arranging employment or accommodation, or gaining entry to programs likely to be approved by the court.

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\* One evaluation indicated that Courtworkers spent 55 to 60 percent of their time in court ("An Evaluation of the [Ontario] Native Courtworker Program (Criminal)," SPR Associates, May 12, 1989 (manuscript on file), p. 69). Frequently in remote areas, not enough defence lawyers are prepared to do criminal work on circuit.

By assisting young people to make such arrangements, courtworker services could fulfil an important need.

**7.5 The Commission recommends that –**

- a) existing courtworker programs be maintained and guaranteed funding by the Ministry of the Attorney General.**
- b) additional courtworker programs be established, particularly those offering services to youth.**

### ***Interpreter services***

The distinctive language of court proceedings is often too complex even for persons whose English (or French) linguistic skills are functional in everyday life. Persons without a working knowledge of English or French are particularly likely to feel vulnerable to an authority system they see as incomprehensible.

The *Canadian Bill of Rights*, passed in 1960, expressly recognized that people involved in court proceedings are entitled to interpreter assistance, but mentioned neither funding nor the quality of services. The right to interpreter assistance was also included among the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* in 1982, but again funding and quality are not specifically mentioned. With an important 1994 decision, the Supreme Court of Canada has now given explicit direction on an accused person's right to interpreter assistance during criminal court proceedings.<sup>23</sup>

A seven-member court decided unanimously that whenever a court proceeding involves a vital interest of an accused person who does not "understand or speak the language" of the proceeding, she or he is entitled to interpretation that is continuous, precise, impartial, competent and contemporaneous. In explaining why the Charter requires court systems to provide interpretation services that meet these standards, Chief Justice Antonio Lamer stated:

It is clear that the right to the assistance of an interpreter of an accused who cannot communicate or be understood for language reasons is based on the fundamental notion that no person should be subject to a Kafkaesque trial which may result in loss of liberty. An accused has the right to know in full detail, and contemporaneously, what is taking place in the proceedings which will decide his or her fate. This is basic fairness. Even if a trial is objectively a model of fairness, if an accused operating under a language handicap is not given full and contemporaneous interpretation of the proceedings, he or she will not be able to assess this for him or herself. The very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.<sup>24</sup>

Although Ontario has established a system of court interpretation, changes are needed to meet the standards required by the Supreme Court of Canada. We found that interpreters, as well as judges, lawyers and representatives of community



agencies involved in criminal justice issues, have serious concerns about the guarantees of court interpreter competence, impartiality and accountability for mistakes. Delivery of interpreter services would be enhanced if judges and lawyers received more guidance on working with interpreters.

## Competence

Ontario lacks a systematic program for training and accrediting court interpreters. Current accreditation involves preliminary tests of linguistic and memory skills administered by the Ministry of the Attorney General, followed by a two-day training workshop for those who pass the tests. At the end of the workshop, candidates are examined on the Ministry's *Court Interpreters Handbook*. Those who complete this test successfully are fully accredited for interpretation in court. Other Canadian provinces and some non-Canadian jurisdictions provide much more extensive academic and practical training for court interpreters, which appears highly successful.\*

Several interpreters who participated in the Commission's research think existing training for court interpretation is too superficial, and that the Ministry of the Attorney General's accreditation process should be more professional. We received many complaints that the process does not require a period of "shadowing," during which a trainee interpreter accompanies an experienced interpreter into various courts. Interpreters considered learning court procedures and terminology as vital to the development of their competence and confidence in court. It is not required in Ontario, however, partly because the Ministry of the Attorney General does not want to deter potential interpreters who cannot afford to go through a lengthy and unpaid training process.

Some interpreters also complained that the vital task of honing and maintaining practical skills after accreditation is entirely voluntary. One interpreter who was especially critical said his own professional development program is: "on my own time going to court, [and] listening and mentally translating what is going on. If there are words I'm not familiar with, I look them up." He is concerned, however, that the Ministry does not require, expect, or even encourage all accredited interpreters to do the same.

Lawyers and judges who responded to the Commission's surveys remarked on what they perceive as the variable quality of court interpreting, and the lack of an effective system to ensure competence. Many made comments such as "some interpreters are excellent, most are adequate and some are abysmal" and "the quality of interpreters varies greatly and at times [is] quite inadequate." They called for better training, testing and screening of court interpreters.

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\* We were told of effective and well-developed academic programs for court interpreters in Alberta and British Columbia, as well as England, Norway, South Africa, Australia and the United States. Unfortunately, resource constraints prevented us from researching these programs in any depth.

The Ministry of the Attorney General should fund continuing education as well as initial programs, and interpreters should attend workshops as a condition of retaining accreditation. The Ministry's Court Interpretation Services Branch should conduct spot audits of court interpreters. Those providing inferior interpretation should be required to requalify for accreditation.

In addition to questioning the interpreter system's capacity to ensure general linguistic competence, many people have serious concerns about the translation of highly sensitive testimony. Representatives of organizations that assist women who have been sexually assaulted or abused by a male family member raised this problem repeatedly. They maintained that, all too often, the only available court interpreter for testimony of these victim/witnesses is a man who has no training concerning violence against women, and may not even know the terminology a woman uses to describe such violence.

Even worse, a male interpreter may attempt to impose his own value judgments. A submission from the Korean Canadian Women's Association echoed others in reporting –

Many of our KCWA clients have often complained of, first, the Korean interpreters' lack of knowledge and/or their improper use of terminology and, second, their unprofessional intrusiveness into the decision-making process of the client. At present almost all Korean interpreters are untrained realtors, businessmen or ministers, the majority of whom are males. Many have presumed to impose their biases and morals on many of our abused women clients by intimidating them into dismissing charges against an abusive husband.<sup>25</sup>

The Commission believes that competence and confidence in the court interpreter system would be considerably enhanced by reforming the accreditation, training and performance evaluation of interpreters. These reforms should be pursued in co-operation with the Ministry of Citizenship, Culture and Recreation, and the Ministry of Education and Training, as well as agencies and institutions providing interpretation services and training.

- 7.6 The Commission recommends that the Ministry of the Attorney General –**
- a) develop objective and consistent accreditation standards for interpretation and translation, which should be used to certify training programs for court interpreters. Such programs should include specific instruction on issues of violence against women, and a practicum funded by the Ministry in which trainee interpreters “shadow” experienced accredited interpreters in courtrooms for up to three months.**
  - b) fund translation of a glossary of legal terms and phrases in common court usage into the principal source languages used in Ontario.**



## Impartiality

Canadian courts have generally insisted on impartiality in interpretation services. Parties to proceedings, relatives and friends of parties or persons close to the events giving rise to a criminal charge are typically viewed as inappropriate interpreters in criminal proceedings. Because some linguistic minority communities are small, however, in practice an accused person, victim or other witness often knows the court interpreter. In many cases, prior acquaintance does not matter and may be unavoidable. But in order to preserve the appearance of justice, an accused person, victim or other witness must fully understand the interpreter's role and be able to object to an interpreter whom he or she does not trust to be impartial.

Equally important is that everyone in the courtroom understand that an interpreter is an impartial professional enabling communication, rather than an advocate or supporter of the accused person. Obviously, judges and lawyers are well placed to understand the interpreters' role, but others should also be clearly informed.

**7.7 The Commission recommends that whenever an interpreter is used, the trial judge or bail justice explain the role and expectations of an interpreter in open court. The judge or justice should –**

- a) state that the interpreter is a neutral professional, employed by the court to translate what is being said. In jury trials, this explanation should be given in the presence of the jury.**
- b) inform the accused person and any witness that he or she may apply to the presiding judicial officer to replace an interpreter whom he or she feels has a conflict of interest or may otherwise not be impartial;**
- c) verify that the accused and the interpreter have had sufficient opportunity to ascertain mutual understanding;**
- d) advise the accused person and the interpreter to alert the judge and request clarification if at any time either is unable to understand or hear what is being said;**
- e) request that observers who have concerns about the quality of interpretation inform crown or defence counsel.**

## Accountability for mistakes

Well-trained, accredited interpreters whose work is facilitated by judges and lawyers are likely to provide high-quality interpretation, but they are not infallible. How are judicial authorities to know if an interpreter has made a significant communication error that affects the decision about the accused?

The standard mechanism for identifying legal or factual errors in court proceedings is the official record of proceedings, which is documented by a court reporter and kept for at least six years.\* In some courts the reporter repeats what is said in court

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\* Originally a regulation under the *Provincial Courts Act* (O. Reg. 60/83). When that legislation was replaced in 1984 by the *Courts of Justice Act*, s. 79 provided that, subject to approval by a chief justice or chief judge, the deputy attorney general could establish directions for their disposal. Directions issued in January 1990 (on file) allowed reporters, in most

into a microphone; in others the reporter maintains a contemporaneous paper record. While court reporters may faithfully record the interpreters' English (or French) statements, neither method permits recording of testimony given in a language other than that of the court proceedings. Thus, if questions are later raised about the accuracy of the interpretation, the court system has no record of what an accused person or witness said in the source language.

The criminal justice system generally treats the absence of a record of the original testimony given by an English or French-speaking person as a source of potentially serious injustice. An appellate court will almost always order a new trial if "there is a serious possibility" of error in a missing portion of the record.<sup>26</sup> However, the same standard is not applied to testimony in languages other than English or French, for which there is usually no record of the source language.

This systemic barrier to equality in the criminal justice system must be removed.

**7.8 The Commission recommends that all court testimony and interpretation be audiotaped and retained as part of the official record of proceedings.**

### **Criminal justice personnel and effective interpretation**

Many interpreters say that judges, lawyers and justices of the peace do not always understand the general demands of court interpreting or how to communicate with witnesses through an interpreter. Participants in Commission focus groups complained of poor acoustics in courtrooms, and stated that interpreters are frequently treated as a nuisance if they interrupt the proceedings when they cannot hear what is being said. Some who had been asked to interpret languages they do not speak felt they were expected to "teach geography or history to the judge and others who have no understanding of languages spoken in different geographical areas of the same country."

Interpreters also said some lawyers and judges have little grasp of the limitations inherent in communicating through interpreters. For example, interpreters are expected to translate what is said word by word, but in practice this type of translation may fail to convey the meaning accurately and effectively. Just as a lawyer may have to rephrase questions that a witness does not understand, an interpreter may need to use different language levels. As one interpreter explained:

"Eighty percent of accused are not highly educated, so I have to use a basic language with them. It is sometimes difficult to translate legal language to the level the accused can understand."

In other instances, word-by-word translation may be impossible. Interpreters who attended Commission focus groups explained:

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cases, to dispose of their tapes six years from the date of judgment.



“Emphatic languages may have no equivalents for some English words used in court. So you have to overcome this by using long descriptions. But it can often be expressed quite shortly in English.”

“While most of the time you can interpret word for word on the basic points, to convey the whole meaning properly, you have to translate it in a different way. The interpreter must feel able to say in court that she/he cannot interpret a particular meaning word for word, but will have to take time to explain.”

Many interpreters find that judges or lawyers are unaware of this problem, and may be suspicious of what the interpreter is communicating. As one focus group participant noted, “if I take too long to interpret, the crown raises his eyebrows and clearly wonders if I am embellishing or not.”

Effective communication through an interpreter is unquestionably an important skill for judges, justices of the peace and lawyers to acquire. It is equally important that judges, lawyers and justices of the peace know how to facilitate interpreters’ work in court proceedings. It is also important to understand cultural interpretation, the time required for interpretation, and when it should be used.

The Ministry of the Attorney General could help by preparing, in association with the Law Society of Upper Canada and interested community organizations, a manual of advice and procedures to explain the role of interpreters and advise how to work with them.

### **7.9 The Commission recommends that judges, crown counsel, employed duty counsel and justices of the peace receive training in working with interpreters.**

Finally, the Commission’s research unearthed a small but significant interpretation problem that is relatively easy to correct: statements in the source language are often inaudible to everyone except the person being assisted. Some spectators or non-excluded witnesses present in a court may not be able to understand court proceedings without the assistance of an interpreter. While such persons do not have a constitutional right to interpreter services in court, the principle of open court proceedings makes it desirable to ensure that interpretation is audible in the source language as well as the language of the court.\* A further benefit of ensuring audibility is the potential for a spectator conversant in both languages to identify errors in the interpretation, perhaps by approaching a lawyer or court official during a break in proceedings. We suggest that court personnel adopt a flexible and constructive approach to criticisms of interpretation so they may take advantage of such informal monitoring.

### **7.10 The Commission recommends that court personnel ensure that interpretation be audible to persons in the court.**

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\* Obviously, any private communication between an accused and counsel using an interpreter should not be audible to any other person.

## *The image of white justice*

One of the most frequently cited reasons for the sense of exclusion that racialized court users experience is the under-representation of persons from their communities among lawyers, judges, justices of the peace and jurors. Participants in Commission consultations spoke vividly of fears that white lawyers and decision-makers – even if well-intentioned – neither understand nor relate to the heritages, cultures and experiences of racialized persons.

## **Under-representation of racialized persons among judges and lawyers**

We heard from many black and other racialized persons that images of white justice convey subtle messages that the court system lacks respect for individuals who are not white. The Commission was told repeatedly that under-representation of racialized persons among judges and lawyers is seen as reflecting assumptions that these Ontarians are less worthy of working as justice system professionals. As such, under-representation repeats and reinforces an unspoken message, that white skin is an indicator of competence.

Over the last few years, courts have slowly begun to reflect the diversity of Ontario. But lawyers from racialized communities are often treated as if they are out of place. In these examples from Commission focus groups and surveys, lawyers from racialized groups were –

- **misidentified as accused persons:**

“I don’t believe a police officer would ask me in court if I was the accused just to lower my self-esteem. I believe it is done unconsciously.”

“If you are [a] black lawyer and are representing someone and you are referred to as the accused or sent to the body of the court [while] you see white lawyers treated with courtesy and respect, it does something to your self-esteem ...”

- **misidentified as interpreters:**

“I am often mistaken [for] an interpreter and I am approached by defence counsel seeking my services while I am seated at the defence counsel’s table or just outside the courtroom. Other than the defence counsel’s client and/or witnesses, I am usually the only other person in the body of the courtroom who is of that racial minority and wearing a suit.”

“Very often I am asked by court staff (white and non-white) and crown counsel whether I (brown-skinned) am an interpreter. I ought to ask, ‘what do you want me to interpret?’ ... There seems to be a lack of respect to[ward] people of colour and an easy presumption that only a white [person] can make the grade. The system needs education on not taking anything for granted and the need for apologies where they err, however innocently. This hasn’t hurt me as much as it has created discomfiture and disappointment that Canada is condoning a backward outlook.”



These incidents occurred in public courtrooms, where they could easily have been observed by others. Many from racialized communities would perceive them as profoundly disrespectful toward the lawyer and the lawyer's community. As a lawyer in a focus group noted, such incidents may also cause observers to doubt the wisdom of hiring a lawyer from their own community:

"Aside from your self-esteem, the way you are treated in court can also have an impact on the client and how he or she perceives your ability to effectively represent him or her."

Indeed, we were also told that clients have been warned not to use a black lawyer:

"I was once representing a police officer. He was going to change lawyers because he was told by other officers that it would be more difficult for him if he was represented by a black lawyer."

"A client told me that his former lawyer – who was white – told him that he was taking a big risk if he went to a black lawyer."

Persons who make statements about the "risks" of engaging a black lawyer often do not realize how offensive they are. While the black or other racialized lawyers who are the object of such statements should not be expected to carry the burden of educating others, they should be encouraged to explain the consequences and supported if they do so. More generally, all justice professionals should be alert to such remarks and take responsibility for drawing the speaker's attention to the underlying assumptions.

### **Under-representation of racialized persons on juries**

Under-representation of black or other racialized persons on juries may convey particularly vivid images of "white justice" in the court system. This is because a jury of one's peers is intended to be the "conscience of the community ... [made up of] a representative cross-section of society, honestly and fairly chosen."<sup>27</sup> Thus, the absence of racialized persons from jury panels symbolizes their exclusion from the justice system's vision of Ontario society.

Many black and other racialized persons perceive members of their communities as under-represented on juries. General concerns about their exclusion were raised repeatedly during public consultations. Specifically, participants stressed that under-representation on juries trying racialized accused persons or "high-profile" white accused – such as police officers – who have killed or injured a racialized victim tend to promote distrust in the system.

Lawyers and judges also expressed concerns that unrepresentative juries in trials of racialized accused might contribute to lack of confidence. Interestingly, some suggested that the extent of problem varies considerably among racialized communities. According to a lawyer responding to the Commission's survey, for example, black Ontarians are especially likely to be under-represented on juries.

“Juries are chosen from assessment rolls, and as a result very few young, black, male jurors are available to try very many young black male accused. Oriental jurors, on the other hand, are numerous, because Orientals are vastly more wealthy, and own far more real estate, as a group than blacks. The same is true of elderly, especially retired, white people, who probably form the bulk of jury panels in Ontario – even in multi-racial cities like Toronto. This hardly makes for equality or trial by one’s peers in the criminal system, and accounts for much of the distrust of it by the black community.”

Findings from the Commission’s general population survey of 417 black, 435 white and 405 Chinese residents of Metropolitan Toronto, though by no means conclusive, support the perception that black people are under-represented on Ontario juries. No black residents reported having served on a jury. By contrast, 10 white and 5 Chinese residents reported that they had served on a jury.

The main systemic barriers to participation of black and other racialized people on trial juries appear to be the citizenship qualification and the database used to list the names from which jurors are selected. These barriers affect the earliest stage of the jury selection process, the creation of the jury pool.

### ***Citizenship qualification***

Ontario legislation governing jury selection stipulates that jurors must be Canadian citizens. While this qualification is common in provincial legislation, neither Manitoba nor the Northwest Territories require jurors to be Canadian citizens.<sup>28</sup> Given the high proportion of Ontario residents who are not citizens, particularly in the major cities, the citizenship qualification inevitably results in widespread exclusion. As noted by David Pomerant –

Immigrants are more likely than the Canadian-born population to live in large urban centres, where most jury trials take place. In 1991, immigrants constituted almost 40 percent of the total population of Toronto .... They represented 20 percent or more of the total populations of Hamilton, Kitchener [and] Windsor, and between 15 and 20 percent of the populations of St. Catharines-Niagara [and] London.<sup>29</sup>

The traditional justifications for restricting jury service to citizens were summarized in a 1980 working paper prepared for the Law Reform Commission of Canada:

Jurors must be familiar with the experiences and standards of conduct of the average member of the community and they must feel a commitment to the community. Citizenship is a logical requirement for qualifying for jury duty .... Citizenship is recommended as a qualifying factor because, while it provides only a rough indication of the above characteristics, it at least draws a line capable of objective application .... Finally, non-citizens are not included on the voters’ list and thus could not easily be placed on the jury list .... Acquiring citizenship demonstrates a commitment to Canada which ought to be the first qualification to participate as a juror in the important functions of a court of criminal jurisdiction anywhere in Canada.<sup>30</sup>



Familiarity with Canadian customs and society and a “commitment to the community” are important to the jury system. Reliance on a selection criterion that is easy to determine and apply has clear administrative benefits. But a more inclusive qualification for jury service could maintain the same values, with little or no loss to administrative efficiency.

Landed immigrants who have lived in Canada for many years, for example, are likely to have greater familiarity with the community than individuals who acquire citizenship after the minimum three-year qualification period. Immigrants pay taxes, rent or buy homes, talk to their neighbours and go to work. Many are at least as capable of grappling with the standards of the “average member of the community” as those who are officially Canadians.

Clearly, it would also be incorrect simply to assume that immigrants, by virtue of their status, are less committed to Canadian society than citizens. As Madam Justice Wilson of the Supreme Court of Canada stated –

... while no doubt many citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that this is the case. Conversely, non-citizens may be deeply committed to our country.<sup>31</sup>

Within the court system the citizenship restriction for jurors seems particularly anomalous since no such restriction applies to justices of the peace, lawyers, or judges, all of whom are expected to be familiar with community standards. The Commission’s view is that jurors should who have lived in Canada long enough to understand Canadian customs, values and standards. If three years’ residence is sufficient to qualify for citizenship, it should also be enough to qualify for jury service, without requiring the additional step of obtaining citizenship.

The Commission discussed the citizenship qualification with provincial justice officials, Ontario Ministry of Revenue personnel responsible for the jury source list, members of the legal profession and judges of the Ontario Court (General Division). We found no opposition to the idea that landed immigrants who have lived in Canada for several years should be eligible for jury service.

**7.11 The Commission recommends that the *Juries Act* be amended to permit landed immigrants to serve as jurors if they have lived in Canada for three years and are otherwise eligible.**

#### ***Sources for the jury pool***

The procedure for selecting the jury pool is regulated entirely by the provinces. Ontario develops an annual list for each county and judicial district, with the number of names on each list depending on the local sheriff’s estimate of how many jury trials will be held in the following year.<sup>32</sup>

Two separate procedures exist for generating sufficient names. Non-Aboriginal persons throughout Ontario are selected from a Ministry of Revenue database that

lists every property in the province, by district.\* In accordance with the provincial *Juries Act*, the selection program is designed to exclude all non-citizens.

Commission research, which included consultations with personnel responsible for the Ministry of Revenue database, found substantial consensus that reliance on this database may have significant limitations. In particular, because the database is organized around property, information about home ownership is quickly updated upon purchase and sale, but tenant information is much less accurate. Since the annual update was abolished in 1990, the only systematic means for tracking tenants is municipal enumeration, normally occurring every three years.

As the database is more likely to have accurate information about owners than about tenants, the latter are less likely to receive the questionnaire used to select the jury pool. This bias has clear implications for the age and income level of jurors. Moreover, since members of some black or other racialized communities tend to be younger and poorer than white Ontarians, the current data base also subtly contributes to racial exclusion.

Partly to promote representativeness, Manitoba and Saskatchewan now use provincial health insurance plans as sources for the jury pool. According to the *Report of the Aboriginal Justice Inquiry* in Manitoba, using this database has significantly increased the representation of Aboriginal persons on trial juries.<sup>33</sup>

Provincial health insurance plans appear to be superior sources for the jury pool than the Ministry of Revenue database. The Ministry of the Attorney General may wish to evaluate alternative potential source lists. However, while doing so, the source for establishing jury pools in Ontario should immediately transfer to the provincial health insurance records.

**7.12 The Commission therefore recommends that the *Juries Act* be amended to establish the Ontario Health Insurance Plan database as the source for jury pools in Ontario.**

## Challenges to equality: oaths and affirmations

The Commission's consultations produced several complaints about the law and practice in relation to the swearing of witnesses. The main objection concerned the practice in many Ontario courts of presenting witnesses with a Bible to hold while swearing the oath. Those who did not wish to be sworn on the Bible were required in open court to state their preference to swear another form of oath or to affirm.

The *Canada Evidence Act* was amended in 1994 to eliminate the requirement that a witness object to the oath "on conscientious scruples" before being permitted to

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\* Administrators of districts that include Aboriginal reserves apply for a list of band members of those reserves and select at random a proportion of the persons required.



substitute a solemn affirmation.<sup>34</sup> We understand that in many Ontario courtrooms witnesses are now asked simply whether they wish to swear an oath or to affirm. If there are indications that they are members of a non-Christian faith, they are asked if they would like to take an oath on a holy book other than the Bible.

It has long been recognized that the former preference for the biblical oath in court could insult or embarrass persons who are not of the Christian faith.<sup>35</sup> In 1975, for example, the Law Reform Commission of Canada said: "Forcing a person publicly to decline to take an oath is an invasion of religious privacy ..."<sup>36</sup> A year later the Ontario Law Reform Commission also expressed disapproval of the biblical oath procedure, stating that: the "oath as it is now administered has discriminatory aspects rooted in religious beliefs that are unacceptable to many people."<sup>37</sup>

The ceremony for impressing upon witnesses the importance of telling the truth is significant to the criminal justice system and how it is perceived. In the past, many people saw the biblical oath ceremony as symbolizing an official preference for Christianity over other religions. The 1994 changes to the *Canada Evidence Act* eliminate that preference. One practical consequence of presenting a neutral choice between the oath or solemn affirmation is that court time must be taken to explain to many witnesses the nature and significance of this choice.

A more complex challenge is to ensure that courts respond equally and respectfully to the diverse religious and non-religious beliefs of Ontarians. One method of securing equality and respect would require the court system to make available the holy books and other facilities, such as washbasins and prayer spaces, necessary to permit witnesses of other faiths to bind themselves. It would also require proper storage and handling of holy books and training of court officials who administer the oath.

The court system in England and Wales has expanded the religious option in this way. Its experience shows that this reform may involve significant adjustment to well-established practices and require considerable sensitivity. A "good practice guide" on the administration of spiritual oaths, issued to all judges and magistrates, provides general advice and specific help on problems that have occurred because of ignorance or insensitivity.<sup>38</sup> In addition to instructions on labelling, storing and handling various holy books, the guide discusses restrictions on swearing oaths that devout members of some faiths may face, and describes obligations relating to dress and cleanliness that witnesses may need to fulfill in order to swear a spiritual oath. It also details how judges or court officials may inadvertently give offence or cause embarrassment through ignorance of spiritual traditions.

Another approach to securing equality would be simply to abolish the spiritual oath. This would result in loss of choice for witnesses who would prefer to swear such an oath. In addition, the criminal justice system would no longer be able to require devoutly religious witnesses to bind themselves in accordance with their faith. However, it would eliminate any need for judges or court clerks to invade the

religious privacy of witnesses by questioning them about their faith. It would also avoid the necessity for courts to anticipate and respond to a potentially wide variety of spiritual practices, with the corresponding risk of causing offence through ignorance.

Most proposals for reform in the 1970s advocated abolition of the spiritual oath. This is simple to implement, would tend to reduce the “mythology of courtroom proceedings,”<sup>39</sup> and would reflect the modern political reality that Ontario is part of a secular state. Arguably, abolition is also the logical conclusion of developments in case law over the last 30 years. No longer does the power of the biblical oath in court proceedings rest on what were once believed to be its spiritual consequences – divine retribution against persons who give false testimony.<sup>40</sup> Instead, it is seen as binding the conscience of the modern witness and heightening the sense of a moral obligation to tell the truth.<sup>41</sup> Shorn of so much original meaning, the essence of the biblical oath today differs little from that of the secular alternative.

Some Ontario judges have already adopted a universal secular “oath” that is administered to adult witnesses and children aged 12 and over. In the swearing ceremony pioneered by Judge Peter Nasmith, for example, a court clerk asks every witness two questions: “Do you know that it is a criminal offence intentionally to give false evidence to a judicial proceeding?” and “Do you solemnly promise to tell the truth in this proceeding?”\* Simple but effective, this ceremony warns of the serious legal consequences of lying under oath and allows witnesses publicly to commit themselves to tell the truth. In this way, the secular “oath” satisfies the court’s need for witnesses to appear to have bound their consciences, in accordance with the requirements of the *Canada Evidence Act*.

We understand that the secular oath has been accepted without question in the courts where it is administered.<sup>42</sup> Witnesses do not appear to be surprised or disturbed by the absence of a Bible and a request to make their promises before god. Some are likely thankful to avoid being questioned in open court about their religious beliefs.

Since the rules of evidence governing criminal trials fall within federal jurisdiction, Ontario is unable to abolish the religious oath in criminal proceedings. Moreover, the failure of the federal government to do so in its most recent amendments suggests that such a change is unlikely in the near future. Finally, the precise form of the ceremony for “binding the conscience” of witnesses falls within the ultimate authority of the presiding judge in the courtroom. The principle of judicial independence precludes the Ontario government from giving judges directions in this respect.

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\* The late Judge Nasmith began using the secular oath ceremony in the early 1980s in Kingston. He continued the practice in Toronto courts and in Barrie. Other judges at these courts have adopted it.



However, adoption of an “oath” that includes only a promise to tell the truth and an acknowledgment of the legal consequences of lying is the best route for achieving equality. We suggest that judges adopt such a practice.

Where judges continue to require religious oaths, we suggest that the judiciary take responsibility for educating them about the variety of oath requirements. For example, the Hindu oath is taken on the Gita, Jews swear on the Torah, Muslims swear “by Allah” on the Quran, Sikhs swear by Guru Nanak, Rastafarians may swear on the Bible but refer to the deity as “Jah,” and Quakers and Moravians would likely make an affirmation. The good practice guide on *Oaths and Oath-taking*, distributed by the Judicial Studies Board in Britain, would provide a good starting point for such judicial education.

## Endnotes

1. Hon. Charles L. Dubin, "The Future of Our Profession and of Our Justice System," *Law Society Gazette* 28 (1994) 201, p. 203.
2. See *R. v. Parks* (1993) 84 C.C.C. (3d) 353 (Ont. C.A.), and Madam Justice Beverley McLachlin, "Stereotypes: Their Uses and Misuses," address to the McGill University Faculty of Law Human Rights Forum, Nov. 25, 1992 (manuscript on file).
3. *R. v. Parks*, at 380.
4. Equal Opportunity Consultants, "A Community Consultation of the Perceptions of Racial Minorities" (Toronto: 1990) (manuscript on file), pp. 18–22; Province of Ontario, Task Force on Race Relations and Policing, Report, chair, Clare Lewis (Toronto: Task Force, 1989), pp. 13–14; Province of Ontario, Task Force on Race Relations and Policing, *Report*, chair, Clare Lewis (Toronto: 1992) p. 7; Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Consultation Document* (Ottawa: 1991), "Background," p. 7.
5. United Kingdom, Judicial Studies Board, Third Annual Report of the Ethnic Minorities Advisory Board (London: February 1995), p. 14.
6. *Ibid.*, p. 12.
7. *R. v. Jose Antonio Medeiros and Albilio Cabral*, Ontario Court of Justice (General Division), Toronto, Oct. 23, 1991 (emphasis added).
8. *R. v. Ronald Butcher*, Ontario Court of Justice (Provincial Division), Toronto, Sept. 4, 1990.
9. *R. v. Do Yuen Ho*, Ontario Court of Justice (Provincial Division), Toronto, Nov. 24, 1992.
10. For discussion of this issue, see generally, Ontario Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, chair, G.A. Martin, (Toronto: Queen's Printer, 1993), pp. 327–30.
11. Courts of Justice Amendment Act, 1994, S.O. 1994, c. 12, s. 16, amending ss. 51.9 and 51.11 of the *Courts of Justice Act*.
12. *Ibid.*, s. 51.9(3)(1).
13. Canadian Bar Association, *Code of Professional Conduct* (Ottawa, 1987), commentary to Rule IX, p. 37.
14. See the case law summarized in Clayton C. Ruby, *Sentencing*, fourth edition (Toronto: Butterworths, 1994) pp. 239–42; *R. v. Shokohi-Manesh* (1992) 69 C.C.C. (3d) 286 (B.C.C.A.); *R. v. Melo* (1975) 26 C.C.C. (2d) 510 (out C.A.); *R. v. N. H.* [1994] O.J. No. 1694.
15. Equal Opportunities Consultants, *A Community Consultation* (note 4), p. 12.



16. Hon. Richard E. Kimball, "Judicial Behaviour and *R. v. Sussex Justices*," *Provincial Judges Journal* 18 (1993) 11, p. 14.
17. Multiculturalism and Citizenship Canada, *Eliminating Racial Discrimination in Canada*, (Ottawa: Supply and Services, 1989), p. 7.
18. *R. v. Parks* (note 2) at 369.
19. See, for example, Toward Unity: Criminal Justice and Corrections, report of the Canadian Committee on Corrections, *Report*, chair, Roger Ouimet (Ottawa: Queen's Printer, 1969); Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Supply and Services, 1977); William J. McGrath, ed., *Crime and its Treatment in Canada* (Macmillan: Toronto, 1976); Hon. Antonio Lamer, "The Courts and the Community," in C.H.S. Jayewardene, ed., *The Community and the Administration of Justice: Proceedings of the Second Conference of Applied Criminology, May 5, 6 and 7, 1976* (University of Ottawa, Department of Criminology: Ottawa, 1976).; Heino Lilles and Barry Stuart, "The Role of the Community in Sentencing" (1992) 8 *Justice Report*.
20. Agreement Between Her Majesty the Queen in Right of Ontario, and the Federation of Indian Friendship Centres of Ontario, 1980 (on file), p. 3.
21. SPR Associates, "An Evaluation of the [Ontario] Native Courtworker Program (Criminal)," May 12, 1989 (on file); Province of Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg, 1991), p. 738; Province of Alberta, Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Report*, chair R.W. Cawsey ("Cawsey Report"), (Edmonton, 1991), p. 16, Rec. 3.9, p. 33, Rec. 7.2; Province of Saskatchewan, *Report of the Saskatchewan Metis Justice Review Committee* (Regina, 1992), p. 72, Rec. 3.1; Province of Saskatchewan, *Report of the Saskatchewan Indian Justice Review Committee* (Regina, 1992), p. 73, Rec. 3.2.
22. Dowrich Management Services, "African Canadian Court Worker Program Evaluation" (Toronto: 1995) (manuscript on file), p. 4, Rec. 2. Informal evaluations of "Why Mee," a smaller project established in 1993 in the Metro North courthouse, are similarly positive.
23. The Court stated that its decision "relates specifically to the right of an *accused* in *criminal* proceedings and must not be taken as necessarily having any broader application." *R. v. Tran* (1995) 92 C.C.C. (3d) 218 at 227 (emphases in original).
24. *Ibid.*, at 238-9.
25. Korean Canadian Women's Association, written submission to the Commission on Systemic Racism in the Ontario Criminal Justice System (on file), p. 8.
26. *R. v. Hayes* (1989) 48 C.C.C. (3d) 161 (S.C.C.)
27. *R. v. Sherratt* (1991) 63 C.C.C. (3d) 193 (S.C.C.) at 203 per L'Heureux-Dubé J.
28. *Jury Act*, R.S.M. 1987, c. J-30; *Jury Ordinance*, R.O. 1985, c. 55, s. 1. A recent discussion paper on juries in Nova Scotia recommends that landed immigrants be eligible for jury service.

- Law Reform Commission of Nova Scotia, "A Discussion Paper on Juries," May 1993, Halifax, Nova Scotia (manuscript on file).
29. David M. Pomerant, "Multiculturalism, Jury Trials and Jury Selection in Criminal Cases," June 21, 1993 (on file), p. 4.
30. Law Reform Commission of Canada, "The Jury in Criminal Trials," working paper no. 27 (Ottawa: Supply and Services, 1980) at 40.
31. *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 21 at 36.
32. *Juries Act*, R.S.O. 1990, c. J-3, s. 5.
33. Province of Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *The Justice System and Aboriginal People*, vol. 1 of the *Report* (Winnipeg, 1991), p. 378.
34. S.C. 1994, c. 44, s. 88.
35. See generally, A. Peter Nasmith, "High Time for One Secular Oath," (1991) 3 *Law Society of Upper Canada Gazette*, 230; Stanley Schiff, *Evidence in the Litigation Process*, fourth edition (Toronto: Carswell, 1993).
36. Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975), pp. 86-7.
37. Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976), p. 129.
38. United Kingdom, Judicial Studies Board, *Oaths and Oath-Taking*, occasional paper no. 1 of *Papers on Ethnic Minority Issues* (London: December 1992). In addition to providing general guidance and specific information for judges and magistrates, the paper urges development and distribution in appropriate languages of pamphlets about the oath.
39. Law Reform Commission of Canada, Evidence Project, *Competence and Compellability* (Study Papers), commissioner, Martin L. Friedland (Ottawa: Information Canada, 1972), p. 10.
40. For explicit repudiation of the "divine retribution" theory of the oath, see *Bannerman v. The Queen* (1966) 48 CR 110 (Man. C.A.); *aff'd* without reasons [1966] S.C.R. 76n; *R. v. Horsburgh* [1966] 3 C.C.C. 240 (Ont. C.A.) 240, *aff'd* [1967] S.C.R. 746.
41. For recent judicial characterizations of the oath as symbolizing a moral obligation, (recognized by law) to tell the truth, see, *R. v. Fletcher* (1982) 1 C.C.C. (3d) 370 (Ont. C.A.); *R. v. Khan* (1988) 42 C.C.C. (3d) 197 (Ont. C.A.); *aff'd* *R. v. Khan* [1990] 2 S.C.R. 531.
42. Telephone interviews with Judge A.P. Nasmith, March 28, 1994 and August 24, 1994.





## Chapter 8

# Imprisonment After Conviction

*The criminal trial and the process of sentencing in particular are a symbol and an embodiment of the principles of justice (or injustice, as the case may be) in Canadian society. As such it is essential to ensure at the very least that the methods by which offenders are sentenced and sanctioned do not promote or exhibit characteristics of racial discrimination.*

– Bruce Archibald<sup>1</sup>

This chapter focuses on decisions that result in imprisonment after conviction. While imprisonment is only one of several sentencing options, it is the most severe. It is extremely expensive and may have a devastating impact on the family and dependents of incarcerated persons. It is also widely viewed as ineffective at either deterring criminal conduct or rehabilitating offenders. Indeed, considerable evidence suggests that imprisonment encourages and increases criminal conduct.<sup>2</sup> Commenting on the futility of imprisonment, a Canadian parliamentary subcommittee stated:

Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes – correcting the offender and providing permanent protection to society. The recidivist rate of up to 80 percent is evidence of both.<sup>3</sup>

Canadian criminal courts have been widely criticized – by community members as well as by judges, lawyers, academics and policy makers – for over-reliance on prison sentences.<sup>4</sup> Canada has a high rate of incarceration relative to other industrialized nations, apart from the United States. We sentence people to prison more frequently than any country in the European Union, at more than double the rates of Sweden and Japan, and three times that of the Netherlands.\*

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\* Comparisons among nations are somewhat crude because of differing methods of counting and reporting incarcerated persons, but estimated incarceration rates are widely reported as general indications. All such reports show an extraordinarily high rate of incarceration in the United States. In December 1992, for example, the U.S. Bureau of Justice Statistics reported an incarceration rate of 330 persons per 100,000 of the population, not counting those held in local jails. These data compare with lower rates in the United Kingdom (92 per 100,000), France (84),



Inconsistency in prison sentences within a criminal justice system is another well-documented problem. Apart from maximum, and occasionally minimum sentences, the *Criminal Code* has traditionally given judges no guidance on sentencing in routine or typical cases. While judgments by provincial courts of appeal offer guidelines for particular types of offences, considerable potential for disparity remains. Differences in how judges view the facts of a case, the goals and principles of sentencing, the causes of crime and the role of courts in passing sentence may all contribute to disparities.

Variations in court practices among or within cities may also significantly influence the likelihood of imprisonment. A recent study of sentencing in adult provincial courts shows, for example, distinct differences in incarceration rates between Ottawa and Toronto.<sup>5</sup> Persons sentenced in Toronto for offences such as trafficking in or possession of a narcotic, assaulting or obstructing a peace officer, or failing to appear in court were much more likely than those in Ottawa to be imprisoned.<sup>6</sup>

Among the most serious concerns regarding sentencing is that incarceration rates are higher for black and other racialized people than for white people. This concern is clearly raised by data in Chapter 4 documenting over-representation of black and Aboriginal persons among those sentenced to Ontario prisons in 1992/93. In addition, participants in Commission consultations repeatedly expressed beliefs that black people, in particular, are more likely to receive prison sentences than white people convicted of the same offences in similar circumstances. We also found that sizeable proportions of black (48%), white (29%) and Chinese (29%) residents of Metropolitan Toronto believe that a black person would receive a longer sentence than a white person who commits the same crime.\*

In light of these preliminary findings, the Commission decided to investigate the exercise of discretion to incarcerate. We consulted with defence, duty and crown counsel, probation officers and other correctional officials. The Commission also conducted a major statistical study of sentencing outcomes for black and white adult males convicted of five specific offence types.

We begin with an overview of the sentencing process and then present the major study in detail. After documenting findings about differential incarceration rates and lengths of prison terms, we make recommendations to safeguard this vital aspect of the criminal justice system against the risk of racial bias.

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Italy (56) and Sweden (55). Canadian data for 1992/93 show both an overall estimated incarceration rate of 130 per 100,000 persons. (Canadian and other rates are summarized in "Basic Facts about Corrections in Canada," 1993 edition [Ottawa: Supply and Services, 1994]). In 1990 incarceration rates per 100,000 were estimated at 45 in Japan and 40 in the Netherlands. (M. Mauer, "Young Black Men and the Criminal Justice System," [Washington, D.C.: The Sentencing Project, 1990]).

\* This finding comes from the population survey of Metro Toronto residents, which is summarized in Chapter 2 and described in more detail in our Technical Volume. See Appendix B.

## Overview of sentencing

In a submission to the Canadian Sentencing Commission, the Law Reform Commission of Canada said:

Excessive discretion is conferred .... Equality, clarity, and truth in sentencing are sacrificed .... Disparity becomes more pronounced in the absence of authoritative statements of purpose and principle .... The current scheme creates disparity and therefore fails to promote equality in a variety of ways.<sup>7</sup>

At its simplest, the objective of sentencing is to decide what penalty is to be imposed on a person found guilty of an offence.<sup>8</sup> However, sentencing for criminal offences is a complex process that is viewed as a specialized art, craft or science. In Ontario, it is practised exclusively by legally trained professionals. Inherent in this organization of decision-making are the ideas that sentencing is a principled process and that decisions must be justifiable in law.

Canadian law has traditionally given wide scope to judicial discretion at sentencing. The *Criminal Code* provides a skeletal framework, supplemented by judgments of appeal courts that sketch an approach to sentencing or specify factors to be considered. But primary responsibility for interpreting and applying the guidelines to each case remains with the sentencing judge. The judge is expected to balance competing goals of punishment – such as deterrence, rehabilitation and denunciation – and to consider a variety of factors pertaining to the convicted person and the offence. A frequently cited decision of the Manitoba Court of Appeal lists seven key factors:

- degree of premeditation
- circumstances of the offence, i.e., the manner in which it was committed, the amount of violence involved, any use of an offensive weapon, and the degree of active participation by each offender
- gravity of the crime, indicated by the maximum punishment provided by statute
- attitude of the offender after commission of the crime, which indicates the degree of criminality and throws some light on the participant's character
- offender's previous criminal record, if any
- offender's age, mode of life, character and personality
- any pre-sentence or probation official's report, or any mitigating or other circumstances<sup>9</sup>

Additional factors that judges may consider include: local incidence of the crime, typical sentences for the same or similar offences, how the offence has affected the victim, "mercy" and the likely effectiveness of the punishment.<sup>10</sup>



Although judges ultimately decide on the appropriate sentence, they do not work in isolation. Crown and defence or duty counsel are responsible for bringing forward information about the offence and offender that suggests where the particular offence fits in the range of available sentences. They may also make a joint submission about an appropriate sentence. A probation officer may be directed to produce a pre-sentence report (called a pre-disposition report if the accused is a youth), which is a social history of the convicted person. These reports are intended to provide sentencing courts with accurate and timely information about "antecedents, family history, previous convictions, character of employment and other information."<sup>11</sup> They generally also include an assessment of the convicted person and recommendations on sentence.

The complex mix of personal beliefs of judges, competing goals of sentencing, imprecise standards and inadequate information about how others apply standards undermine consistency in sentencing.<sup>12</sup> This tendency is exacerbated by a powerful tradition of individualized sentencing that purports to allow the punishment to fit the offender as well as the crime. According to this tradition, offenders who commit similar offences in similar circumstances need not receive the same sentences if they differ in ways perceived to be relevant. Thus a convicted person who can demonstrate mitigating factors such as a steady employment record and good character witnesses, may be less likely to receive a prison sentence than someone convicted of the same offence who lacks these advantages.

What are the implications of the individualized approach for the fundamental principle of equality, especially racial equality? The answer largely depends on what factors are viewed as sufficient to justify a less serious sentence. If, for example, the courts consistently restrict mitigation to factors such as steady employment that may indirectly discriminate against black and other racialized accused, then the individualized approach may result in inequality in sentencing outcomes. Conversely, were the courts to treat cultural diversity or social deprivation as mitigating,<sup>13</sup> the individualized approach could enhance equality.\*

Restraint in the use of imprisonment is another fundamental principle of a fair and effective sentencing system. In a policy statement released in 1982, the Government of Canada called for formal adoption of the restraint principle, proposing that "in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances."<sup>14</sup> In 1987, the Canadian Sentencing Commission concluded that:

Humanitarian concerns dictate that punishment should be inflicted with restraint. If one adds to this consideration the fact that the imposition of the harshest form of sanction appears to contribute only modestly to the maintenance of a harmonious society, a commitment to restraint is the inevitable result.<sup>15</sup>

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\* This point is frequently made in connection with Aboriginal accused.

In response to recommendations from these and other policy-making bodies, Parliament recently enacted that judges should not impose imprisonment when a less restrictive sentence would be appropriate.<sup>16</sup>

## Sentencing outcomes: our major study

### *Introduction and scope*

To investigate the exercise of discretion at sentencing, the Commission conducted a major statistical study of imprisonment decisions for samples of black and white adult males sentenced for any of five offence types: drug charges, sexual assaults, bail violations, serious non-sexual assaults and robbery. This study, which is unique in Canada, draws on the same set of data, gathered by the Canadian Centre for Justice Statistics, as the major study of imprisonment before trial in Chapter 5. Analyses were conducted by Professors Julian Roberts of the University of Ottawa and Anthony Doob of the University of Toronto.

As noted in Chapter 5, the original sample consists of 821 adult males classified by the police as black and 832 adult males classified by the police as white who were charged by the Metro Toronto Police in 1989/90.\* This sample was randomly selected from police files using a matching technique that would ensure significant and virtually identical numbers of accused described as black and white charged with each offence type. To supplement the information about charges and race, the Centre collected a great deal of data about personal characteristics of the accused, previous criminal histories and how they were processed through the criminal justice system.

Inevitably, the sentenced sample – 488 men classified by the police as white (59% of white men charged) and 383 classified as black (47% of black men charged) – is smaller than the original. It contains a higher proportion of white (56%) than black (44%) men and racial matching by offence types is less precise. Robbery charges, for example, accounted for 19% (154) of white and 18% (147) of black accused in the original sample. At sentencing however, these charges accounted for 22% of white and 15% of black convicted men (see Table 8-1).

Attrition also resulted in small numbers in some offence categories,<sup>†</sup> which makes detailed statistical comparisons of black and white sentences within these categories unfeasible. Across the sentenced sample as a whole, however, the numbers are more than sufficient for meaningful comparisons of factors such as previous criminal histories, unemployment and the processing of charges prior to conviction.

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\* See Chapter 5 for an explanation of why this particular sample was selected, and restrictions of the study. A detailed description of methodology appears in our Technical Volume (see Appendix B).

† For example, only 25 black and 51 white accused in the sample were sentenced for sexual assault.



The overwhelming concern expressed in Commission consultations is that black men are disproportionately vulnerable to incarceration. Therefore, the study focuses on one sentencing disposition only – imprisonment. Our primary interest was the threshold decision to incarcerate, but we also compared the length of the prison terms given to black and white men.

After presenting the basic findings of higher incarceration rates for black compared with white convicted men, we consider whether race could be masking other differences relevant to sentencing. First, we separately compare characteristics of offences and those convicted, and aspects of criminal justice processing. These analyses look at gravity of offences, previous criminal histories, unemployment and other social factors, plea, crown election and pre-trial detention. We then integrate these separate comparisons into a multivariate analysis – which shows how factors interact – to see if differential outcomes for the black and white sentenced samples persisted once factors known to influence sentencing were taken into account.

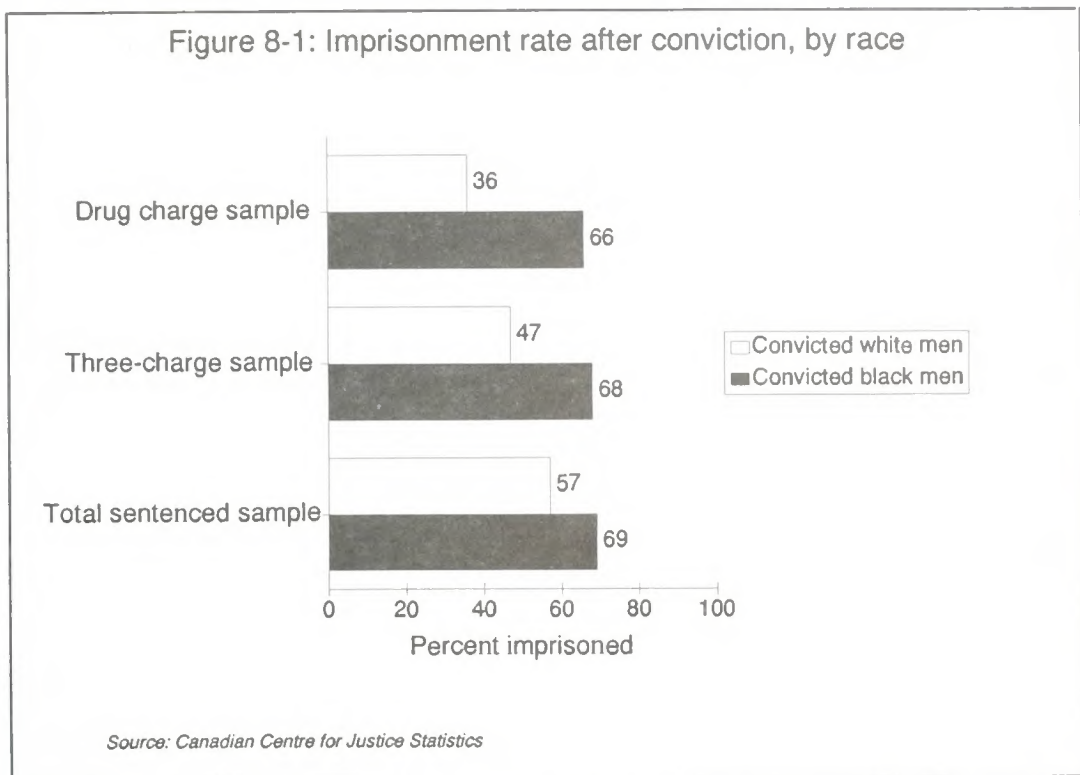
### ***Differential imprisonment rates***

Initial comparisons of sentencing outcomes for black and white convicted men revealed statistically significant differences across the sample as a whole, within the largest single offence category (the drug offence sample) and within a sub-sample of those sentenced for sexual assaults, bail violations and drug offences. As Figure 8-1 illustrates, about two-thirds of the black convicted men in the entire sentenced sample, the sub-sample and the drug offence sample received a prison sentence. By contrast, the proportion of white convicted men who were sentenced to prison varies depending on whether the sample includes those sentenced for all five offences (57%), the three offences in the sub-sample (47%) or drug offences only (36%).

These findings are highly suggestive, but taken alone do not establish direct racial discrimination in sentencing decisions. What appears to be a relationship between being black and being sentenced to prison could conceal other differences that matter in sentencing. Identification of such other differences would not necessarily absolve the sentencing process from responsibility for discriminatory outcomes, but it might highlight reliance on apparently neutral factors that adversely affected the black sample.

### ***Seriousness of offences***

One explanation for the basic findings of differential outcomes could be that the black sample was sentenced for more serious offences than the white sample. Variations in offence seriousness was limited by restricting the sample to black and white men sentenced for the same five offence types. Nevertheless, the possibility remained that in general the two groups were sentenced for qualitatively different offences.



We tested the data for three indications of significant differences in offences. The first relates to the seriousness of the criminal offence category. Although the sample in each category was comparable when charges were laid, not all accused reached the sentencing stage. We therefore attempted to determine whether the different samples in each category could explain the disproportionate outcome. In other words, did more black than white accused end up being convicted of and sentenced for more serious offences?

Second, we compared the specific charges laid against those convicted of offences in the sexual assault, bail violation and drug categories. Offence-specific data on this sub-sample are important because of the finding, reported below, that racial differences in outcomes persist after taking account of criminal histories, choice of plea, crown election (where applicable), detention before trial, and economic status of those convicted.

Third, we examined the incident that led to a charge. Such factual details are important because judges consistently emphasize them when determining sentences. Both an armed hold-up at a bank and a theft of a baseball cap in a street scuffle, for example, may result in robbery convictions, but a sentencing court is highly unlikely to view the two as equally serious.



**Seriousness of offence type**

Table 8-1 shows the number and proportions of black and white men in the sample who were sentenced for each type of offence. It can readily be seen that the offence profiles of the two groups are distinct. Those sentenced for sexual assaults or robberies, for example, account for just over one in five (22%) of the black sample, compared with one in three (33%) of the white sample. While the drug offence category contains virtually identical numbers of black (152) and white (157) convicted men, it accounts for a notably higher proportion of sentences in the black (40%) than white (32%) samples.

The difference between the offence profiles of the two groups is statistically significant. Does it explain the harsher sentences imposed on the black sentenced sample?

**Table 8-1. Offence profiles of sentenced sample, by race.**

Offence category	White men		Black men	
	number	percentage	number	percentage
Drugs	157	32	152	40
Sexual assault	51	10	25	7
Bail violation	109	22	70	18
Serious assault	66	14	79	21
Robbery	105	22	57	15
Total by race	488	100	383	101

Percentages may not add up to 100 due to rounding.  
Source: Canadian Centre for Justice Statistics, 1994

Since Canada lacks an official scale of offence seriousness,<sup>\*</sup> the ranking of offence categories such as these inevitably requires judgments – about which reasonable persons may and do disagree. But the higher proportions of white than black convicted men who were sentenced for robbery and sexual assault – compared with the higher proportions of black than white men sentenced for serious non-sexual assaults and drug offences – suggest that the offence profile of the white sample is at least as serious as that of the black sample.

This view is supported by a recent study of sentencing in adult provincial courts. According to that study, incarceration rates for sexual assault and robbery offences in Ontario range from 54% to 95% of those convicted, depending on the specific

\* While the *Criminal Code* stipulates maximum (and some minimum) sentences for each offence, and the Ontario Court of Appeal issues guideline judgments, neither offers a mechanism for ranking each criminal offence as more or less serious than every other offence. The Code has a limited number of maximum sentences and applies each one to several offences. In this respect, for example, offences such as burglary of a business and sexual assault with a weapon are formally equivalent because the maximum penalty for both is 14 years imprisonment.

charge. Offences within the categories with higher proportions of the black than white convicted men in the Commission study (drugs and serious non-sexual assaults) have incarceration rates ranging from 21% to 87%.<sup>17</sup>

***Specific charges: the sub-sample***

Comparison of the specific charges in the drugs, sexual assaults and bail violation samples was hampered by missing data. Analysis of the available data revealed no difference in the offences of black and white men sentenced for bail violations or sexual assaults. Everyone in the sample sentenced for bail violation had been charged with "fail to comply with the conditions of release," and everyone sentenced for sexual assault had been charged with a Level 1 (least serious) offence. Unless, for some unknown reason, the missing charges laid against the black and white sentenced men differed significantly, these data would not account for the higher incarceration rates of the black sample.

By contrast, the data showed distinct differences between white and black persons sentenced for drug offences. Of those for whom information was available, 90% of the white but only 67% of the black sample were convicted of simple possession, while 25% (12 men) of the black sample but only 8% (six men) of the white sample were convicted of possession for the purposes of trafficking. Since trafficking offences are more serious than simple possession, this difference in offences could explain some of the disparity in sentencing outcomes.

Further analysis of the drug offence sample indicates, however, that the difference in incarceration is not wholly due to the nature of the offences. We compared the sentences imposed on the black and white samples convicted of the same offence, possession of a narcotic. This analysis revealed that of those known to be convicted of simple possession, 49% of black but only 18% of white men were sentenced to prison.

***Characteristics of the criminal incident***

We analyzed data on the criminal event that led to the conviction. Again a significant quantity of data was missing, which is not unusual in these studies, but the information available indicates that the circumstances of the black and white samples are quite comparable. Among those convicted of sexual assaults, serious non-sexual assaults and robberies, the data showed no significant differences in the number of victims, the extent of injury to victim(s), relationships between victim(s) and the convicted men, and the sex of the victim(s). In addition, there was no difference in the amount of property loss in the robbery category. Among those convicted of drug offences, the data showed no statistically significant differences in the nature or quantity of drugs involved.



### **Summary**

In general, the comparison of offences shows little difference between the two samples. We found no evidence that the black sample was sentenced for more serious offence types, nor were the characteristics of their cases more serious than those of the white sample. Even where we did find a significant difference (specific drug offences), further analysis demonstrated that it did not fully account for the higher incarceration rate of the black sample. Taken together, these findings suggest that the basic findings of differential incarceration rates are not explained by qualitative differences in the offences.

### **Criminal history**

A criminal record (or lack of one) exerts a powerful influence on sentencing decisions. Judges regularly refer to it in reasons for sentence,<sup>18</sup> and empirical studies have consistently found that it affects sentence severity.<sup>19</sup> Comparison of the criminal records of the black and white sentenced samples is particularly important to this study because research in Canadian and other jurisdictions suggests that differential imprisonment of black or other racialized people is often due to seriousness of criminal record.<sup>20</sup>

To investigate fully this factor, we selected six aspects of criminal record that are known – or might reasonably be thought – to influence sentencing judges. Each aspect was first analyzed to see if it appeared to affect the sentencing decision, regardless of race. We then compared the black and white samples in the entire sentenced sample to see if that characteristic would account for racial disparity in imprisonment. The six characteristics are –

- number of previous convictions for any criminal offences
- time since last conviction – “clean time”
- number of previous convictions for violent offences
- number of previous convictions for the same offence as the current one – “offence track record”
- most serious previous conviction
- length of prison sentence(s) for previous conviction(s)

Two aspects of criminal record – previous convictions for a violent offence and “offence track record” – proved very significant to prison sentences, regardless of race. Comparison of the records of the black and white sentenced samples, however, revealed no statistically significant differences in either characteristic.

Another aspect – most serious previous conviction – appeared in different patterns on the records of black and white convicted men, but the likely impact of the difference on sentence severity was unclear. Black convicted men (27%) were slightly more likely than their white counterparts (25%) to have a violent offence apart from robbery as their most serious previous conviction. While courts usually

view violent offences as very serious, the difference between the two groups is small. Black (14%) were also more likely than white (8%) convicted men to have as the most serious prior conviction an offence in a miscellaneous category involving neither personal violence nor loss or damage to property.

White convicted men (10%) were significantly more likely than their black counterparts (6%) to have been previously convicted of robbery, a serious offence that has one of the highest incarceration rates in Ontario.<sup>21</sup> The data also show a dramatic difference in the proportions of white (15%) and black (4%) convicted men whose most serious prior offence was break and enter. This offence has a high incarceration rate,<sup>22</sup> which again indicates that it is viewed as serious. Since the patterns of offences appear to be comparable, the differences in "most serious previous convictions" are unlikely to explain the basic findings about differential sentencing.

### ***Number of previous convictions***

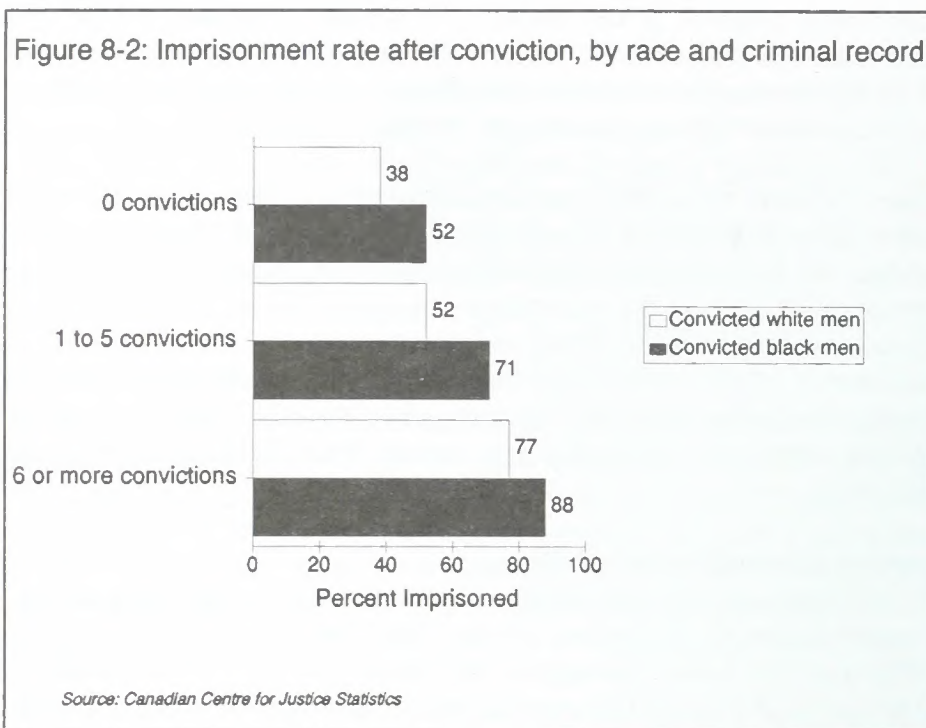
As would be expected, the number of previous convictions increases the likelihood of prison sentences. Regardless of race, convicted men without a criminal record (45%) were less often incarcerated than those with one to five previous convictions (61%) or six or more (81%) convictions on their records. Black convicted men (35%), however, were more likely than their white counterparts (28%) to have no previous convictions. Also, black convicted men (28%) were less likely than their white counterparts (36%) to have six or more previous convictions.

This noteworthy finding, that white convicted men had more serious criminal records than their black counterparts, led us to compare incarceration rates at each level of record. Figure 8-2 shows that at each level, black convicted men were significantly more likely than white convicted men to be sentenced to prison. Among those without prior convictions, 52% of black, but only 38% of white convicted men received a prison sentence. Within the sample of those with one to five prior convictions, 71% of black but only 52% of white convicted men were imprisoned. Of those with the longest records (six or more convictions), 88% of black and 77% of white convicted men were sentenced to prison.

### ***Previous prison terms***

One important indication of the seriousness of earlier criminal offences is whether they resulted in prison sentences. Another is the length of such sentences.<sup>23</sup> Our study found that these aspects of criminal record had an evident influence. Regardless of race, convicted men who had previously served a prison sentence were more likely than those without a prison term on their records to be imprisoned on the current offence(s). Moreover, the longer the previous sentence, the stronger the likelihood of imprisonment. Prison sentences for the current offence were imposed on 48% of convicted men without a previous custody term, on 72% of those who had served a sentence of up to one year and on 85% of those who had previously served a prison term of more than one year.





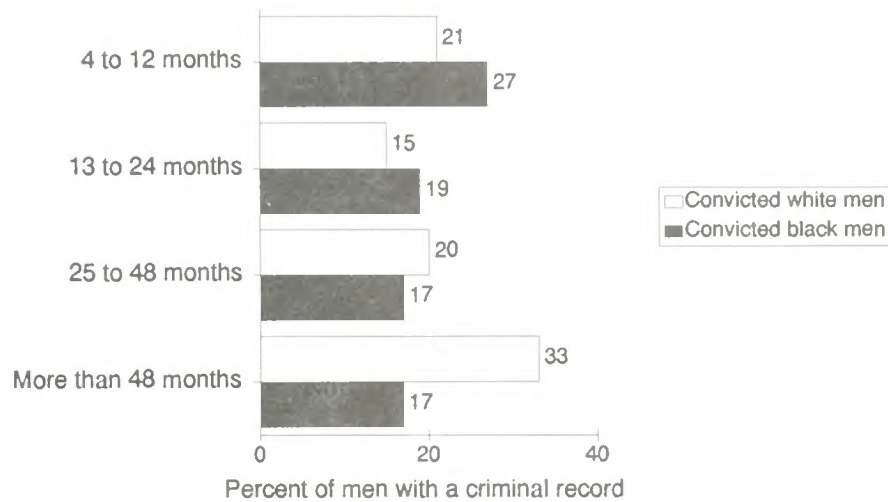
Comparison of the white and black sentenced samples shows that this aspect of criminal record does not account for the harsher sentences imposed on black men. The data show, first, no statistically significant differences in the proportions of black (61%) and white (64%) convicted men who had served a previous prison sentence. Second, of those who had been sentenced to prison, the average prior sentenced for white convicted men (752 days) was significantly longer than the average sentence for their black counterparts (271 days).

### ***Clean time***

All else being equal, judges typically impose less severe sentences on those who have avoided convictions for a significant period than on those re-convicted shortly after a previous offence. This “decay” or “gap” factor, in which older offences carry less weight than more recent convictions, was evident in our findings. Regardless of race, the more recent the last conviction, the more likely that a convicted man would receive a prison sentence.

Comparison of black and white convicted men with previous records reveals that black convicted men had less “clean time” than their white counterparts. For example, black (21%) were much more likely than white (12%) convicted men to have been convicted within three months prior to the charge leading to the current conviction. By contrast, white (33%) were twice as likely as black (17%) convicted men to have been last convicted more than four years before. Figure 8-3 illustrates the general pattern of more recent convictions for black than white convicted men.

Figure 8-3: Time since last conviction, by race, sentenced men with a criminal record



Source: Canadian Centre for Justice Statistics

### Criminal justice supervision

Judges tend to impose harsher sentences on those who are already under criminal justice supervision when charged,<sup>24</sup> a pattern that was evident in our research. Regardless of race, convicted men who were on bail or conditionally released from prison on parole or mandatory supervision when charged were significantly more likely than those not under supervision to be sentenced to prison.\* Comparison of the black and white sentenced samples, however, revealed no significant differences in the proportions of black and white convicted men recorded as under criminal justice control when charged.†

\* Across the entire sentenced sample, 95% of those recorded as being on parole or mandatory supervision, compared with 61% of those who were not under warrant when charged, received a prison sentence. The difference in incarceration rates between those who were (68%) and were not (59%) on bail when charged is smaller but still statistically significant.

† Only 2% of black and 3% of white convicted men were recorded as on parole or mandatory supervision when charged; 47% of black and 41% of white convicted men were recorded as on bail when charged. The proportions of those on bail when charged are high, of course, because one of the selected offence categories is bail violations.



## **Criminal justice variables**

Several aspects of the criminal justice process may influence sentences. Some such influences are openly acknowledged. For example, courts usually impose a less severe sentence on someone who pleads guilty, especially early in the process, than on someone convicted after a contested trial, because the guilty plea is perceived to demonstrate contrition, as well as saving scarce court time and resources. Other factors that may affect incarceration rates, such as detention before trial, have no explicit justification within ordinary sentencing practice.

We analyzed three key variables to see if they contributed to the harsher sentences imposed on black convicted men: the plea, crown election in hybrid offences and detention before trial.

### ***The plea***

Studies in other jurisdictions have shown that black accused are less likely to plead guilty than white accused and so are less likely to benefit from any resulting sentencing discount.<sup>25</sup> Our study revealed a similar pattern: 20% of black compared with 11% of white men had pleaded not guilty to the charge(s) of which they were convicted. As the multivariate analysis reported below shows, however, this factor did not significantly influence incarceration rates across the sample as a whole.\*

### ***Crown election***

For some charges the Crown attorney may choose whether to proceed by summary conviction or indictment. This “crown election” may be important to sentencing outcomes because summary convictions have much lower maximum penalties than convictions for charges proceeded with by indictment. In practice, maximum penalties are rarely awarded, but sentencing judges may view them as indicating the gravity of the crime.<sup>26</sup>

Some of the offences included in this study offered crown attorneys a choice about how to proceed. Most of the known drug offences, and all of the known sexual assaults, bail violations and “assault peace officer” offences in the sample are hybrid charges. The robberies, serious assaults apart from “assault peace officer” and some of the drug charges are indictable only. Crown attorneys had proceeded summarily against a higher proportion of white (61%) than black (55%) men who were convicted of these charges.†

This important finding may be explained in two ways. One is that the offences committed by black men convicted of hybrid offences were more serious than those of similar white men. While we cannot eliminate this possibility without detailed review of the crown files, the evidence from the analysis of offence seriousness does

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\* See page 278. Within the smaller subset of persons convicted of drug, sexual assault or bail violation offences, however, plea did have a small but significant effect on incarceration.

† See Chapter 6 for more details.

not support it. Another possibility is that crown attorneys, perhaps after discussion with police or defence counsel, were simply more inclined to proceed summarily on charges against the white accused who were later convicted. If so, their decisions may then have independently contributed to differential sentencing.

### **Imprisonment before trial**

Consistent with the findings of many sentencing studies, the analysis revealed a strong relationship between imprisonment before trial and after conviction, regardless of race. We found that 81% of convicted men who had been denied bail, compared with 63% of those ordered released at a bail hearing and 16% of those released by the police, received a prison sentence.

This relationship would account for some racial disparity in sentencing since white (30%) were almost twice as likely as black (16%) convicted men to have been released by the police, while 39% of black but only 29% of white convicted men had been ordered detained before trial.\* We also investigated the possibility of racial disparity at sentencing beyond that consistent with earlier bail decisions. First, the entire convicted sample was divided into three groups according to pre-trial status: released by the police, released after a show cause hearing and detained. We then compared the sentences imposed on black and white men who had the same pre-trial status.

This analysis indicated that white (63%) and black (63%) convicted men released after a show cause hearing were equally likely to be sentenced to prison. Similarly, no statistically significant difference was found in the incarceration rates of white (84%) and black (90%) convicted men who had been detained. By contrast, the data revealed a substantial difference in the percentages of white (11%) and black (27%) convicted men who had been released by the police but subsequently received a prison sentence (Figure 8-4).

This striking finding of higher incarceration rates for black than white men who had not been detained before trial is difficult to explain. While the offences of the black men may have been more serious, this explanation is unconvincing given the lack of supporting evidence. Another possibility is that the white men were more likely than the black men to be well represented by a lawyer who could raise mitigating factors with the sentencing judge. Without more information, however, any such explanation is speculative.

### **Social factors**

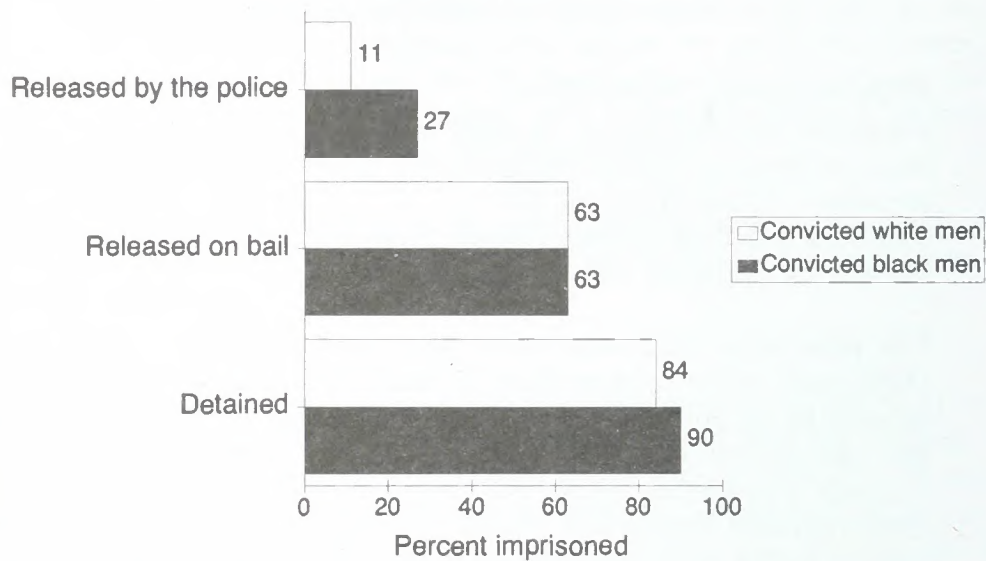
Judges may consider "age, mode of life, character and personality"<sup>27</sup> when passing sentence. While judges may vary the weight they attach to such factors or not consider them, evidence abounds that young, poor persons with "unsettled" lifestyles generally fare worse than others at sentencing.<sup>28</sup>

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\* See Chapter 5 for data on the entire original sample of accused.



Figure 8-4: Imprisonment rate after conviction, by race and pre-trial status



Source: Canadian Centre for Justice Statistics

The Commission had no means of assessing the character or personality of the men in our sample, but we did gather data on employment status, employment type, welfare status, place of residence and single status. These factors were first tested to see whether they appeared to influence sentencing outcomes, regardless of race. We then looked for differences between black and white convicted men that might account for differential incarceration rates. Finally we compared sentencing outcomes for black and white convicted men who shared the same attributes.

These analyses showed that incarceration rates varied with both employment and residential status. Unemployed (76%) were much more likely than employed (50%) convicted men to be sentenced to prison, and those without a fixed address (86%) were much more likely than accused with a fixed address (58%) to receive a prison sentence. By contrast, we found no significant relationships between incarceration rates and welfare status,\* employment type or marital status.

Comparison of the white and black sentenced samples indicated that the two groups differed only regarding employment status among social factors. The data showed that 44% of white and 62% of black convicted men were described as unemployed. This finding suggests that consideration of employment status as part of "mode of

\* Only a tiny proportion of the sample (4%) was recorded as being on welfare; 60% were unknown. The result may have been different had more information been available about the "unknowns."

life” may have indirectly contributed to harsher sentences for black than white convicted men.

Further analysis disclosed evidence of racial differences in the incarceration rates of employed and single convicted men. The data showed that 58% of black employed, compared with 45% of white employed convicted men received prison sentences, as did 71% of single black compared with 58% of single white convicted men. There were no statistically significant differences in the incarceration rates of black and white convicted men who shared other attributes.

### **Direct and indirect racial discrimination**

These detailed comparisons reveal notable differences between black and white convicted men:

- Black convicted men were less likely than their white counterparts to have a criminal record, or a lengthy record, but those with a record were more likely than white convicted men to have a recent conviction.
- Black convicted men were more likely than their white counterparts to have contested the charge, been detained before trial, and been prosecuted by indictment.
- Black convicted men were more likely than their white counterparts to be described as unemployed.

Some of these differences are consistent with harsher sentencing of the black men, some are inconsistent, and others raise the possibility that discrimination earlier in the criminal justice process was transmitted into sentencing. To clarify the relationship between these differences and racial discrimination at sentencing, we conducted multivariate analyses of the entire sentenced sample and the sub-sample of those sentenced for drug, bail violation and sexual assault offences. These analyses allowed us to see if racial differences in sentencing remained when all the other factors identified in the detailed comparisons were simultaneously taken into account.

We found that –

- within the entire sentenced sample, race did not account for any more of the disparity in sentences than was due to differences in pre-trial detention and employment status. This finding indicates that unemployment and detention before trial had an indirectly discriminatory influence on judges.
- within the sub-sample, race had a small but statistically significant influence on sentencing decisions beyond the effects of other factors. This finding indicates that some black convicted men were sentenced to prison when white convicted men with the same personal and case characteristics were not sentenced to prison.



- within the sub-sample, unemployment, detention before trial, not-guilty pleas, and prosecution by indictment were related to the likelihood of prison sentences. These findings indicate that apparently neutral factors, which are not directly related to race, indirectly contributed to higher incarceration rates for black than white convicted men.

### ***Disparity in prison terms***

The evidence of discrimination in the decision to incarcerate has complex implications for the length of prison terms. If, for example, judges target black convicted persons for harsher treatment than white convicted persons, then black people may receive longer as well as more frequent sentences. If, on the other hand, direct discrimination is mostly due to unexamined assumptions and other subtle factors, black people may receive shorter sentences than white people who are imprisoned. This is because the differential incarceration rates mean that the circumstance of the offences and the records of some black convicted persons would not have resulted in imprisonment had they been white. These convicted persons, while thought to deserve a prison sentence, would likely be perceived as deserving shorter prison terms than the white convicted persons who are incarcerated.

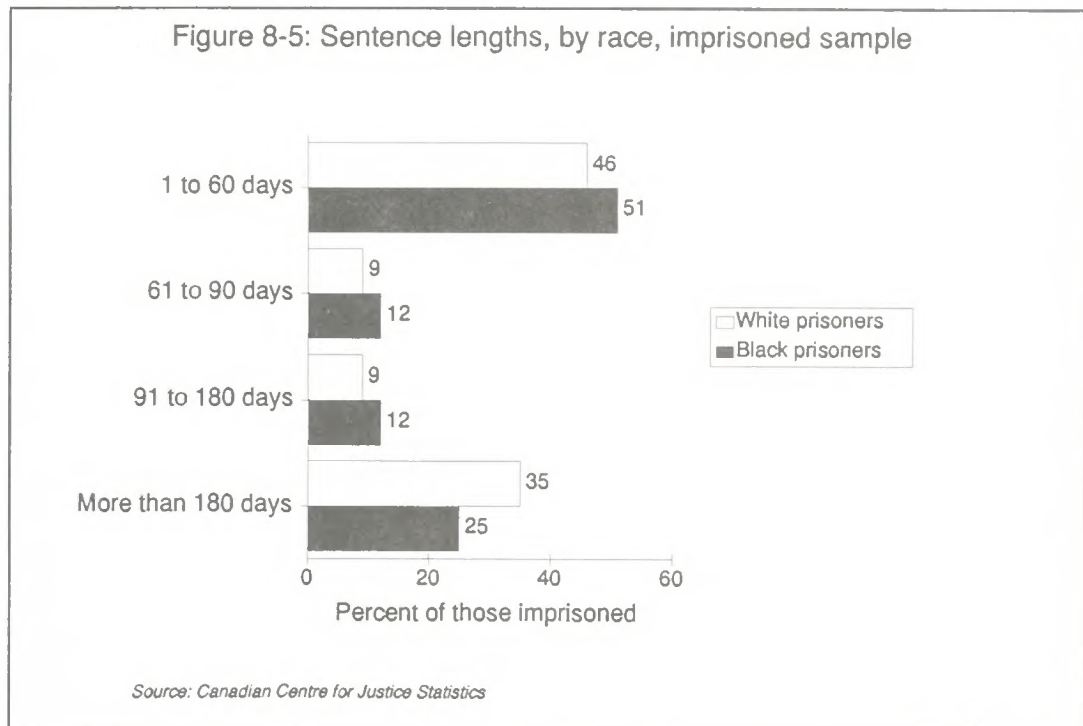
Another reason for anticipating *shorter* prison terms for black men in this study is the legacy of the bail decision. Many judges take account of pre-trial custody when determining the length of a prison sentence, giving “credit” for time served before the trial. Depending on the judge and the offence, prison sentences may be discounted by up to two days for every day spent in jail before the trial. Since black convicted men in the sample were more likely to have been imprisoned before their trials (and to have been jailed for longer periods), they would be more likely than their white counterparts to receive credit for pre-trial detention.

To investigate these possibilities, we compared the terms imposed on the 279 white and 264 black men who were sentenced to prison. The basic findings showed that across the sample as a whole the average prison terms of black prisoners (212 days) were significantly shorter than those of white prisoners (339 days). A statistically significant difference was also found for the drug offence sample: the average sentences of white prisoners (183 days) were almost twice as long as those of black prisoners (95 days).\*

Figure 8-5 illustrates the pattern within the entire imprisoned sample more clearly than the average sentences. It shows that 51% of black and 46% of white prisoners received sentences of one to 60 days, while 25% of black and 35% of white prisoners were sentenced to more than 180 days.

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\* White prisoners sentenced for sexual assaults, other serious assaults and robberies also received longer sentences, but the differences were not statistically significant. Within the bail violation sample, however, the sentences of black prisoners were longer, but again the difference is not statistically significant.



These basic findings are consistent with judges perceiving black people found guilty as less serious offenders than convicted white people who receive a prison term, or discounting sentences of convicted black people to take account of time served before trial. To see if racial differences in sentence length remained after accounting for relevant factors, we conducted multivariate analyses of the entire sentenced sample and a sub-sample of those incarcerated for drug charges, sexual assaults and bail variations.<sup>6</sup> These analyses showed that –

- within the entire incarcerated sample, race had no effect on length of prison term, once pre-trial detention and aspects of criminal record were taken into account. This finding suggests that the shorter prison terms of black prisoners were mostly due to time spent in custody before trial and less serious criminal records.
- within the sub-sample, race had a direct effect on sentence length independent of the effect of time served before trial or criminal record. This finding is consistent with the possibility that sentencing judges viewed at least some black accused found guilty whom they incarcerated as less serious offenders than white men incarcerated for the same offence types.

<sup>6</sup> We did not compare in detail factors such as criminal record or aspects of criminal justice processing that could influence sentence length, because the incarcerated sample is relatively small.



### ***Differential imprisonment: conclusions***

Not every factor that might have influenced sentencing judges was measured in this study. We had no way of observing the “attitude,” “character” or “personality” of the convicted men,<sup>29</sup> nor could we assess whether “deterrence” or “mercy”<sup>30</sup> were factors in particular cases. Though we cannot eliminate the possibility of systematic differences between the black and white sentence samples regarding these factors, their subjective nature suggests that any such difference would be largely due to perception.

Regarding “objective” characteristics of offences and previous criminal histories that might influence sentencing, the two groups were well matched. Only with respect to criminal record did the black and white sentence samples differ significantly: the evidence showed that black convicted men were less likely to have a record or to have a lengthy record. Yet judges were more likely to resort to imprisonment to punish black than white men.

Among those imprisoned, the less serious records of the black convicted men, together with time served in pre-trial custody, contributed to shorter prison terms. In addition, less serious circumstances for the offences of black than white convicted men may have been included among the sample of those imprisoned for certain offence types. Thus the shorter sentence lengths of black convicted men are consistent with their higher incarceration rates both before and after trial.

These findings demonstrate that judges’ reliance on the apparently neutral factors of employment status and detention before trial contributed to the higher incarceration rates of the black sentence sample. We also found an unexplained differential, not due to gravity of charge, record, plea, crown election, pre-trial detention, unemployment or other social factors. In short, some black prisoners would not have been sentenced to prison had they been white. This difference can only be attributed to direct racial discrimination.

The findings of differential incarceration rates do not show direct racial discrimination in sentencing across the full range of criminal charges. The study was not designed to test such a hypothesis, and its results should not be generalized in this way. While similar patterns of direct discrimination may be found with offences not documented here, they are unlikely to appear across all offences. In other words, these findings suggest that *direct* discrimination in sentencing sufficient to create patterns of differential imprisonment is associated with specific offences. Nothing in these findings, however, indicates that *indirect* discrimination arising from employment status or differential detention before trial is limited to particular offences.

What explains these findings of differential incarceration?

In the vast majority of cases, especially in the busy courts of Metropolitan Toronto, judges must decide on sentences quickly and generally without adequate

information, especially regarding the range of available community-based sentencing options. Judges are expected to balance vague and conflicting goals of punishment and to make complex assessments about accused persons and community needs such as the “protection of society.” They depend on crown and defence or duty counsel (if available) for facts about the offence and offender, and their assessments may draw heavily on information collected by probation officers.

Lack of relevant information, complex criteria and reliance on the work of others obviously do not compel or excuse discriminatory sentencing. However, they establish conditions in which unexamined assumptions and stereotypes may become influential. For example, a judge who is told by a crown attorney that a convicted person is foreign-born may think a harsh sentence is warranted to teach respect for the Canadian system.<sup>9</sup> Or a judge whose court is in a culturally diverse area and who sees many persons from a racialized group charged with the same offence may implicitly associate that group with the offence, forgetting that white people in other areas commit the same crime. Once the association is made, the judge may subconsciously rely on stereotypes rather than facts when sentencing offenders from that group.

In addition, a judge with little personal experience outside his or her own cultural group may have difficulty assessing body language and other forms of implicit communication or even the accents of persons from another culture. This may result in misreading the attitude, personality or character of an accused person from a racialized group and thus making unduly harsh judgments. Repeated frequently enough, such judgements, together with reliance on stereotypes and unwarranted assumptions, are likely to result in patterns of differential sentencing. The following passage indicates the importance of constant vigilance to avoid this danger:

[As a result of learning about the problem] one young stipendiary magistrate has told me that he is now so well aware of the risks of unconscious discrimination that before he passes a sentence on a black defendant he always carries out the mental check of asking himself whether he would have passed the same sentence on a white defendant.<sup>31</sup>

## Recommendations

Judges have a special role to play in ensuring equality before the law in the outcomes as well as the process of sentencing, but they should not be expected to work alone. Everyone involved in sentencing must help to guard against racial injustice in the process. Changes in four key areas of the sentencing process would considerably reduce the risk of differential incarceration:

- guidelines for the exercise of judicial discretion

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<sup>9</sup> See examples given in Chapter 7.



- judicial education on the consequences of prison sentences and the availability of community-based alternatives
- guidelines for the exercise of crown attorney discretion
- direction for probation officers preparing pre-sentence reports

### ***Judicial discretion at sentencing***

Disparity in the exercise of sentencing discretion was a major concern of the Canadian Sentencing Commission in its 1987 report (although racial differentials in sentencing outcomes was not specifically within its mandate). The Sentencing Commission identified several “deficiencies” in the sentencing system that may contribute to unwarranted disparity, including lack of a uniform approach to the “theory, purpose and principles of sentencing,” inadequate direction in sentencing law, “acceptance of the concept of individualized sentencing” and unaccountable charge management practices by police and prosecutors.<sup>32</sup> The Commission’s thorough and detailed report proposed many reforms, most of which were based on the twin principles of restraint and proportional responses to harm. Its most ambitious proposals were presumptions to restrict the use of prison sentences for many offences and a special sentencing commission to maintain uniformity across Canada. After lengthy consideration, Parliament partially adopted the principles of proportionality and restrained imprisonment, but effectively rejected reforms that would have provided more systematic guidance on appropriate sentences.

Our Commission has no mandate over sentencing policy, which is within federal jurisdiction. But our findings clearly demonstrate the need for reforms to promote racial equality at this key stage of the criminal justice system.

### **Guideline judgments**

One avenue of reform would be for the Ontario Court of Appeal to reconsider some of its sentencing principles in light of our findings that apparently neutral factors have an adverse impact on black accused. The Court might, for example, reconsider the relevance of factors such as employment to mitigation, the interpretation of guilty pleas as signs of “remorse,” and whether its views of sentencing for drug use and petty trafficking are factually based. The Court could identify issues coming before it that provide opportunities to reduce differential sentencing outcomes and sit as five-judge panels.

The Ontario Legal Aid Plan could provide considerable assistance to the Court in this respect. Additional funding should be provided to the Plan to permit identification and preparation of cases that raise significant issues for racial equality. This initiative should be publicized and funding should be sufficient to establish a

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• The British Columbia Court of Appeal has done this several times in the past few years, to reconsider the policies underlying its previous sentencing decisions. See, for example, *R. v. Preston* (1990) 79 C.R. (3d) 61; *R. v. Sweeney* (1992) 71 C.C.C. (3d) 47.

thorough evidentiary record, including expert testimony if necessary, during the sentencing hearing, and also to support appeals.

Intervenor funding for sentencing appeals on these cases should be made available to clinics with expertise in responding to systemic discrimination, and to other interested groups. If granted leave to intervene, these organizations could file briefs drawing on empirical and other evidence of systemic discrimination. For cases involving drug and other charges handled by federal prosecutors, the Attorney General of Ontario should seek intervenor status to ensure that data on systemic discrimination is placed before the Court of Appeal.

#### **8.1 The Commission recommends that –**

- a) the Ontario Legal Aid Plan be specially funded for a program of test cases that may contribute to greater racial equality in sentencing.**
- b) the Plan publicize this special initiative to lawyers, legal clinics and interested community groups.**
- c) intervenor funding be available from the Plan for legal clinics and other interested groups to seek leave to raise systemic issues regarding racial equality before the Court of Appeal.**
- d) the Attorney General of Ontario seek intervenor status on sentencing appeals from federal prosecutions to submit evidence of systemic discrimination.**

#### **Credit for pre-sentence custody**

Credit for time spent in custody prior to sentencing is particularly significant to convicted black people, who are more likely than others to be imprisoned both before and after trial. While the Commission hopes implementation of our other recommendations will change this propensity, safeguards should be maintained in case differential imprisonment before trial continues, perhaps on a smaller scale.

Ontario judges have discretion over whether to give credit and, if so, how much for time spent in custody prior to sentencing, except when the person receives a life sentence (in which case credit is automatic). The *Criminal Code* gives no direction on this issue, and the Ontario Court of Appeal, while indicating that some credit should generally be given, does not require it. Consequently, judicial practice may vary considerably. Some judges routinely grant one day credit for each day in custody; some more than one day. Others may refuse to give credit when they believe that the sentencing decision must result in imprisonment. Even though the time spent in pre-trial detention may be greater than the appropriate sentence, all or partial credit might be withheld. In addition, since judges are not required to take account of pre-sentence custody, the same judge may make different judgments from case to case about adjusting the sentence. Such variation is highly unsatisfactory and may result in considerable disparities.

Other jurisdictions, such as the United States<sup>33</sup> and England,<sup>34</sup> have a standard rule granting credit of one day less in sentenced custody for each day spent in prison



before sentencing. Parliament has been urged to adopt this approach for all sentences by the Canadian Sentencing Commission and other organizations interested in reforming the criminal justice system. Unfortunately, the absence of any provision for crediting time served in the recent revisions to the *Criminal Code* suggests that Parliament is unlikely to act in the near future.

The Commission agrees with the National Criminal Justice Section of the Canadian Bar Association that formalizing such credit “would eliminate unwarranted disparity and provide for increased certainty in sentencing practices.”<sup>35</sup> In general, each day spent in custody in connection with the offence should be treated as one day of a prison sentence. Consistent with the principle of restraint, however, judges should retain the discretion to grant more than one day credit where they believe a larger award is justified.

In view of our findings, granting credit for pre-sentence incarceration has important consequences for racialized persons. The Ontario Court of Appeal should reconsider this issue in order to establish clear guidelines for sentencing judges.

### References to deportation

We received persistent complaints that some sentencing judges recommend removal from Canada of convicted persons who are not Canadian citizens. Judges have no power to order deportation during or after sentence and such remarks are widely perceived as evidence of discrimination against racialized people. On occasion these comments have been reported in the media, where they may contribute to public anti-immigrant sentiments that are routinely directed at many black and other racialized persons.

The only legitimate reason for a sentencing judge to refer to deportation is if a deportation order has already been issued and the convicted persons, through counsel, asks for a deportation recommendation to be endorsed on the warrant of committal. In effect, this allows the existing order to be executed more quickly. Otherwise it seems entirely inappropriate for a judge even to comment on such matters. Parliament has assigned decisions about deportation to specialized tribunals, which may consider factors unknown to judges passing sentence. References at sentencing to the desirability of removing persons from Canada are gratuitous and may reflect or be perceived as reflecting systemic racism.

Judges have wide latitude to express their views while fulfilling their judicial role. However, racist comments fall outside that role and constitute judicial misconduct, which should prompt complaints to judicial councils. The Ontario Government is not able to restrain judges from making such comments. However, the Ontario Court of Appeal can denounce them and should be vigilant in doing so whenever possible. In particular, it should establish that it is wrong in law for a sentencing judge to recommend deportation when passing sentence.

## Judicial education

Judicial education, a central feature of modern judiciaries, has a vital role in helping judges avoid differential imprisonment at sentencing. Within Ontario, the Chief Judge is responsible for the continuing education of provincially appointed judges.<sup>36</sup> The stated goals of such education are to maintain and develop professional competence and social awareness, and to encourage personal growth.

While these legislative provisions<sup>37</sup> are recent innovations, the Provincial Division also has a well-established annual three-day seminar mostly devoted to sentencing principles and practices. In addition, each judge of this court is expected to attend a week-long refresher course every three years at which sentencing issues may be discussed.<sup>\*</sup> The justices of the General Division meet twice yearly for a two-day educational seminar, one session of which is an update on criminal law and sentencing. To keep judges and justices updated on changes in sentencing, both courts, through their research facilities, provide judges with regular summaries of recent sentencing decisions of the Ontario Court of Appeal.

Current programs, plus the Chief Judge's plan for continuing education, lay a solid foundation for judicial education on the problems raised by Commission research. One obvious need is for judges to learn how to prevent the exercise of their discretion (or that of other criminal justice professionals) from causing or being perceived to cause unjust imprisonment of black and other racialized people. We are confident that Ontario judges are anxious to address these challenges and we suggest ways of doing so in Chapter 12.

Specific education on the practical implications of sentencing choices would also be beneficial. Judges often lack crucial information on local programs for serving sentences in the community. Sometimes the perception that no suitable community-based program exists may result in incarceration of someone whom the judge would have released on condition that the person attend a well-structured program.

The longstanding absence from the criminal justice system of agencies that specialize in serving racialized communities, together with many judges' distance from these communities, makes it particularly likely that community-based options for black and other racialized people may be unknown. While comprehensive pre-sentence reports on individual accused may address this problem to some extent, judges should not be wholly dependent on probation officers for information that is so important to fairness in sentencing.

A more systematic solution is for regional senior judges to maintain a catalogue of services available for persons serving sentences in the local community. Extensive outreach is required to ensure that the catalogue covers all local communities. Local

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<sup>\*</sup> As part of this course, judges have visited penitentiaries in the Kingston area to meet prisoners and staff, observe parole hearings, and see some of the consequences of imposing prison sentences that are served in federal institutions.



administrative judges should meet with community representatives to identify their needs and consider ways of meeting them. The catalogue should detail the main client groups of community agencies, services and programs offered, and languages in which services are provided. The catalogue should be kept up to date, distributed to judges and circulated to the probation service. It should also be available for review by lawyers and members of the public attending the courthouse.

Education about non-prison options for sentencing may also be promoted by sharing experiences of local services. Regional senior judges should prepare an annual report that describes and evaluates local services for community dispositions. These reports should be filed with the Chief Judge and be available to judges of trial and appellate courts, the provincial Attorney General and the federal Department of Justice, as well as to members of the public. The Chief Judge should analyze the data from across Ontario and compile reports to distribute to all regions and share with local communities.

**8.2 The Commission recommends that –**

- a) regional senior judges maintain an up-to-date catalogue of community services available for non-prison sentences. The catalogue should be distributed to all sentencing judges at local courts, circulated to local probation offices and made available to lawyers and members of the public attending courthouses.
- b) regional senior judges prepare an annual report on local services for non-prison sentences that should be filed with the Chief Judge for analysis and distribution.

Judicial education about the consequences of incarceration, especially within the provincial prison system, is also important. The provincial system holds prisoners sentenced for up to two years and offers correctional programs that may be important to rehabilitation. Most sentenced prisoners are serving much shorter terms, however, and in practice many programs are not available to them. Consequently a short sentence may simply mean unproductive time spent in overcrowded and stressful conditions, and disruption to employment and family relationships. Of course a judge may genuinely think a particular case warrants a short custodial sentence, but this decision should be based on full information about how local provincial institutions manage prisoners on short sentences.

Structured programs in which judges visit provincial prisons were introduced in 1994. This worthwhile exercise should be a key component of judicial education for all sentencing judges. Visits to provincial prisons should involve meetings with prisoners, including those serving short sentences, and correctional staff, and observation of parole and temporary absence hearings.

**8.3 The Commission recommends that –**

- a) the Chief Judge of the provincial division and the Chief Justice of the general division establish programs for judges to visit provincial adult and youth institutions in the regions where the judges sit.

b) educational programs should provide for judges who preside over criminal cases to make such visits within one year of their appointment and at least every five years thereafter.

### ***Crown attorney discretion at sentencing***

Crown attorneys provide judges with information that affects sentencing and may also give an opinion on what sentence would be appropriate. In their legal role as ministers of justice, crown attorneys are responsible for ensuring that all relevant information is placed before the judge, whatever its implications for sentence. In practice, however, unless an agreement on a sentencing submission has been reached, defence or duty counsel normally present mitigating factors that may lead the judge to be lenient, while crown attorneys present aggravating factors that could result in harsher sentences. If pre-trial discussions have been successful, crown and defence counsel may submit a joint recommendation to the judge.

Crown attorney discretion, like judicial discretion, should be governed by the fundamental principles of equality and restraint. In some circumstances, these principles require crown attorneys to take the initiative; in others, they may simply need to show flexibility. The role of crown counsel in sentencing has recently been described by Judge Barry Stuart:

The Crown is the voice of the community, and to be effective this voice must be informed and sensitive to the particular circumstances of each case. Sentencing hearings, especially hearings in which the Crown seeks a significant jail sentence, call upon a commitment of time, skill and imagination that parallels or exceeds the demands of trials. Until all involved in sentencing rise to the challenge, courts will continue to squander public funds by employing sentencing tools based on incomplete and misleading information. Mistakes in sentencing ... can hinder the rehabilitative potential of individuals and in doing so adversely affect families and communities. Competent, well-prepared Crown sentencing submissions serve the best interests of the court, the community, the victim and the offender.<sup>38</sup>

Skill and sensitivity in the exercise of crown attorney discretion at sentencing, as at other stages of the justice system, is largely a matter of training and careful monitoring for evidence of problems (addressed in Chapter 12). In addition, specific guidance to crown attorneys in two key areas would enhance fairness in the sentencing process.

The first area concerns unrepresented convicted persons who were imprisoned before their trials. Verified information about the amount of time spent in custody is often unavailable to the sentencing judge.\* Obviously, a judge who does not know of the pre-trial imprisonment is unable to give an appropriate “discount” in a prison

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\* This problem is particularly likely when the accused is granted bail at a show cause hearing but remains in prison because of inability to meet a condition of release. See Chapter 5.



sentence. Crown attorneys may prevent this injustice by obtaining and presenting information about pre-trial detention to the court.

The second problem concerns crown discretion in sentencing submissions that involve a “discount” for a guilty plea. As noted above, this factor may contribute to differential incarceration rates. The *Crown Policy Manual* strongly promotes discounting:

As an early guilty plea generally signals remorse and saves resources, it will normally enable Crown counsel to submit to the court the bottom end of the range of sentence appropriate to that particular offence and offender .... Accordingly, the earlier that a guilty plea is entered, the greater will be the consideration given to the accused by Crown counsel .... On a trial date or preliminary hearing date, barring a material change in circumstances, Crown counsel *shall* seek a higher sentence in the appropriate range than that which was offered prior to the setting of the date. The attendance of witnesses and the scheduling of court time undermines the responsiveness of the justice system, results in both inconvenience to the public and a waste of limited resources, and calls into question the accused’s remorse.<sup>39</sup> (emphasis added)

This policy should not be applied too rigidly, especially when an accused is unrepresented. Many accused persons proceed to trial in Ontario without legal representation\* and the most recent funding crisis of the Legal Aid Plan suggests that the proportion of unrepresented persons is likely to rise. These accused may have little understanding of court proceedings, still less of the possibility of negotiating with a crown attorney before a date set for attendance at court. It is patently unjust to penalize these accused who do not know the system for waiting until a court appearance to indicate an intention to plead guilty.

The *Crown Policy Manual* appears to have overlooked this predicament. While it states that a “material change in circumstances” justifies not pursuing a higher sentence for a later plea, it treats these as legal and administrative problems within the justice system –

including but not limited to: the unavailability of full disclosure to Crown counsel and/or defence counsel prior to the set date; a reassessment of the strength of the Crown’s case having regard to all the witnesses; or a change in the law or a reassessment of the impact of existing law.<sup>40</sup>

The policy should be amended to clarify that when an accused is unrepresented, crown counsel should not seek a higher sentence simply because an accused does not indicate an intention to plead guilty before a trial or preliminary hearing date is set. A safeguard against crown attorneys seeking a higher sentence for the late plea

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\* Ontario Legal Aid Plan officials estimate that only about 30 percent of those charged with criminal offences in Ontario are represented by a lawyer retained under a legal aid certificate. Of course some convicted men hire their own lawyers and others may be assisted by duty counsel. (Telephone interview with George Biggar, Deputy Director.)

of person who does not understand the process should be built into the sentencing hearing. This could be achieved by requiring crown counsel to state on the record in open court the reasons for departing from the Manual by seeking more than the minimum sentence appropriate to the offence, offender and circumstances when a guilty plea was entered.

**8.4 The Commission recommends that the *Crown Policy Manual* –**

a) require crown attorneys to obtain and present to a sentencing judge information about any time spent by a convicted person in pre-sentence custody.

b) direct that when a convicted person is unrepresented, crown counsel should not seek a higher sentence simply because the person does not indicate an intention to plead guilty before a trial or preliminary hearing date is set.

c) direct that when seeking more than the minimum appropriate sentence for a similar offender for a similar offence committed in similar circumstances, a crown attorney state the reasons in open court.

### ***Pre-sentence and pre-disposition reports***

A judge may order a pre-sentence report (called a pre-disposition report if the convicted person is a youth) to “assist the court in imposing sentence.” The judge makes the report available to crown counsel and the convicted person, and provides both with an opportunity in open court to disagree with its factual content, interpretations and recommendations.<sup>41</sup>

Research on pre-sentence reports suggests that they significantly influence sentencing: rates of concurrence between the recommendations of probation officers and the sentence imposed are high.<sup>42</sup> For example, an Alberta study reports that judges agreed with probation officers in 80 percent of cases.<sup>43</sup> A Yukon study reports a concurrence rate of 85 percent, with the judge more likely to impose a harsher sentence than recommended than a lighter one.<sup>44</sup>

The close relationship between report recommendations and sentences raises the question of the extent to which pre-sentence reports contribute to differential incarceration. Canadian research to date has focused on sentencing of Aboriginal offenders. John Hagan’s research in Alberta suggests that probation officers’ perceptions of Aboriginal offenders as less co-operative or less remorseful than others tended to result in less favourable assessments and thus recommendations for harsher sentences. However, a study in the Yukon revealed no evidence of either harsher or more lenient recommendations for Aboriginal offenders.<sup>45</sup>

Studies in other jurisdictions have examined relationships between pre-sentence reports and differential sentencing of black and other racialized persons. Some English research suggests that probation officers are less likely to recommend Afro-Caribbean people for probation because the officers do not know how to deal with them and view them as troublesome or unco-operative.<sup>46</sup> Another potential problem is that white probation officers may prefer not to work with Afro-Caribbean clients,



whom they perceive as “high risk,” and may therefore avoid recommending sentences that might result in probation supervision of Afro-Caribbean people.<sup>47</sup>

Some researchers have identified subtle factors in pre-sentence reports that may contribute to harsh sentences for black offenders. One analysis of English pre-sentence reports and probation officer “culture” and thinking about black people concluded that these reports were “a dangerous medium for conveying information about ethnic minority cultures.”<sup>48</sup>

Another found that pre-sentence reports rarely took account of reasons for offending such as poverty, structural inequalities<sup>49</sup> and racism, tending instead to explain deviant behaviour of black offenders in terms of personality, family and school problems.<sup>50</sup> As one researcher notes, “... this kind of colour-blind approach fails to recognize that the black life experience is fundamentally different from white experience in our society and that [the] difference is due to racism.”<sup>51</sup>

The Commission did not find any Ontario research into racial differentials in the content of pre-sentence reports and related racial differences in incarceration rates. The need for detailed research in this area became apparent only late in the Commission’s mandate. Our findings in relation to sentencing highlight the importance of such research to securing racial equality in sentencing.

**8.5 The Commission recommends that Ontario correctional ministries and the Ministry of the Attorney General conduct research into race differentials in pre-sentence and pre-disposition reports, and into the relationship between pre-sentence and pre-disposition reports and sentencing outcomes.**

We raised the question of potential bias in pre-sentence reports in a focus group of experienced white probation officers from five offices in areas where demographics are rapidly changing. While participants acknowledged that cultural differences sometimes made their jobs more complicated, most felt that, even in the absence of training, they had adapted to the diversity of their clientele. The officers noted that most of the information in their reports is gleaned from reports of police officers and school officials, and in interviews with people who know the accused such as family, friends and employers. They felt confident that they could handle any biased comments appropriately and produce factually accurate reports.

Participants had strikingly different responses, however, to examples of comments in pre-sentence reports that draw on stereotypes or implicitly racialize convicted persons. Some perceived no problem in reproducing emotive language from their sources about a person said to belong to a “posse” or “Latin American” gang, so long as such characterizations were “substantiated” by the police. Some were more inclined to exclude such labelling as well as what they termed “psychological evaluations” convicted person’s attitude or demeanour. Others felt that such “colourful” comments should be in the report and perceived no danger that including them would make them seem more credible – and damaging.

This range of views suggests a need for stronger direction on the content of pre-sentence reports. Even if judges ignore stereotypical comments reproduced in pre-sentence reports, the sentencing process should not be tainted by such commentary. Present Ministry of Solicitor General and Correctional Services procedures for preparing pre-sentence reports, while comprehensive in other ways, provide no assistance in dealing appropriately with stereotypical or biased comments by the officer's sources.

In 1994 the Ministry of the Solicitor General and Correctional Services began to review procedures for writing pre-sentence reports, with "heightened sensitivity to native and multi-cultural issues" as one goal. Helping probation officers avoid transmitting bias from other sources into the sentencing process should be a priority of the review. Meanwhile, the Ministry should simply direct probation officers to request an explanation whenever a source provides material referring to a convicted person's race, ethnicity, immigration status, religion, nationality or place of origin. A probation officer who receives an unsatisfactory explanation from staff of a public sector agency should review the comment and explanation with an area manager of the probation service. If the area manager agrees that the explanation is inappropriate, this should be communicated to a senior supervisor in the public sector agency.

#### **8.6 The Commission recommends that Ontario correctional ministries –**

- a) direct probation officers to request an explanation in writing whenever a pre-sentence report source provides material that refers to a convicted person's race, ethnicity, immigration status, religion or nationality.**
- b) direct probation officers to review with their area manager any unsatisfactory explanation of such a reference provided by a source in a public sector agency. If the area manager agrees that the explanation is inappropriate, this should be communicated to a senior supervisor of the source.**

## **A broader view**

Our recommendations propose specific reforms well within the capacity and jurisdiction of the provincial justice system. Their implementation in concert with the system-wide recommendations in Chapter 12 should help to prevent imposition of harsher sentences on black and other racialized people than white people.

The criminal justice system should also address the broader problem of the over-use of prison sentences, especially short sentences served in provincial institutions, because restraint is important to equality. While racial differentials in incarceration could be avoided by imposing harsh but equal sentences on white and racialized offenders, this would increase rather than reduce injustice. Those sentenced to prison would still represent only a tiny minority of individuals who break the law and generally be drawn from the most marginal sectors of society. People convicted of property and nuisance offences would continue to dominate sentenced admissions to provincial prisons. Ontario would carry on wasting millions of dollars warehousing



people away from the community for short periods, instead of assisting them to avoid further offending and integrate themselves into the community.

Over-use of imprisonment has been criticized so frequently in Canada, as elsewhere, that adding our voice to the chorus may seem redundant. But the key points cannot be repeated too often:

“There is no evidence that higher sentences are effective in reducing the crime rate.”<sup>52</sup>

“The majority of admissions to jail [in Canada] are non-violent offenders who do not need to be incarcerated to protect the public .... A large proportion of persons are incarcerated because there are no appropriate places or programs for them.”<sup>53</sup>

“... we send too many people to jail in [Canada]. Every Royal Commission on sentencing in the last 159 years, and there have been many, has come to the same conclusion.”<sup>54</sup>

“Growing evidence exists that, as educational centres, [Canadian] prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals.”<sup>55</sup>

“Every Royal Commission, official report and extensive study done on sentencing in [Canada] ... has...concluded that rehabilitation is unlikely to occur while the offender is incarcerated.”<sup>56</sup>

These criticisms of incarceration apply with particular force to over-use of short sentences. While the conditions under which short sentences are served are often unpleasant, there is no evidence that the sentences deter individuals or reduce crime in the wider society. Even if prisons could deliver useful rehabilitative services, such as literacy or job training, a short-term prisoner is unlikely to complete such programs before release. Furthermore, short periods of incarceration may delay restitution to the victim, disrupt employment and personal relationships, and postpone community reintegration.

Some relief from over-use of short sentences may come with the passage of federal Bill C-41, which enshrines in sentencing law the principles of restraint and proportionality.<sup>57</sup> It directs judges not to impose imprisonment when a less restrictive sentence is appropriate. The systemic change necessary to reduce reliance on short prison sentences also requires judicial leadership, backed by support from other criminal justice professionals, in partnership with the community. Sentencing should be pragmatic and flexible. Penalties and obligations imposed on offenders should make the best use of the creativity and resources of the community. They should, in the words of Judge Stuart:

... reflect a blend of the interests and resources of the formal justice process and the community. A blend that assists in stemming the shocking exponentially

rising costs of professional justice services and reducing the equally shocking failure to prevent crime within our communities. A blend that is achievable only when Counsel invests the resources and time to fit the sentence to the facts, and if all justice officials acquire the humility to recognize their limitations and the valuable contribution a community can and must make to the sentencing process, and to the larger more pressing objectives of individual, family and community well-being.<sup>58</sup>



## Endnotes

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9. *R. v. Iwaniw: Overton* (1959) 127 C.C.C. 40, adapted from 9 *Halsbury* (2d ed.) 256.
10. Clayton C. Ruby, *Sentencing*, fourth edition (Toronto: Butterworths, 1994), p. 24; Roger Salhany, *Canadian Criminal Procedure*, fifth edition (Toronto: Canada Law Book, 1989), p. 345.
11. This wording comes from the first Ontario legislation authorizing preparation of pre-sentence reports (*Probation Act*, R.S.O. 1922, c.103, s.3(1)).

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13. See Andrew Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicolson, 1992), pp. 121–40; *R. v. Fireman* (1971) 4 C.C.C. (2d) 82 at 86 (Ont. C.A.); *R. v. Ettagiak* [1986] N.W.T.R. 203 (S.C.), aff'd. [1986] N.W.T.R. 286 (C.A.); *R. v. Capot-Blanc* [1987] N.W.T.R. 1 (S.C.); *R. v. Beatty* (1982) 69 C.C.C. (2d) 223 (Sask. C.A.); *R. v. Onalik* (1987) 65 Nfld. & P.E.I.R. 74 (Nfld. C.A.); Richard Delgado, "'Rotten Social Background': Should Criminal Law Recognize a Defense of Severe Environmental Deprivation?" 3 *Law and Inequality: A Journal of Theory and Practice* (1985) 9.
14. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Supply and Services, 1982), p. 53.
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17. Assault incarceration rates range from 54 to 85 percent, depending on the offence (Canadian Centre for Justice Statistics, *Sentencing in Adult Criminal Provincial Courts* [note 5]).
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## Chapter 9

# *Racism Behind Bars Revisited*

*“Jail is like school, but the only subject is survival.”*

*– Black prisoner in Metro West Detention Centre<sup>1</sup>*

This chapter returns to the Ontario prison system to examine its treatment of racialized persons. Elsewhere in this Report we have discussed how lack of restraint by the Ontario criminal justice system has led to high rates of incarceration of both tried and untried persons, most charged with or convicted of non-violent offences. We have also shown that black and Aboriginal persons are admitted to Ontario prisons at higher rates than white persons, a difference at least partly due to discrimination in the administration of justice. The prison system is not responsible for these problems, since it has no control over who is admitted to prison or how many people are incarcerated. It is wholly accountable, however, for how prisoners are treated.

The Commission’s Terms of Reference directed us to submit an interim report on the treatment of racial minorities in both adult and youth correctional facilities. Our Interim Report – *Racism Behind Bars* – showed that racially hostile environments, racial segregation among and within institutions, and failures to accommodate the service and program needs of black and other racialized prisoners deform Ontario prison systems. Underlying these specific findings of mistreatment is the general theme that racism behind bars may be used to intimidate black and other racialized prisoners, operating as an indirect method of control. For this Report, we investigated the extent to which systemic racism influences direct methods of controlling prisoners.

Direct control in prisons is generally based on the behavioural model of the carrot and stick. Prisoners who are seen to conform to the norms of the institution and who obey the rules quickly and quietly are offered rewards such as early release through parole or permission to be temporarily absent during a prison term, and privileges while in jail. Those who are not perceived as compliant may find their privileges withheld or parole denied, or involuntary transfers imposed. They may also be subjected to institutional punishments, such as the “prison within a prison” of



segregation cells, or forcibly controlled through violence by correctional officers or other prisoners (sometimes provoked by staff).

To determine which of the many rewards and penalties used to manage prisoners should be priorities for this inquiry, the Commission undertook extensive consultation. We visited adult and youth prisons in every region of the province and talked to correctional workers and management, spiritual advisers who work in prisons, representatives of community agencies involved in correctional issues and prisoners of diverse backgrounds. These sources all urged investigation of the same three issues: prison punishments, use of force by staff and access to early releases for adult prisoners.\*

Before documenting findings, we first set out the legal and policy framework for control within prisons and the institutional context. We discuss these in some detail because the exercise of authority inside provincial prisons is largely hidden from view. Policies and procedural guidelines for the use of discretionary powers are generally unknown, and correctional practices are wholly invisible to most Ontarians. Prisons are not courts; the public or the media cannot simply walk in and watch. Even judges, justices and lawyers involved in decisions to incarcerate have little exposure to the exercise of discretion inside provincial prisons.

The next section focuses on institutional punishment. It describes the procedures governing punishments and the types of discretion exercised, and presents an exploratory study of punishment practices in selected prisons. Following that, we document concerns about staff violence against prisoners and describe problems we encountered in investigating them. Then we examine discretionary releases from prison. This section describes temporary absence programs and presents findings from a study of access to them at two provincial prisons. It also considers key issues in the parole system. The final section proposes changes to enhance public accountability in the prison system.

## The context of prison discipline and control

### *Law and policy*

Although imprisonment involves the loss of some personal freedom, the law makes it clear that the state cannot take away all of a prisoner's rights.<sup>2</sup> The *Canadian Charter of Rights and Freedoms* requires that prisoners not be deprived of "life, liberty and security of the person ... except in accordance with the principles of fundamental justice."<sup>3</sup> They must not be "subjected to any cruel and unusual treatment or punishment."<sup>4</sup> They must be treated with equality.<sup>5</sup> The right to non-discriminatory treatment is also affirmed in the *Ontario Human Rights Code*.<sup>6</sup> In

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\* The *Young Offenders Act* assigns control over most types of significant releases for young offenders to the courts.

addition, rules of “natural justice” or “legal fairness” require that important decisions about prisoners must be made fairly and without bias.<sup>7</sup>

Obligations and duties required by law are supplemented and reinforced by government policies. All ministries, including those responsible for prison services,<sup>\*</sup> are subject to the “Policy Statement on Race Relations,” which declares that “Racism in any form is not tolerated in Ontario.”<sup>8</sup>

The policy of the Ministry of the Solicitor General and Correctional Services is to

... treat inmates in a responsible, just and humane manner which recognizes their inherent dignity as human beings, promotes their personal reformation, development and socialization, and affords them the rights, privileges and protections prescribed by law.<sup>9</sup>

Staff are directed to find an “equitable balance between the protection of inmate rights on the one hand and the legitimate safety and security concerns of the institution and community on the other.” The policy is sensitive to the pressures that lead staff to favour institutional concerns over the prisoners’ rights and interests. Ministry policy seeks to promote “equitable balance” by spelling out key principles to govern the treatment of prisoners:

- Imprisonment in Ontario is a *limited* restriction of freedom. It does not of itself take away all of an individual’s rights in Canadian society.
- Prisoners are entitled to equality. Imprisonment does not take away their rights to be treated without discrimination.
- Prisoners in Ontario are entitled to justice. Imprisonment does not take away their rights to be treated fairly.
- Prisoners in Ontario are entitled to respect. Imprisonment does not take away their rights to be treated with decency.

Thus both formal law and official policies require that prisoners be treated in accordance with the fundamental values of equality, fairness, accountability and decency. These are not extras to be accorded if time and circumstances allow, but should, infuse all official actions in containing, controlling and attempting to rehabilitate prisoners.

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\* When we began our work, the ministry responsible for correctional services for adults and 16- and 17-year-olds was known as the Ministry of Correctional Services. As part of the reorganization of provincial government services in February 1993, it was amalgamated with the ministry responsible for policing services; the department is now the Ministry of the Solicitor General and Correctional Services (MSGCS). The Ministry of Community and Social Services (MCSS) has responsibility over correctional services for youths aged 12 to 15, and has similar policies.



### ***Institutional context***

In practice, the institutional context or environment of a prison creates constant pressures to elevate expedience and control over demands of law and policy. Prisons are “total institutions,” with complex social structures and relationships formed in response to large numbers of people being forced to live, temporarily, in very close quarters, without choice or freedom.<sup>10</sup> Officially, goals such as reformation and rehabilitation of prisoners are still part of the prison agenda.<sup>11</sup> To those denied liberty and to their keepers, however, the intrusive and all-encompassing nature of prison life tends to create different priorities.

Imprisonment means that prisoners lose virtually all aspects of their right to privacy. They live with almost every activity observable by guards of both sexes and by other prisoners – from toilet functions to socializing to eating to sleeping. At the same time, prisoners lose most choices. Many aspects of their daily lives are dictated – from what to read or see on television, to what clothing to wear, what food to eat, what work to do. Prisoners are isolated from their friends, families and other sources of emotional support and guidance. They are compelled to live with strangers, some of whom they fear. Confronted with these realities, most prisoners endure their confinement with only two goals: release and survival until release, ideally with some measure of dignity and self-respect.

Prisons are also highly stressful environments for the people who work there. From their perspective, by far the most important goal of their institutional power is to control the behaviour of prisoners effectively. Thus, containment and order are top priorities. Fairness and accountability may matter to individuals in other areas of their lives, but inside the prison it is easy for staff and management to see them as secondary to their need to control prisoners and maintain order.

The values and attitudes of correctional staff and managers towards crime, prisoners and minorities may also affect the culture of correctional authority. Correctional workers are as influenced by stereotypes or as likely to favour punitive goals as anyone in society. Their intimate knowledge of prisons and prisoners does not serve in and of itself to challenge false assumptions. Some may recognize their common humanity with prisoners, and question popular beliefs about “criminals” or myths about the criminality of certain races. Conversely, intense exposure under quite abnormal conditions to persons charged with or convicted of crimes may reinforce such beliefs and myths. It may also spawn cynicism about rehabilitation and disregard for the values of fairness and accountability when dealing with prisoners.

Such toxic elements in this isolated environment are strongly associated with what has been aptly called “deformative risk” of prisons – the danger that prisons increase the likelihood that prisoners will offend again after release.<sup>12</sup> The principles for reducing deformative risk – fairness, decency, equality and accountability – are already part of the legal and policy framework governing the treatment of prisoners. Practising these values, however, is challenging because Ontario prisons hold people for relatively short periods of time. Time is an important factor in managing prisons

and prisoners, affecting every decision from the allocation of prisoners among and within institutions to the assistance available to prisoners preparing for parole or other release processes, or defending themselves against allegations of misbehaviour. For example, it is difficult to argue that a remand prisoner charged with misconduct must receive notice in writing of the case against him or her, let alone have the opportunity to consult counsel, when he or she may be in a particular institution for only a few days.

Practices said to be standard in federal institutions to promote justice, such as internal grievance procedures for prisoners, may simply not be feasible for prisoners held on remand or serving short sentences in the provincial system. Meaningful assessments of prisoners as individuals and planning programs to help sentenced prisoners are almost impossible. Decision-making based on patterns and expectations that may be stereotypes is a serious risk.

While the rapid turnovers of prisoner populations and relatively short imprisonment clearly pose special challenges for the provincial system, neither the appearance nor the practice of justice must be compromised. Because persons held in total institutions are highly vulnerable to arbitrary, unjust or unequal treatment, the protections afforded by principles of equality, fairness and accountability must be secured in practice as well as policy.

## Prison discipline: misconduct

Prisoners are subject to a system of institutional punishments based on rules laid down by the Ministry of the Solicitor General and Correctional Services.<sup>13</sup> Some rules emphasize demeanour or attitude and respect for authority;<sup>\*</sup> some concern harm to persons or property;<sup>†</sup> others focus on risks to security and control.<sup>‡</sup> Alleged breaches of the rules by prisoners may be reported to the institution's superintendent. If, after investigating an incident and hearing from the accused prisoner, the superintendent is satisfied that a "misconduct" occurred, a punishment authorized by the regulations may be imposed.<sup>§</sup>

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\* These forbid such behaviours as the "mak[ing] of a gross insult, by gesture or abusive language" (s. 29(1)(c)), "leav[ing] a cell, place of work or other appointed place without authority" (s. 29(1)(i)), "wilful disobe[dience] of a lawful order of a ministry employee" (s. 29(1)(a)), and "wilful breach or attempt to breach any regulation or written rules ... governing the conduct of inmates" (s. 29(1)(n)).

† Prisoners must not, for example, "commit or threaten to commit an assault" (s. 29(1)(b)), commit theft (s. 29(1)(d)) or damage property (s. 29(1)(e)).

‡ These rules forbid attempted escapes (s. 29(1)(h)), possession of "contraband" such as alcohol, weapons or illegal drugs (s. 29(1)(f)), and creation or incitement of "disturbance(s) likely to endanger the security of the institution" (s. 29(1)(g)).

§ Section 29(3) provides that no Ministry official other than a superintendent or authorized delegate may impose formal disciplinary penalties on a prisoner.



Although the rules are strictly framed, prison discipline is highly discretionary. Staff are expected, first, to make the fundamental decision about whether the formal disciplinary process is the best method of handling a problem. Some may actively limit the use of their authority to punish, relying instead on other methods to manage conflict. Others may lack the skills or the confidence to secure co-operation from prisoners except by invoking discipline.

Second, when exercising the power to punish, staff and management must interpret prisoners' behaviour within the meaning of the prison rules. As they make decisions about policing, investigation, adjudication and punishment of prisoners, staff and management may be motivated by many concerns. They may worry about their own authority over individual prisoners, over specific groups of prisoners or over prisoners generally. They may think about the implications of using discipline – or not using discipline – for the atmosphere of the prison. Some staff may want to be seen as tough, while others are more anxious to be seen as fair.

Fairness in the exercise of the power to punish is not, however, a matter of personal choice, but a requirement of law and Ministry policy. Referring specifically to punishment in prison, the Ministry states that “*fair and consistent application* of ... inmate discipline is *essential* [to] security, safety, and good order of institutions and ... rehabilitative goals”<sup>14</sup> (emphasis added).

A consistent complaint of prisoners – male and female, adults and youths, black and white – is that the power to punish is not used evenly and fairly. They insist that correctional officers punish black prisoners, more frequently, more severely and for less reason than white prisoners. Correctional officers, both black and white, expressed many of the same concerns:

“Black inmates are more severely punished for insignificant incidents such as answering back to a CO (correctional officer).”

“Twice as many blacks are put in segregation, not because they have done anything wrong, but because they are black.”

“Black inmates receive far harsher misconducts than white inmates due to the perception that black inmates are more violent or are instigators in most incidents.”

“... A white inmate may use ‘profane’ language towards a white officer and nothing happens. A few moments after, a black inmate may just suck his teeth towards the same officer and [he] receives a misconduct.”

A submission to the Commission by the Ontario Public Service Employees Union (OPSEU) which represents provincial correctional officers, includes these observations:

“Punishment for offences within the institution isn’t standardized. It can be pretty capricious. It all depends on what the officer writes on the report.”

“As in the courts similar offences committed by white inmates get lesser penalties. Black offenders are often found guilty and punished by being sent to segregation. Minority inmates constitute the majority of those sentenced to segregation or to menial tasks for ‘obstructive offences.’”

“A lot of Caribbean inmates use singing or chanting reggae songs when they are in the day area as a way of coping with incarceration ... They can be charged with causing a disturbance and put in segregation or on a restrictive diet as a penalty.”

To investigate these concerns we researched case law and academic literature, reviewed Ministry policies and procedures governing misconducts, analyzed Ministry and institutional records, and consulted with staff, management and prisoners. We also conducted a small exploratory study of how the power to punish had been used against white and black prisoners at selected Ontario institutions. Our goals were to identify practices that might be responsible for perceptions of unfairness and discrimination, and to see if misconducts on the files of white and black prisoners show racial differences in punishing prisoners.

We begin by documenting forms of discretion that are available to prison personnel at each stage of the misconduct process. This review demonstrates the *potential* for institutional discipline to be used, or perceived to be used, in an arbitrary, discriminatory or abusive fashion.

We then document findings from the exploratory study of disciplinary practices at selected Ontario prisons. These findings suggest that staff use their punishment power differently against white and black prisoners. Distinctive patterns appear in the types of misconducts and punishments recorded against black and white adult prisoners of both sexes, and also in the uses of misconducts to discipline and control 16- and 17-year-old male prisoners. As with the review of procedure, the exploratory study shows why current practice fails to convince prisoners, staff and all other concerned Ontarians that the prison discipline process manifests fairness, consistency, equality and accountability.

### ***Enforcing the rules***

Two fairly typical incidents from Ministry files serve as our reference points for the different types of discretion in the enforcement process.

CASE A: Prisoner A was reported for the offence of “making a gross insult, by gesture, use of abusive language, or any other act, directed at any person.” According to the reporting staff member, the incident occurred while prisoners were being summoned for work. The staff member stated in the Misconduct Report: “Inmate [A] shouted at me from his room to ‘fuck off.’ I have told him repeatedly to be on time for work.”

In a related document, the Occurrence Report, the staff member added more detail. Under the heading “re attitude and behaviour of inmates [A] and [another prisoner] while on [work assignment],” he wrote:



"I have told [the] inmate named above about being ready for work on time. All I ever get from him was 'he didn't hear the officer call him.' He has an explosive attitude to people when being collected by them. I have heard him mumble to me before to 'fuck off.' But this morning was a show of bravado to his fellow inmates when he swore at me."

CASE B: Prisoner B was reported for two misconducts arising out of a single incident. The officer reporting the first alleged rule violation described the incident in the Misconduct Report in this way: "I did witness inmate [B] throw a pat of butter behind him in the direction of another inmate, namely inmate [Y]." In the Occurrence Report the officer repeated the same basic allegation and added:

"I ordered inmate [B] to go to the search area .... I should note that there were about ten pats of butter discovered in the area that the one witnessed to be thrown would have landed, indicating that there were numerous others thrown. Inmate [B] was placed on a misconduct and lodged in the Special Needs Unit [segregation cell]."

The prisoner was charged with the misconduct "creates or incites a disturbance likely to endanger the security of the institution."

The second incident occurred immediately after prisoner B had been interviewed as part of the investigation into the events in the dining room. B was being taken back to the segregation cell by two other correctional officers when, in the words of the second reporting officer:

"Inmate B made a false and extremely derogatory accusation that I had called him 'BLACKIE.' He also made very libellous and demeaning statements that I was a 'RACIST.' He stated, in fact, 'you are the most "RACIST" person in here.' This was without provocation or any dialogue on my part and was completely unwarranted. This was witnessed by Mr. Z [a correctional officer]." (emphasis in the original)

In the Occurrence Report of this incident, the officer repeated the statements allegedly made by the prisoner, describing them as "a cheap and insulting attempt to cause a situation by this inmate." He added: "Accusations of this nature are very serious and libellous whether founded or unfounded and will certainly not be tolerated either publicly or in the workplace."

This second incident was recorded as "makes a gross insult, by gesture, use of abusive language or other act, directed at any person."

### Reporting discretion

Staff members who reported these incidents had to decide if the prisoner's conduct amounted to a breach of a rule, and if so, which rule. They also had to decide whether to invoke institutional punishment or respond more informally. Language such as that allegedly used by inmate A, for example, is hardly rare inside or outside prisons. According to the staff member's report, he had heard the same words from the same prisoner on previous occasions, apparently without doing

anything about it.\* Clearly the staff member this time chose a punitive response by labelling the behaviour a breach of the rules, categorizing it as “gross insult” and reporting it as a misconduct.

Such choices are even more evident in the incidents involving prisoner B. Throwing one or even ten butter pats in a dining room is not obviously “likely to endanger the security of the institution.” Nor do the reports indicate a disturbance, retaliation by other prisoners, or behaviour suggesting they had been incited to do anything. Of course, there may be more to the story than appears on the official record. If the dining room was understaffed, “acting up” on the part of a prisoner might seem threatening, especially if the atmosphere in the prison was unstable at the time. Alternatively, the officer may simply have perceived the individual prisoner as a troublemaker and used the misconduct charge to have him removed. She may have lacked the confidence or the training to use a non-punitive approach. In the absence of further information, such speculation will not take us far; the crucial point is simply that labelling the behaviour as a breach of the rules involves considerable discretion.

Yet more striking is the exercise of labelling discretion in the second misconduct charged against B, when the prisoner alleged that an officer had behaved in a racist fashion† and described him as “the most racist person in here.” Clearly, the officer was upset and insulted by the allegation; this impact on the officer seems to have motivated the decision to treat the allegation as requiring a disciplinary response. In choosing this response, the officer appeared to be concerned to deter any similar allegation against any member of the prison staff. He stated that such accusations would not be tolerated even if they were “founded.”

As well as exercising discretion to label conduct as a breach of the rules, staff may also make choices about the offence category. Many rules are so broad that they overlap. Aggressive gestures directed by one prisoner at another, for example, might be viewed as a gross insult or a threatened assault. Conduct that appears to combine a defiant attitude and insulting language, as in the misconduct charged against A, could be seen as disobedience or insulting. Assuming that the officer in the dining room first told B to stop throwing butter, B’s alleged misconduct might have been reported as “disobeys order,” rather than “incites/creates disturbance .... likely to endanger security.”

After deciding that a prisoner’s behaviour is a specific type of forbidden conduct, staff then face the choice of whether to report the incident as a misconduct, or to disregard it, perhaps with a warning or caution of serious consequences in case of another infraction. As with the discretion to lay criminal charges in the wider

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\* The prisoner’s institutional record does not disclose any prior misconduct of “gross insult.”

† As we show in our Interim Report (pp. 13–19), many correctional officers in Ontario’s prisons are known to use racist language to and about black and other racialized prisoners.



community (see Chapter 6), charging discretion behind bars may be influenced by many factors. These include judgments about the seriousness of an incident, beliefs about the value of a formal disciplinary response as a response to the specific problem, (un)willingness to give the prisoner a break, or a desire to secure the prisoner's co-operation on other matters.

Policy may also shape the exercise of discretion over charges. Ministry guidelines state, for example, that informal resolution rather than official processing of a misconduct charge may be appropriate when the breach of the rule is not serious. Thus the staff members involved in the incidents with prisoners A and B could have treated the conduct as a minor breach of the rules and offered the prisoner an opportunity to apologize or otherwise make amends.<sup>15</sup> That they chose not to meant the incident was officially recorded as an alleged misconduct, and the formal machinery for adjudicating guilt and deciding punishment was brought into action.

Once a correctional officer has decided to label and charge a prisoner's behaviour as a disciplinary offence, the prisoner may be isolated until further processing of the misconduct report. While the regulation clearly states that segregation may be used only if the alleged misconduct is "of a serious nature,"<sup>16</sup> in practice much depends on the interpretation of "serious." Both A and B, for example, were placed in segregation as soon as the officers decided to treat their alleged conduct as requiring discipline.

### Processing misconduct reports

Once an officer has decided to invoke formal discipline, she or he must tell the prisoner of the misconduct charge and complete a misconduct report. These record details of the incident, the section of the regulation that was allegedly violated, and any immediate action taken by staff. After completing the report, the officer submits it to an institutional supervisor, who must notify the prisoner of the allegations.\*

Formal notification usually occurs as part of an "investigative" interview with the prisoner, conducted by an institutional supervisor. Apart from notification, such interviews are used to advise prisoners of their rights, find out if they need interpretation or other assistance, ask for their version of the incident and the names of any witnesses they wish to have interviewed, and to assess the prisoners' "current attitude to the allegation." When a prisoner is being held in segregation cells, the interview also gives the supervisor an opportunity to review the prisoner's status and decide whether segregation should continue.<sup>†</sup> As part of the investigation, the institutional supervisor interviews the correctional officer who reported the incident and any witnesses named by the officer or the prisoner.<sup>17</sup>

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\* Although Ministry policy is to notify the prisoner orally and in writing, the regulations do not require written notification.

† Section 34(2) of the regulation requires that the superintendent review whether the prisoner is to remain segregated within 24 hours of such incarceration.

Ministry policy anticipates that just as misconducts vary in seriousness, so should the resources and investigative efforts devoted to processing them.<sup>18</sup> When a prisoner admits to a relatively minor rule violation that is unlikely to merit a heavy penalty, the fact-finding process may involve no more than a brief interview with prisoner and staff member. More serious allegations may require a lengthy investigation in which the facts emerge only after interviews and re-interviews of many individuals.

Judged by the investigation, it would appear that the allegations in our examples above were not seen as serious. In the case of A, who admitted swearing at the staff member but asked for one witness to be interviewed in support of his explanation, the entire fact-finding process seems to have been completed within a couple of hours of the incident, although A was not released from the segregation cell until the next day.

B was interviewed shortly after the incident in the dining room and denied the first charge. B is recorded as having identified one witness – the prisoner at whom he was alleged to have thrown the butter – but there is no record of any statement by the witness, nor was the witness called at the subsequent hearing. During processing of B's second misconduct report (the allegations that he had grossly insulted the correctional officer), he admitted making the statements. However, the record gives no indication of efforts to assess the validity of the prisoner's accusation. B seemed to have accepted that the allegation of racism itself amounted to a gross insult whether or not it was true.

### **Superintendent's interview**

Once the investigation is completed, the superintendent must, if requested, hold a formal hearing (witnessed by at least one other staff member), at which the prisoner has an opportunity to challenge the charge. Specifically, the prisoner is entitled to dispute the allegation, to question the person making the allegation, and to explain the incident. Again, the seriousness of the alleged misconduct influences the nature and formality of the hearing. Ministry policy reminds superintendents that although in all cases they must "weigh the facts of the case in a fair and impartial manner ...," "[t]he more serious the alleged misconduct" and the stronger the potential disciplinary sanction, the more formalized the hearing and the greater the procedural safeguards must be.<sup>19</sup>

Of the three misconducts in our two examples, only one – the incident in the dining room involving B – was contested. At his hearing, B's position remained unchanged, namely that the officer had made a mistake when she identified him as the person who threw the butter. Although the allegation against a prisoner must be proven "beyond reasonable doubt," the decision-maker often simply chooses which



story to believe.\* In this case the superintendent chose to believe the officer, recording as his reason “the close proximity of the officer [to B].” The problems of assessing the relative credibility of prisoners and correctional officers have been well documented.<sup>20</sup>

## Punishments

After accepting the allegation against the prisoner as proved, the superintendent must choose an appropriate penalty. For this purpose, Ministry regulations authorize the superintendent to classify the offence as “a misconduct”<sup>†</sup> or “a misconduct of a serious nature.”<sup>‡</sup>

The Ministry does not provide guidance for determining whether offences are inherently serious or not serious. Instead it guides discretion by highlighting factors about the prisoner, the incident and its impact on the institution that superintendents should consider. Superintendents are advised, for example, to take account of: “remorse,” the prisoner’s “performance during the present incarceration” and “the inmate’s conduct and demeanour at the interview,” as well as “previous misconduct reports during the present incarceration,” the nature and seriousness of the misconduct and its impact on “security, safety and good order of the institution.” While this procedure has the advantage of encouraging superintendents to look at the context of a misconduct, it also creates potential for penalties to be, or to appear to be, disparate, harsh or inexplicable.

The penalties imposed in our examples are illustrative. Prisoner A, who swore at the staff member, was punished by forfeiting five days of remission, which meant he had to spend five more days in prison than if the misconduct had been treated as not serious. Prisoner B, whose “gross insult” was the allegation that the officer had used racist language and was a racist, was punished by forfeiting ten days of remission. For throwing butter pats in the dining room, conduct that staff interpreted as creating or inciting a disturbance likely to endanger the security of the institution, B

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\* It is well established by case law that it is an error to instruct a Jury that it must accept one story or the other beyond a reasonable doubt. In law the standard of proof beyond a reasonable doubt must be applied to all the facts, and the trier of fact may accept all, part or none of either story. *R. v. W. (D.)* (1991) 63 C.C.C. (3d) 397 at 409 (S.C.C.).

† Section 32 of the regulation provides that any misconduct may be punished by any combination of a reprimand, withdrawal of privileges, cancellation of a temporary absence permit, removal from a living unit, program or (prison) employment, or a change in the security status.

‡ If the misconduct is judged serious, s. 32(2) of the regulation gives the superintendent greater powers, such as ordering a prisoner held in segregation on a restricted diet for up to ten days, or segregated on a regular diet for as much as 30 days. With prisoners who are serving a sentence (as opposed to remanded before trial or held for immigration purposes), superintendents may also impose “forfeiture of remission” (loss of “good time”) or, subject to Ministerial approval, suspend prisoners’ eligibility to earn remission. Both of these penalties have the effect of delaying the date of release.

was punished by “closed confinement [segregation] for an indefinite period of no more than 30 days.”\*

## Conclusion

This formal process for investigating and adjudicating allegations of prisoner misconduct attempts to accommodate many of the legal requirements of fair procedure within the constraints of the provincial prison system. However, the discretion available to correctional officers and superintendents has few practical constraints. As we have pointed out elsewhere in this Report, the availability of such broad discretion provides greater opportunities for racist attitudes to influence decision-making, with adverse consequences for racialized communities. Within the institutional constraints of prisons, the due process model of adjudication cannot be relied upon as protection against systemic racism. As our Interim Report recommended, operational responsibility and accountability for eliminating overt and systemic racism must be placed squarely in the hands of institutional superintendents and permeate every level of operations.

## *Misconducts in practice: differential enforcement*

The Commission designed a study to investigate disciplinary practices at five prisons that hold significant numbers of black prisoners.<sup>†</sup> We hoped to conduct detailed comparisons that would include issues such as the circumstances in which misconducts were recorded, the nature of the investigations, and reasons for the choices made. However, due to inadequate record-keeping practices much of the information we needed was unavailable. Our analysis was therefore limited to comparing types of misconduct charges and penalties imposed on black and white prisoners.<sup>‡</sup>

A further consequence of the poor record-keeping is that our findings should be interpreted with caution. Although we note several important trends that emerged from the data available to the Commission, the considerable quantity of missing data means that it is simply not possible to determine the extent to which racial differentials exist.

Data were gathered for all prisoners charged with one or more misconducts during the period of our study,<sup>‡</sup> but the analysis compares only black and white adults

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\* Section 33(1) of the regulations permits prisoners to ask the Minister to review any misconduct penalty that delays their potential release date or whenever they believe that the required procedures were not followed. Our investigation of these reviews (including in our two examples) led us to conclude that the Ministry interprets the obligation to review narrowly.

† Maplehurst Correctional Centre, Metro West Detention Centre, Metro Toronto East Detention Centre, Toronto Jail and Vanier Centre for Women. Although initially we collected data about all racialized prisoners, we were unable to collect a sufficient sample of racialized prisoners other than black.

‡ All misconducts from Jan 1, to March 31, 1992, for the men's prisons and Metro West, and from Jan. 1 to May 31, 1992, for Vanier.



(males and females) and male youths.\* The samples of black and white prisoners are quite comparable by offender status and misconduct history. Only about 5% of the adult women and 15% of the adult men had a previous record of breaking institutional rules. Youths were much more likely than adults to have had earlier misconducts: the records of about half showed at least one prior misconduct.

Taken as a whole, the data show that black prisoners were over-represented and white prisoners under-represented among prisoners charged with misconducts during the study period. This pattern was consistent for adults and youths, and occurred at every prison in the study.

This finding is consistent with the perception that black prisoners are more likely to be charged with misconducts than white prisoners. The trend clearly suggests an adverse impact on black prisoners in the invocation of the misconduct sanction. However, critics might suggest that black prisoners are more likely to break the rules and that correctional officers are just responding to their behaviour. This view is not borne out by our more detailed analysis, which reveals distinctive trends in the rule infractions reported for black and white prisoners.

### Policing discretion

- Taken as a whole, black prisoners were most over-represented and white prisoners most under-represented in misconduct reports for wilfully disobeying an order. By contrast, black prisoners were most under-represented and white prisoners most over-represented in misconduct reports for possession of banned substances – the misconduct known as “contraband.”
- Black women were most over-represented and white women most under-represented in misconduct reports for issuing a “gross insult.” By contrast, black women were most under-represented and white women most over-represented in misconduct reports for contraband.
- Among youths aged 16 and 17, black males were most over-represented and white males most under-represented in misconduct reports for wilfully disobeying an order. By contrast, black young males were most under-represented and white young males most over-represented in misconduct reports for committing or threatening assault.
- Black adult males were most over-represented and white adult males most under-represented in misconduct reports for committing or threatening assault.<sup>†</sup> By contrast, black adult males were most under-represented and white adult males most over-represented in misconduct reports for contraband.

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\* The male youth sample is aged 16 and 17.

<sup>†</sup> Of the 114 misconducts charges involving “commits or threatens assault,” black men were charged at a rate 1.3 times higher than their representation in the prison population, while white men were charged at only 0.8 times their representation in the prison population.

These trends indicate that black prisoners are more likely to be charged with misconduct involving interpretation of behaviour, in which correctional officers exercise a greater degree of subjective judgment. However, black prisoners are less likely to be charged with misconduct when the discretionary powers of correctional officers are limited by the need to show factual proof, such as possession of forbidden substances. The reverse is true for white prisoners.<sup>22</sup>

### Penalty discretion

- Taken as a whole, black prisoners were most over-represented and white prisoners most under-represented in the “closed confinement” or segregation category of punishment.
- Black women prisoners were most over-represented and white women prisoners were most under-represented in the segregation category. By contrast, black women were most under-represented and white women most over-represented among prisoners punished with a reprimand.
- Among 16- and 17-year-old youths, black males were most over-represented and white males most under-represented in the segregation category. By contrast, black males were most under-represented and white males most over-represented in punishments involving “changes in program or living accommodation.”
- Black men were over-represented and white men under-represented in segregation penalties, but this was not the penalty with the greatest over-representation of black and under-representation of white prisoners. The category with the greatest disparity favouring white men was changes in program or living accommodation. Black men were most under-represented and white men most over-represented in punishments involving loss of remission.

Given these findings, it was clearly important to explore the relationship between the type of misconduct and penalty to see if over-representation of black prisoners in the segregation category of penalty simply reflected the nature of the offence charged or the combined effect of policing and punishment choices. This analysis shows a striking absence of a correlation between offence type and penalty, indicating complete randomness in the assignment of penalties to offences.

This finding strongly confirms the views of prisoners, OPSEU and individual correctional officers about disparities in the exercise of penalty discretion, at least if the nature of the offence is supposed to be the most important factor. As noted above, however, decision-makers are to take account of several factors when selecting penalties. Since they generally do not record the reasons for the penalty, or even the factors they took into account, the study was unable to identify any explanations for penalty choices.



## Conclusion

While these trends do not conclusively document systemic racism, they go much further than indicating greater representation of black prisoners amongst those subjected to formal discipline. The over-representation of black prisoners in the more subjective misconduct charges, and their under-representation when discretion is restricted, strongly support the conclusion of differential treatment because of race.

As we have already observed, prison disciplinary processes can have only a limited role in diminishing systemic racism in prisons. Nevertheless, efforts should be made to standardize disciplinary proceedings and make them more objective. The Anti-Racism Co-ordinator of the Ministry of the Solicitor General and Correctional Services should play an active role in this process.

The definition of misconducts should be restricted to behaviour rather than subjective assessments of attitude or lack of respect for authority. Restraint should be shown in resorting to formal discipline, and informal alternatives should be preferred. Superintendents should also exercise restraint and seek greater consistency in the penalties they impose. The purposes of the disciplinary system and its underlying principles should be clearly articulated. In short, the disciplinary system should comply with the rule of law.

### **9.1 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with the Ministry's Anti-Racism Co-ordinator –**

- (a) review the Ministry of Correctional Services Regulations in order to eliminate subjective elements of the definitions of misconduct wherever possible.**
- (b) review policies for resorting to the disciplinary process and imposing penalties in order to achieve greater restraint and consistency.**

## Use of force by prison staff

During our consultations with many hundreds of prisoners, a frequently expressed area of concern was the inappropriate use of force by correctional officers in penal institutions. Black prisoners, in particular, consider themselves vulnerable to physical violence by guards.

Their views were supported by some former correctional officers. One officer explained that these occurrences are a result of a traditional punitive correctional philosophy that is still deeply rooted in many staff members. He stated:

“There are too many people in the Ministry who are from the old school, the one we called colonialism. In the old days, if an inmate did something wrong, you took him down to the end of the range, and you laid a beating on him. It didn't matter if he was black or white ....”

While this “old school” correctional philosophy may have played a significant role in the use of force, other correctional officers speculate that racism may be a catalyst. The following comment by a correctional officer is particularly powerful:

“The leading union official in my institution, on my very first day, made a point of coming to see me to say no CO [correctional officer] is trusted in this institution unless they have beaten up an inmate. In my time there, many CO’s sat around telling me how much they hated niggers, how much they enjoyed beating them up.”

Another concern expressed by prisoners, institutional staff and managers, lawyers and prison support groups is the difficulty of investigating and verifying excessive use of force because of a culture or “conspiracy of silence” in prisons, by which guards protect one another and prisoner complaints are given little credence. Indeed, from our interviews with correctional officers, it was apparent that line staff in particular are under enormous peer pressure to deny allegations regarding improper use of force against prisoners, and to support their fellow officers. In one forum conducted by the Commission, an experienced black correctional officer stated:

“Correctional officers are reluctant to intervene when a black inmate is being beaten by a white officer. If you did, there would be retaliation – from your white peers, from supervisors, from managers. When a black officer speaks out against racist incidents, there is retaliation. They are targeted.”

The problem of improper use of force by correctional officers is a particularly abhorrent blight on the criminal justice system. Prisoners are especially vulnerable because correctional officers have almost complete control over them. The closed environment of prisons means that correctional officers’ conduct is rarely subject to outside scrutiny. Institutional and personal accountability is further complicated by the short sentences served in provincial institutions, barriers to making complaints, and the lack of credibility of prisoners trying to establish misconduct on the part of correctional officers. In light of these serious allegations, the Commission attempted to determine whether the use of force differs according to race.

Whenever a prisoner alleges that correctional staff have used excessive or unnecessary force, written incident reports must be prepared. We requested that the correctional ministries provide us with copies of incident reports (or equivalent documents) from 1989 to 1994. Data was obtained from 34 adult correctional institutions, 37 Phase 2 young offender facilities, and 12 area and regional offices of Ministry of Community and Social Services. Incidents specifically relating to “use of force” or assault were analyzed.

Unfortunately our study was plagued by incomplete and inconsistent information. The study did not make any significant findings in relation to black and other prisoners’ relative vulnerability to excessive violence. The detailed study, which describes the problems of data-gathering, is available (see Appendix B) and might well form a starting point for systematic research in this area.



The Office of Anti-Racism Co-ordinator for adult corrections, and the Office of Child and Family Service Advocacy should establish mechanisms for monitoring excessive use of force in Ontario prisons. They should also document any differential use of force against racialized prisoners. Strategies to prevent and respond to such violence should be a priority.

## Discretionary release from prison

The Ontario correctional system has two discretionary release programs – temporary absence and parole – that enable some prisoners to begin to reintegrate themselves into the community during their prison sentence.\* Participants may attend school, do paid or unpaid work, rebuild family relationships and join community-based treatment or counselling programs. Both parole and temporary absence involve conditional release, which leaves participants subject to correctional authority while away from prison. They may be required to return to a correctional institution if they are deemed to have breached a condition of release.

### *Temporary absence program*

The temporary absence (TA) program authorizes superintendents<sup>23</sup> (or their designates<sup>†</sup>) to permit adult prisoners to leave an institution while under a sentence of incarceration. In some situations, the prisoners are offered little or no freedom, such as during an escorted absence to obtain medical or dental treatment. Others allow almost full participation in community life. For example, a prisoner granted a temporary absence permit to reside at a community resource centre may go to work, attend school, participate in other community programs and rebuild relationships with family.

In addition to giving prisoners the practical and psychological benefits of spending time outside the institution, TAs may favourably affect prisoners' treatment on their return to prison and their ultimate release date. Successful participation in a TA program may enhance a prisoners' status in the eyes of correctional officers and may favourably influence parole boards.

Black and other racialized prisoners and members of community organizations voiced concerns to the Commission about access to TA programs. Some prisoners reported difficulties in finding out how to apply for TAs, and many were disappointed that the type of permit they wanted was not available at the prison where they were held. Others perceived racial differences in approval rates within some prisons. Prisoners in some institutions were also concerned about lack of accurate information about TA decisions and decision-makers. They reported

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\* A third program of early release, earned remission, has lost much of its discretionary element. Any prisoner not paroled is entitled to unconditional release from incarceration after serving two-thirds of the sentence (unless an institutional penalty involving loss of remission delays release). Release as a result of earned remission satisfies the sentence and the individual cannot be required to return to prison to serve the remaining time.

† Section 3 of the regulation allows the superintendent to delegate this power to other institutional officials.

significant difficulties in determining who is responsible for recommendations and approvals of TA applications, or why an application is rejected.

We investigated these concerns through reviews of Ministry policy and institutional practices, interviews with correctional staff and representatives of community resource centre (CRC) residences, observations of permit hearings and an exploratory study of the participation of black and white prisoners in the TA programs at Maplehurst Correctional Centre (for adult men) and at Vanier Centre for Women (adult women). Our key findings are:

- Inadequate provision for translation and interpretation in the prison system may impede access to TAs for persons who do not speak English or French.
- Considerable variation among prisons in the availability of TAs, eligibility criteria, and application and approval procedures creates disparity within the system and may confuse prisoners.
- At Maplehurst Correctional Centre, which has a reactive and ad hoc application process, black men were under-represented among applicants relative to their representation in the prison population. Black and white applicants, however, were equally successful in obtaining TAs.
- At Vanier Centre for Women, which has a proactive and systematic TA application process, black women were represented among TA applicants in about the same proportion as in the prison population. Black and white applicants were equally successful in obtaining TAs.

### Linguistic barriers

Access to temporary absence programs depends not only on eligibility, but also on knowledge that the opportunity exists and understanding of the process. Ministry policy holds superintendents responsible for ensuring that prisoners are advised of the types of permits available at each prison, eligibility criteria and the application process.\* This information is normally given orally or on video during an orientation session shortly after a prisoner arrives at the institution. Information about TAs may also be posted on prison walls, circulated in leaflets or distributed in handbooks to prisoners.

Unfortunately, this information is available only in English or French. None of the prisons reviewed in the Commission's study used professional interpreters to tell prisoners from linguistic minority communities about TAs (or indeed about any other aspect of prison life and programs). To the extent that prison managers had considered their duty to communicate information about TAs to these prisoners, they largely relied on other prisoners, staff with relevant linguistic skills (if any), and, occasionally, volunteers.

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\* Superintendents must also provide information about the TA programs on request to the public and to people who may wish to make representations on behalf of a prisoner.



Several aspects of the application process also indicate lack of attention to the needs of prisoners from linguistic minority communities. First, the TA application forms are available only in English and French. Second, Ministry policy provides that access to an interpreter during the TA application process is entirely at the discretion of superintendents, even though the policy accords prisoners a *right* to make oral or written submissions in support of an application. Third, there are no formal standing arrangements for institutions to fund or secure interpreters. While some staff told the Commission that the prison in which they worked would pay for interpreters when necessary, a more typical response was: "We don't have the money to pay for interpreters."

### Inconsistent procedures

The Ministry provides some guidance on basic criteria for assessing temporary absence applications\* and the procedures to be followed for applications to a community resource centre or for a TA of longer than 15 days. No further guidance on the TA process appears in law, or policy. Institutions are free to set their own eligibility standards for applications, devise procedures for assessment and recommendations, and determine who should review applications and make recommendations to the superintendent.

In the absence of comprehensive provincial standards for the TA process, considerable variation has developed among Ontario prisons. Some have established qualifying periods before eligibility for a first application or between applications. At some institutions, eligibility depends on participation in specific internal programs. Some require a period free from misconducts. The existence and nature of such requirements vary from prison to prison.

Procedures for reviewing TA applications and making recommendations to the superintendent also vary. Some institutions channel all applications through a TA co-ordinator, who reviews the forms, collects assessments of applicants and makes recommendations to the superintendent. Some rely on the standing TA board that is required to review community resource centre applications,<sup>†</sup> adapting the procedures to the type of absence being sought. Other prisons strike ad hoc committees of correctional officers on duty at the time applications need to be reviewed. Many

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\* These are: minimal risk to the community, "suitability" of the prisoner's plans for the time away from the institution, the relative benefits to the prisoner of "continued custodial supervision" instead of community programming, and likely reactions in the community if the release were to become public. (Ministry of Correctional Services, *Adult Institutions Policies and Procedures Manual*, 1992). When assessing applicants on these criteria, correctional staff are to consider current and previous convictions, relevant judicial comments at trial, immigration status, behaviour within the institution and "progress" during the time in custody.

† Superintendents are required to establish a "Temporary Absence Committee" and must refer all applications for lengthy absences (more than 15 days) to this committee for review and a report before deciding. The committee must review the application as soon as possible and no later than 15 days after receipt. Prisoners have a right to meet the committee to make their case orally and may, at the discretion of the superintendent, be assisted by an interpreter or any other person whom the superintendent believes would help the committee.

prisons do not interview applicants for TAs of less than 15 days, but some interview everyone who applies, whatever the purpose or period of the absence sought.

While prison staff and management may welcome the absence of a standard ministry procedure because it permits flexibility in the use of staffing resources, it may pose problems for prisoners, especially if they are moved between prisons. Differences in procedures among institutions are confusing, and may cause the process to be perceived as arbitrary.

Inconsistency may also be found within prisons, especially those where on-duty officers (rather than a designated staff member or standing committee) collect information, report and make recommendations to the superintendent about TA applications. Since participation in the approval process changes from work shift to shift, prisoners in these institutions may have little idea of who is responsible for processing their applications and making recommendations. Even though applicants receive a copy of the application form with a signature in the recommendations section, they experience the process as anonymous and unaccountable.\*

Senior managers of institutions that use this system say it offers line staff an opportunity to participate in programming and enhances the capacity of correctional officers to control prisoners. Prisoners are said to be more likely to co-operate in institutional routines if they know that any one of many staff members may evaluate a TA application. This view elevates expedience and institutional control over fairness, which requires that prisoners know the identity of those who judge them.

**9.2 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, advised and assisted by the Ministry's Anti-Racism Coordinator, review policies and procedures respecting the temporary absence system in order to establish ministry-wide core standards that include removal of communication barriers.**

### Case management and access

Variations in temporary absence programs partly reflect differences in approaches within the Ontario correctional system. Prisons that emphasize this important form of community reintegration typically invest more in preparing and selecting prisoners. They may proactively encourage applications, and advise and assist prisoners to take advantage of these opportunities. Other institutions are reactive, undertaking the least possible adjustment to institutional priorities of control and responding only to prisoner initiatives or their own needs. (If overcrowding reaches crisis proportions, for example, TAs may be a desirable way of easing the pressure.)

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\* One correctional officer told the Commission quite openly, "They don't know who I am because they can't read my signature."



Our exploratory study of access to TAs at two southern Ontario prisons – Vanier Centre for Women and Maplehurst Correctional Centre – illustrate different approaches. Vanier Centre for Women is the only Ontario prison exclusively for sentenced adult women. It has a wide range of temporary absence options and a highly structured program. Most women who wish to participate must first apply for a “recurring escorted TA,” which permits them to leave the prison under staff supervision for weekly outings. Prisoners who build credibility by good behaviour during these outings may “graduate” to less restrictive and longer absences.

Prisoners learn about the TA program during their orientation to the prison in the first few days after they arrive. A staff member assigned as her “case manager” also reminds each prisoner of the program and advises her about applications to it. There are no specific arrangements for information and assistance in languages other than English and French. Few prisoners at Vanier are from linguistic minority communities.

TA applicants at Vanier are not interviewed, but their forms go through an elaborate process of review and assessment. Staff, management, the supervisor of the unit housing the applicant, a social worker and the prisoner’s case worker are all asked to comment on the application, evaluate the prisoner, and make a recommendation. Assessments typically consist of detailed written descriptions of the prisoner and her progress at Vanier. Applications and all evaluations are submitted to the Temporary Absence Board, a standing committee that reviews the material and makes recommendations to the superintendent. The Board consists of two permanent members (the senior assistant superintendent and the “discharge planner”) and a third staff person, typically a shift supervisor of correctional officers.

Maplehurst Correctional Centre is a medium-security prison for sentenced adult males. Its TA program generally has many fewer options and much less structure than Vanier’s. Eligibility is determined mostly by qualification periods.

Prisoners learn about TAs through staff contact, an orientation video and information posted in the prison. There is no specific provision for information to be provided in languages other than English and French. Prisoners from linguistic minority communities may receive informal assistance from other prisoners, staff and volunteers.

Maplehurst relies on correctional officers on shift to staff an ad hoc panel that reviews applications and makes recommendations. Applicants are not interviewed. Once the panel has reviewed an application, its report and recommendations are submitted to the senior assistant superintendent for decision.

In addition to reviewing the TA programs at each institution, we conducted a small statistical study of TA applications by black and white prisoners. Data were collected on all TA applications made during two months of 1993 for which a file

was available.\* The data were first analyzed for indications of barriers to access to the TA program. We then compared outcomes for black and white prisoners at each stage of the application process to see if they were equally successful.

At Vanier, these analyses indicated that black women were represented among applicants in the same proportion as in the prison population as a whole, and they were as successful as white women at being recommended and approved for TAs. Thus the study provides no indication of systemic barriers to TAs for black prisoners at Vanier at that time, and no evidence of direct or indirect racial bias in decision-making. It suggests that black women are as knowledgeable as white women about the existence of TAs and just as eager as white women to use opportunities for community reintegration.

At Maplehurst, black prisoners were substantially under-represented and white prisoners substantially over-represented among TA applicants. About 40% of all prisoners but only 24% of TA applicants were black. By contrast, 57% of prisoners and 76% of the TA applicants were white. Once an application was made, however, black and white prisoners were equally successful. Thus the study shows no evidence of direct or indirect racial bias in the decision-making stages of the TA process at Maplehurst. But the under-representation of black prisoners in the application process suggests that systemic barriers may impede their access to TA program.

From our numerous discussions with black women prisoners at Vanier, it appears that some credit for their active participation in the TA program is due to the staff member responsible for setting up the Black Cultural Awareness Program in this prison, and the superintendent who fully supported this important initiative when it came under attack. As we noted in our Interim Report, "Black prisoners show enormous pride in this program, saying that it provides education, builds self-esteem and is a source of emotional support."<sup>24</sup> Members of the group share information about opportunities for change inside and outside the prison, and learn from one another how best to use what is available.

Another significant difference between the TA processes at Maplehurst and Vanier is the use of a case management model in the women's prison. This involves active encouragement of prisoners, regular assessment of their suitability for various programs and assisting them to apply for appropriate programs. Case management means prisoners are likely better informed about their opportunities, and they also receive help in planning applications. The reactive model at Maplehurst, by contrast, places all the onus on the prisoner. A prisoner who does not understand the system,

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\* At the time of this study (1993) 34% of women at Vanier and 40% of men at Maplehurst were black; both prisons had experienced massive growth in the number and proportion of black prisoners in the previous six years. See Chapter 4. All applications filed during the two months were reviewed at both institutions if a file was available (Maplehurst – 287, Vanier – 107). We chose this period because complete records of TA applications were kept only a few months. Many prisoners in both institutions filed more than one application. Not every application on record could be linked to a file because some applicants and their files had been transferred to other prisons.



does not know where to go for assistance, or is illiterate in English or French is at a great disadvantage, while prisoners familiar with the system are implicitly favoured. This reactive method of allocating opportunities to begin community reintegration should be replaced by a proactive case-management system.

**9.3 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with the Ministry's Anti-Racism Co-ordinator, establish a case management system in all prisons to ensure that every prisoner is advised and counselled about available prison services and programs.**

As the Commission was finalizing its work, we learned from a Government press release that the Ministry will no longer fund community resource centres (which the media call "halfway houses"). Instead, the Ministry intends to expand other types of institutionally based TA programs, supplemented by electronic monitoring.

While it would be beyond our mandate to assess the appropriateness of such a shift, there is little doubt that staged transition from close custody to full release is necessary and desirable for some provincial prisoners to promote rehabilitation. Further, our study of access to community resource centres demonstrates that black and other racialized prisoners can face considerable access barriers to TA programs. It would be most unfortunate if these changes deny access to a stable address, assistance and counselling to find employment or to establish links with family and supportive community members and groups to black and other racialized prisoners.

## **Parole**

Parole is a more systematic program than temporary absence. The eligibility criteria are national standards,\* decisions to grant or revoke parole are made by a provincial board, and persons released into the community are supervised by staff of the Ministry of the Solicitor General and Correctional Services. However, the parole application process is administered by institutional staff, which leaves considerable potential for disparity among and within Ontario prisons.

Failure to offer racialized prisoners appropriate assistance with parole applications was a key theme of our consultations with advocacy groups and prisoners. They reported that many prisoners, especially from linguistic minority communities, lack knowledge about the parole system and do not know where to turn for advice. As a result they are highly vulnerable to correctional officers providing false or misleading information, persuading them not to apply or threatening to withhold support for the application.

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\* Section 120(1)(a) of the *Corrections and Conditional Release Act* (S.C. 1992, c. 20) provides that eligibility for full parole arises when one-third of the sentence is completed. In highly exceptional circumstances, such as terminal illness, significantly deteriorating mental or physical health or release for extradition, s.121 provides that "parole by exception" may be granted at any stage.

A second key theme is differential treatment in decisions to grant or revoke parole. Prisoners from racialized communities were said to be scrutinized more intensively – and questioned less respectfully – than white prisoners. They were also said to be more likely than white applicants to be viewed as in need of further incarceration or, if paroled, to be subjected to harsh and unnecessary conditions.

The Commission was unable to compare outcomes systematically for white and racialized parole applicants because the Ontario Board of Parole does not keep statistics that would permit such monitoring. Thus we focused our research on barriers that prisoners from racialized communities may face in applying for parole and the potential for discrimination in decisions. Much of our understanding of the potential for differential treatment in the parole system is drawn from a lengthy submission prepared in 1993 by a committee of members of the Board's central region. Members of the Board showed considerable interest in our work and repeatedly expressed a desire to identify and eliminate practices that may reflect systemic racism.

### **Preparation for parole**

Commission visits to prisons, our interviews with prisoners, correctional staff, prisoner advocates and parole board members, and our observations of parole hearings indicate that in many institutions preparation for parole is reactive and inconsistent. Information about parole is available to prisoners in a pamphlet and on video, but little is done to ensure that they receive and understand it. Once again, the information needs of prisoners from linguistic minority communities are generally overlooked. Neither pamphlet nor video is available in languages other than French and English, and we found no evidence of formal arrangements to secure interpreters when necessary.

A frequently expressed concern was that prisoners have difficulty finding a knowledgeable person to explain Parole Board procedures, answer questions and assist in developing a release plan acceptable to the Board. Ontario prisons provide staff – Institutional Liaison Officers (ILOs) – to co-ordinate the parole process and ensure that the Board receives accurate information in a timely manner. ILOs interview prisoners seeking parole to determine what aspects of a release plan need investigation and verification by a parole officer in the community. These interviews could enable prisoners to ask questions and seek clarification of the parole process. In practice, however, prisoners receive little guidance because ILOs are generally overwhelmed by paper work and often unsure of their role. Many whom we interviewed felt they were not responsible for helping prisoners create a realistic release plan. Without such a plan, prisoners have virtually no chance of obtaining parole.

Parole preparation may be as reactive for non-racialized prisoners as for racialized ones. However, findings from the TA study associating reactive process with under-representation of black prisoners among applicants for discretionary release suggests that such a process may have a harsher impact on racialized prisoners. While further



study of this possibility may be of interest, change should not be delayed. The merits of a case management approach to guide prisoners in preparing for parole are indisputable. Well-prepared prisoners are likely to reintegrate into the community more successfully. Poorly prepared applications simply waste time and resources on hearings with no chance of success.

**9.4 The Commission recommends that the Ministry of the Solicitor General and Correctional Services and the Ontario Board of Parole, in consultation with the Ministry's Anti-Racism Co-ordinator, assign a formal role to Institutional Liaison Officers in a case management system such as in Recommendation 9.3. In particular, these officers should assist prisoners in preparing parole applications, and work to remove communication barriers.**

### Parole hearings

At a parole hearing, prisoners are interviewed by a panel of three members of the Ontario Board of Parole. Prisoners may be "assisted" at the hearing by a lawyer\* or another person of their choice. Board members usually base their inquiries on a "parole consideration form," which includes suggested questions in the following areas: Has the prisoner derived the maximum benefit from imprisonment? Will the release of the prisoner on parole constitute an undue risk to society? Will reform and rehabilitation be aided by granting parole?†

Board members are expected to read the entire file on the applicant before a parole hearing. However, because of time and cost, a transcript of the sentencing judge's findings and reasons for sentence, let alone a trial transcript, is rarely available. Nor is any documentation prepared by crown or defence counsel at trial. Instead, the police summary of the offence and the offender prepared for the original bail hearing is frequently relied upon. In Chapter 5 we show that, in the absence of rules for the contents of such documents, they often contain gratuitous and occasionally explicitly racist comments. Even if they are free of such taint, these "show cause" reports inevitably put the police case against the prisoner at its strongest. They do not record what was proven against the accused or admitted by him or her as part of a guilty plea.

The Board usually also considers a separate police recommendation on the parole application. On occasion this may contain exaggerated views and stereotyped perceptions of the prisoner.

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\* According to Board data, only about four percent of prisoners are represented by a legally trained person (lawyer or articling student).

† These questions were the criteria in the *Parole Act* for granting parole before the passage of the *Corrections and Conditional Release Act* in 1992. Section 102 of the latter Act provides that parole may be granted if "(a) the offender will not, by reoffending, present an undue risk to society ... and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen."

In its submission to the Commission, the central region of the Board noted the dangers of members stereotyping parole applicants who do not seem remorseful:

“The Board tends to look favourably on those who show some signs of ‘remorse’ .... It is not uncommon for the Board to interview inmates who blame everyone and everything else for their situation without taking any responsibility for their behaviour or for finding solutions. However, there are also a number of people appearing before the Board who we believe have a legitimate claim to being the victims of a system that treats them unfairly and contributes to a downward spiral with little hope of recovery. They refuse to take responsibility because they were in fact *not* responsible. If the members of the Board do not take a stand at this point, then we will be contributing to the perpetuation of racism.” (emphasis in original)

The central region submission further noted that pre-parole reports by probation and parole officers sometimes (unintentionally) stereotype applicants. The submission described suspect references to residence in a “high crime neighbourhood,” to fathering children from different concurrent relationships, or to “aliases” of people known by several different names among families and friends. In Chapter 8 we make recommendations about the need for probation officers to avoid irrelevant references to race on pre-sentence reports and to question references by sources whom they consult when preparing such reports. Similar care should also be taken by parole officers, ILOs and Parole Board members.

Several lawyers experienced in appearing before parole boards pointed out that the absence of mechanisms to disclose materials in the Board’s possession in advance can particularly disadvantage racial minority applicants. Typically, the prisoner is informed only at the outset of the hearing which sources of information the panel has reviewed. It is highly unlikely that the prisoner has seen them prior to the hearing or has an opportunity to examine them during the hearing.\* Disclosure in advance of the hearing would give applicants an opportunity to challenge or explain reports containing inaccurate or incomplete information or impressions based on stereotypes.

Our observation of parole hearings revealed evidence of stereotyping of racialized persons, particularly in relation to women and drugs. For example, a black female prisoner who denied having a drug problem was repeatedly asked what programs she had entered to address her drug problem. In addition, stereotypes were raised about the residences of prisoners from racialized communities. The following examples of comments about black and Aboriginal prisoners by Board members’ were generally unchallenged by their colleagues:

“He is going to be living near where the drug dealing takes place ... As a result, I am not in favour of parole.”

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\* Federal case law dealing with non-disclosure of confidential information has ruled that in virtually all cases, disclosure of at least “the gist” of the information must be provided to the applicant if the Board intends to rely on it: *Gough v. Canada (National Parole Board)* (1990) 3 C.R. (4th) 325 (F.C.T.D.), aff’d. 3 C.R. (4th) 346 (F.C.A.).



“How would parole to Jane and Finch [in Metro Toronto] help you with your drug problem?”

“Parkdale [in Toronto] may not be the best place for her because of the drug scene.”

This discussion indicates three avenues for improving the parole process for prisoners generally and particularly for racialized applicants. At the first level, greater outreach in prisons would make parole accessible to all prisoners. Second, applicants deserve better and more timely disclosure of information to prepare properly for hearings. Finally, while the brief we received from the Ontario Board of Parole expresses a genuine resolve to address problems of systemic racism, the recent comments referred to above indicate persistent racial stereotypes that the Board must confront.

## Public accountability

Unlike the courts, where openness and public visibility are fundamental, prisons are physically designed and operated to exclude members of the public. As a result, opportunities to observe whether “the rule of law [runs] behind prison walls”<sup>25</sup> are limited. Therefore, mechanisms to expose official conduct and practices to public accountability are vitally important. Recommendations in our Interim Report to establish an Anti-Racism Co-ordinator were designed in part to serve this purpose. In addition to reviewing that role, we recommend here two further avenues for public accountability: community advisory committees and specialized legal services.

### *Anti-Racism Co-ordinator*

In response to our Interim Report, the Solicitor General has established the office of Anti-Racism Co-ordinator. We understand that steady progress is being made but is constrained by funding. Our analysis in this chapter reinforces the desirability and indeed the necessity of this institution. This office must be properly funded and receive the full support of the Minister in order to fulfill its functions proactively and creatively.

The Co-ordinator’s office and of the Office of Child and Family Service Advocacy could increase the public accountability of Ontario’s prisons in several ways:

- by ensuring and overseeing the development and implementation of strategies for ongoing community involvement in corrections;
- by conducting systematic reviews of ministry-wide programs and policies;
- by conducting periodic and random audits of prison conditions, programs, practices and services;
- by investigating complaints of racism from staff or prisoners;
- by receiving periodic reports on anti-racism initiatives and records of racist incidents from superintendents; and

- by publishing reports on activities, progress and requirements on a periodic basis and in Ministry annual reports.

The first function – ongoing community involvement in corrections – is of primary importance. Since the Interim Report was released, we have had broader consultations, which have led to our recommendation to create community advisory committees.

### ***Community advisory committees***

Our consultations with correctional staff, spiritual advisers, community groups, former members of Ministry community advisory groups, members of federal Citizen Advisory Committees (for penitentiaries) and the Anti-Racism Co-ordinator indicate that a critical element of any strategy to reduce racial discrimination in prisons lies in extensive public scrutiny of their operations. While security concerns must be respected, they should not be used to prevent representatives of the public from observing prison operations first-hand and from communicating directly with prisoners. A public presence not only helps humanize a bleak environment, but also provides prisoners with a link to the wider community and reminds staff of their obligations to that community.

The federal penitentiary system has developed Citizen Advisory Committees, which are authorized by regulations.<sup>26</sup> Committee members are given reasonable access to all parts of the institutions and to all staff and prisoners, and are permitted to observe disciplinary and release hearings if the prisoners involved consent.

Some of these committees have interacted extensively with prisoners and staff. Members may escort prisoners on temporary absence permits, negotiate with superintendents and staff over prisoner grievances, and arrange for prisoners to participate in community education.

A similar community presence should be established in provincial institutions. The Solicitor General, in consultation with the Anti-Racism Co-ordinator and local community organizations, should establish a community advisory committee for every provincial correctional institution. These committees could vary from three to seven members depending on the size of the institution, and members should be drawn from the area of the institution.

Each committee should include people with a variety of skills and backgrounds and should reflect the diversity of the local community. A criminal record should not prevent membership on these committees. Members should be compensated for travel and other reasonable expenses related to their work and be representative of the prison population.

Committee members should be given inspection powers under the *Public Institutions Inspection Act*, which would make it an offence to obstruct their work. They should have access to all parts of the institution, including disciplinary and release hearings



with the consent of the prisoner involved. Their functions should include communication with prisoners and staff to assist in informally resolving grievances or otherwise to assist prisoners. They should be specifically authorized to advise institutional heads, and a complete written response to their advice should be required. Finally, their functions should include a role in encouraging community education about prisons and the correctional system.

In addition, the Solicitor General should establish an Ontario Council of Advisory Committees consisting of representatives of community advisory committees. Its membership might include three members from each region of Ontario, who would be elected at an annual meeting of all community advisory committees. The Council should have a permanent secretariat. Members should receive an honorarium for attending Council meetings, as well as reimbursement for reasonable expenses.

The Council of Advisory Committees would communicate information amongst local advisory committees and organize annual meetings to disseminate information and exchange ideas. Its role would include assisting the Anti-Racism Co-ordinator in monitoring province-wide problems and making recommendations to the Minister.

**9.5 The Commission recommends that –**

- a) the Solicitor General, in consultation with the Office of the Anti-Racism Co-ordinator and local community organizations, establish a community advisory committee for every provincial correctional institution.
- b) committee members reflect a variety of skills and backgrounds, and the diversity of the local community. A criminal record should not prevent membership.
- c) committee members be given inspection powers under the *Public Institutions Inspection Act* and have access to all parts of the institution, including disciplinary and release hearings if the prisoners involved consent.
- d) committee functions include informal resolution of complaints and other assistance to prisoners, and encouraging community education about the correctional system.
- e) committees be specifically authorized to advise institutional heads and to require a full, written response to any such advice.

**9.6 The Commission recommends that –**

- a) the Solicitor General establish an Ontario Council of Advisory Committees consisting of representatives of the community advisory committees from all regions of the province.
- b) the Council establish liaison and communicate information amongst local advisory committees, organize annual meetings to disseminate information and exchange ideas, and work with the Anti-Racism Co-ordinator in monitoring province-wide problems and making recommendations to the minister.

### *Correctional legal clinic*

In addition to community accountability, prison practices should be subjected to scrutiny against the legal standards established for them. However, low public visibility of decisions and imprecise standards in the provincial prison environment, create special difficulties for this type of accountability. In addition to addressing these problems, a special model is needed to provide effective legal advice and representation to prisoners.

The Correctional Law Project of Queen's University provides legal advice, assistance and representation to prisoners in the 11 federal penitentiaries in the Kingston area. The Project occasionally receives inquiries from prisoners serving sentences in Ontario prisons. While its staff respond to simple inquiries from provincial prisoners, the Project has no mandate to serve them.

The Project's principal services are assisting prisoners with appeals against conviction and sentence by preparing factums for the Court of Appeal, representing prisoners at hearings before the National Parole Board and penitentiary disciplinary courts, and advising in other areas of correctional law (such as outstanding criminal charges or other court proceedings, immigration issues and international transfers of prisoners).<sup>27</sup>

Such advice and advocacy on behalf of prisoners in provincial institutions is obviously needed. These services require legal expertise, hands-on knowledge of prison practices and dynamics, and a proactive approach. The clinic model for providing legal services to prisoners has several attractive features. It allows development of expertise in this area, which seldom occurs in private practice. It permits development of eligibility criteria for legal aid that accommodate the specific needs of prisoners. Continuity of practice and the accumulation of institutional knowledge would permit further identification of systemic issues and adoption of coherent strategies for responding to them.

We propose establishment of a provincial correctional law project on a pilot basis. Although its services should be available to any prisoner in the institutions served, the project should be located in the Toronto area, where it could assist many black and other racialized prisoners. The clinic should have a small staff complement of full-time lawyers, well-trained paralegals and a board of directors comprised of community representatives, ex-prisoners and prisoner support groups. Staff and the directors should reflect the diversity of Ontario.

**9.7 The Commission recommends that the Ontario Legal Aid Plan establish a pilot correctional legal clinic in the Toronto area staffed by full-time, salaried lawyers and paralegals.**



## Endnotes

1. Commission field notes of interview with black prisoner interviewed at Metro West Detention Centre, March 26, 1993 (manuscript on file).
2. See Canada, House of Commons, *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada*, chair Mark MacGuigan ("MacGuigan Report") (Ottawa: 1977), paras. 414–18 and principles 11 and 12.
3. *Collin v. Lussier* [1983] 1 F.C. 218 (TD); appeal allowed in part, Dec. 12, 1984, unreported, No. A-294-84 (FCA).
4. *Canadian Charter of Rights and Freedoms*, s. 12.
5. *Ibid.*, s. 15(1).
6. Human Rights Code, R.S.O. 1990 c. H-19, s. 2(1).
7. *R. v. Beaver Creek Correctional Camp (Institutional Head), ex p. MacCaud* [1969] 1 C.C.C. 371 at 378-9 (Ont. C.A.). The pre-Charter law is reviewed in Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983); *Re Desroches and the Queen* (1985) 6 C.C.C. (3d) 406 (Ont. Div. Ct.).
8. Reproduced in Ontario Ministry of Correctional Services, "Adult Institutions Policy and Procedures: Policy Statement on Race Relations," subject no. AD1 02 12 01, April 1992.
9. Ontario Ministry of Correctional Services, "Adult Institutions Policy and Procedures: Conditions of Confinement," subject no. AD1 05 01 01, April 1992.
10. Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, N.J.: Princeton University Press, 1958); David Rothman, *The Discovery of the Asylum* (Boston: Little, Brown & Co., 1971); Michel Foucault, *Discipline and Punishment* (New York: Pantheon, 1978); D. Melossi and M. Pararino, *The Prison and the Factory: The Origins of the Penitentiary System* (Totowa, N.J.: Barnes & Noble Books, 1981); Jackson *Prisoners of Isolation* (note 7).
11. For example, according to the Ontario Ministry of the Solicitor General and Correctional Services (note 9): "It is the policy of the ministry to treat inmates in a responsible, just and humane manner which ... promotes their personal reformation, development and socialization" and "the custodial aspect of the ministry's mandate comprises two primary components, the protection of society by supervising the detention and release of inmates and the provision of an environment and opportunities to promote their rehabilitation and successful reintegration into the community."
12. Rupert Cross, *Punishment, Prison and the Public: An Assessment of Penal Reform in Twentieth Century England by an Armchair Penologist* (London: Stevens and Sons, 1971). See also Solicitor General of Canada, "A Summary and Analysis of Some Major Inquiries on Corrections – 1938 to 1977," cited in Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach – The Report of the Canadian Sentencing Commission* (Ottawa: Supply and Services, 1987), p. 44.

13. R.R.O. 1990, Reg. 778, s. 29.
14. Ontario Ministry of Correctional Services, "Adult Institutions Policy and Procedures: Inmates – Discipline and Misconduct," subject no. AD1 05 08 01, July 1992, p. 1.
15. Ministry of Correctional Services, "Inmates – Discipline and Misconduct" (note 14) pp. 3–4. If the misconduct involves conflict with someone other than the intervening officer, the aggrieved party must also consent to informal resolution.
16. Regulation 778, s. 34(1)(c).
17. Ontario Ministry of Correctional Services, "Inmates – Discipline and Misconduct" (note 14), pp. 5–6.
18. *Ibid.*, p. 3.
19. *Ibid.*, p. 8.
20. Timothy Bynum and Raymond Paternoster, "Discrimination Revisited: An Exploration of Frontstage and Backstage Criminal Justice Division Making," *Sociology and Social Research*, 69 no. 1 (October 1984): 90–108; Julius Debro, "Institutional Racism Within the Structure of American Prisons," in Robert Woodson, ed., *Black Perspectives on Crime and the Criminal Justice System: A Symposium Sponsored by the National Urban League* (Boston: G.K. Hall 1977), pp. 143–60; Eric Poole and Robert Regali, "Race, Institutional Rule Breaking, and Disciplinary Response – A Study of Discretionary Decision Making in Prison," *Law Society Review* 14, no. 4 (June 1980): 931–946; John Ramirez, "Race and the Apprehension of Inmate Misconduct," *Journal of Criminal Justice* 11, no. 5 (1983): 413–427.
21. Dianne L. Martin, *The Discipline Study*, October 1993 (manuscript on file).
22. See generally: Leo Carroll, *Hacks, Blacks and Cons: Race Relations in a Maximum Security Prison* (Prospect Heights, Ill.: Waveland, 1988); Poole and Regali, "Race, Institutional Rule Breaking, and Disciplinary Response" (note 20); William Wilbanks, *The Myth of a Racist Criminal Justice System* (Monterey, Calif.: Brooks/Cole, 1987).
23. *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, s. 27 and Regulation 778, ss. 35–39 set out the basic statutory framework for temporary absences.
24. *Province of Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System, Racism Behind Bars: The Treatment of Black and Racial Minority Prisoners in Ontario Prisons* (interim report) (Toronto: Queen's Printer, 1994), p. 75.
25. *Martineau v. Matsqui Institution Disciplinary Board* (1980) 50 C.C.C. (2d) 353 (S.C.C.) at 373 per Dickson J.
26. *Corrections and Conditional Release Act Regulations*, SOR/92–620, s. 7.
27. Ontario Legal Aid Plan, project description (manuscript on file).





# **PART III**

## **Moving Forward**

**Chapter 10 Community Policing**

**Chapter 11 Systemic Responses to Police Shooting**

**Chapter 12 An Equality Strategy for Justice**

**Chapter 13 Looking Forward**





# Chapter 10

## Community Policing

*Comfortable! That's what we have been these past few decades.  
Comfortable with our role as police officers, with our roles as police  
managers and in our relationship to our surroundings ....*

*Because few questions were asked about what we did and even fewer  
demands for change made, we assumed that we were in step. Well, times  
change.*

*– Leadership in Turbulent Times<sup>1</sup>*

The Commission's mandate directs us to inquire into, report and make recommendations on community policing policies and their implementation. The federal Government has described community policing as "the most appropriate response ... to the [policing] challenges and problems of the next decade."<sup>2</sup> The Government of Ontario has declared that it is "shaping the future" of the province's residents.<sup>3</sup> The Ontario Provincial Police and municipal police forces have embraced community policing as an organizational philosophy and a strategic operational goal. For example, in 1991 the strategic plan of the Metropolitan Toronto Police presented community policing as an organizational philosophy that would take the force beyond the year 2000. In 1994, implementation of community policing was listed as the number one goal.<sup>4</sup>

This evolving vision of policing envisages a dynamic relationship between the police and the community,<sup>5</sup> which differs significantly from the hierarchical structure of what Chris Murphy calls traditional "hi-tech" policing.<sup>6</sup> A recent report of the Ottawa Police describes the relationship in this way:

*The philosophy of community policing is by design a difficult concept to quantify or generalize. Through it, community problems can be confronted by utilizing strategies which the constable and public deem most suitable. In order to be truly effective, this philosophy dictates that any police response must be tailored specifically to address the needs of a particular community.<sup>7</sup>*



Community policing involves partnership between the police and the community. This requires empowerment of community members and community police officers, openness of police services and accountability of the police to the community.

A community policing approach emphasizes peacekeeping, problem-solving, crime prevention, reducing barriers between the police and the community, constructive alternatives to law enforcement for dealing with some offences or offenders, and inclusion of citizens in these and other policing activities.\* Stated goals generally include efficiency, effectiveness and economy in policing, as well as increased public satisfaction with police services.<sup>8</sup> Community policing strategies vary considerably because they depend on the perceived needs of the community, police resources and organizational structure, imagination, leadership and willingness to innovate. Most involve assigning specific officers to neighbourhoods for lengthy periods, promoting positive contacts between officers and local residents, and developing mechanisms that enhance accountability for services.<sup>9</sup>

Community policing aims to transform relationships between the police and the community; but, as the Ontario Association of Chiefs of Police told the Commission, it "is not, and never has been a panacea" for all that is, or is perceived to be, wrong with traditional policing.<sup>10</sup> Many of the challenges facing traditional policing are also found in a community policing system. Among the most important challenges is to respond effectively to public concerns about systemic racism in policing services.

This problem has attracted considerable attention over the last two decades. Government task forces and police-sponsored inquiries have documented a need for change and called for swift action.<sup>11</sup> Slowly at first, but more vigorously since the late 1980s, police authorities across Ontario have incorporated many of the proposed reforms into their practices. Despite the best efforts of reformers, community members and police officers, however, well-founded concerns about systemic racism continue to taint the policing system.

Implementation of community policing provides opportunities to ensure that systemic racism is no longer an issue for Ontario police services. To take advantage of these opportunities, unequivocal commitments to racial equality must be demonstrated in the delivery of police services and public confidence built. Recent reforms to police recruitment, training and other employment practices suggest that this work is under way.<sup>12</sup> Commitments to change are also evident from programs

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\* Community policing, as it is being discussed across North America, by no means dismisses law enforcement as an important police function. Rather, it views other methods of problem-solving as more appropriate in the vast majority of cases, and sees these other methods as contributing to more effective law enforcement when the need arises. Police officers are expected to promote communication among those in the community who have conflicting interests and views. Skills gained and relationships developed by police officers through peacekeeping in the community help them deal with more serious problems that require criminal justice processing.

undertaken by local police services, such as the creation of units dedicated to investigating hate crimes, and from initiatives of the Canadian Association of Chiefs of Police, such as the development guidelines for community policing in diverse neighbourhoods.

Our preliminary consultations showed, however, that concerns about systemic racism in police practices remain widespread and are deeply felt. These consultations produced numerous allegations of rude or disrespectful police treatment and of excessive police scrutiny of black and other racialized Ontarians, and revealed strongly held beliefs that police authorities tolerate such abusive behaviour. We also found considerable suspicion of community policing, especially among black and other racialized youths. Many feel excluded from the co-operative partnerships with the police that community policing envisages; they fear that racial equality is not on the community policing agenda.<sup>13</sup>

These preliminary findings led us to focus on strategies for building confidence in community policing among black and other racialized communities. To develop these strategies, we investigated perceptions of racial inequality in policing, practices that contribute to such perceptions, and existing responses to community concerns about systemic racism.

Our research into perceptions is based on the Commission's survey of black, white and Chinese residents of Metro Toronto (see Chapter 2). The findings show that the majority of residents surveyed believe the police treat black people worse than white people; a substantial minority believe the police discriminate against Chinese people. Perceptions that police discrimination is widespread are obviously likely to erode further public confidence in the police. To address this problem, we propose that systematic strategies to promote constructive relationships between the police and the community should be built into the planning, implementation and governance of community policing systems.

After presenting our findings on public perceptions and recommendations on community policing, we turn to specific practices that have eroded confidence in the police amongst members of black and other racialized communities. First we look at a police practice that has probably done more than any other to exacerbate tensions and fuel mistrust – exercise of the discretion to stop people in cars and on foot. Findings from the Commission's public survey about the number and the nature of stops lend considerable weight to community concerns that this discretion is exercised in a racially discriminatory manner. Our recommendations for solving this problem include guidelines for officers and reforms to the complaints system.

Police authorities obviously have the most influence over practices that police officers initiate. More complex problems arise when the police are implicated in actual or perceived discrimination by other people or institutions. This may occur when a person who requests police services acts, perhaps implicitly, on racialized



assumptions. For example, a shopkeeper who holds racialized stereotypes about criminality might call the police and urge that charges be laid against a young black person who steals a baseball cap, but view a similar theft by a white youth as an annoying prank that does not merit police involvement.\* Similarly, neighbourhood residents may believe that black male youths playing soccer in a local park are intimidating, likely to be drug dealers and deserving of police attention; but the same residents may view white male youths who use the park for recreational sports as harmless.

Many complaints about policing that we received involved situations such as these, in which the police risked being drawn into discriminatory patterns of enforcing the law or responding to calls for police services. Even if these requests, by other citizens or institutions, were the catalysts for (apparently) discriminatory police action or scrutiny, members of black and other racialized communities tend to hold police authorities responsible for police actions.

We focus on an issue that was raised repeatedly during public consultations and interviews: alleged discrimination when school authorities resort to the police in response to harmful behaviour by students. Some schools were said to be quick to treat such behaviour by black students as criminal conduct and request police intervention, while handling similar behaviour by white or other racialized students internally. Many youths and parents complained about the perceived double standard and what they saw as police "collusion" in differential treatment of black students. We were left in no doubt that the relationship between schools and the police has contributed to distrust of the police.

Our research into this problem involved interviews with police officers and school authorities, and surveys of staff and students at 11 Ontario secondary schools. While the survey findings are complex, they clearly demonstrate a need for police services to guard against erosion of confidence in community policing that may result from excessive policing of black students in schools.

The chapter closes by looking at how privately employed police – security officers – in shopping malls and other publicly used spaces may create problems for community policing. Black and other racialized youths frequently report excessive scrutiny, aggression, racial epithets and contempt by security officers who seem to perceive their behaviour as "un-Canadian." Many of these youths do not fully understand the differences between security officers and publicly employed police; even those who do understand tend to experience the activities of both as part of a single policing enterprise. Consequently, perceived racism in the conduct of security officers, especially if it leads to intervention by the public police, may damage perceptions of the public police.

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\* In many areas of Ontario, the police do not generally lay charges for minor thefts, but may advise the complainant to do so.

## Perceptions of inequality in policing

A longstanding barrier to successful policing in many black and other racialized communities is the extent to which community members perceive their treatment by police as racially discriminatory. One impediment to dismantling this barrier is the frequency with which such perceptions have been dismissed as insignificant, wrong or held by only a small, vocal and unrepresentative minority of the community. Though inquiry after inquiry has concluded that such beliefs are widespread, the findings have sometimes been discredited because of their reliance on “self-selected” participants in public consultation exercises.

To avoid fruitless debates about the extent of the views we report, the Commission supplemented our consultations with a survey of residents of Ontario’s largest and most diverse city. More than 1,200 randomly selected adults from Metropolitan Toronto’s black, white and Chinese communities participated in this survey, which dealt with a range of criminal justice services and processes.\* Here we report their perceptions about whether the police treat people equally.

### *Findings*

We asked respondents if they think the Metro Toronto Police treat –

- young people the same as older people
- black people the same as white people
- poor people the same as wealthy people
- women the same as men
- English-speaking people the same as people who do not speak English
- Chinese people the same as white people
- Chinese people the same as black people

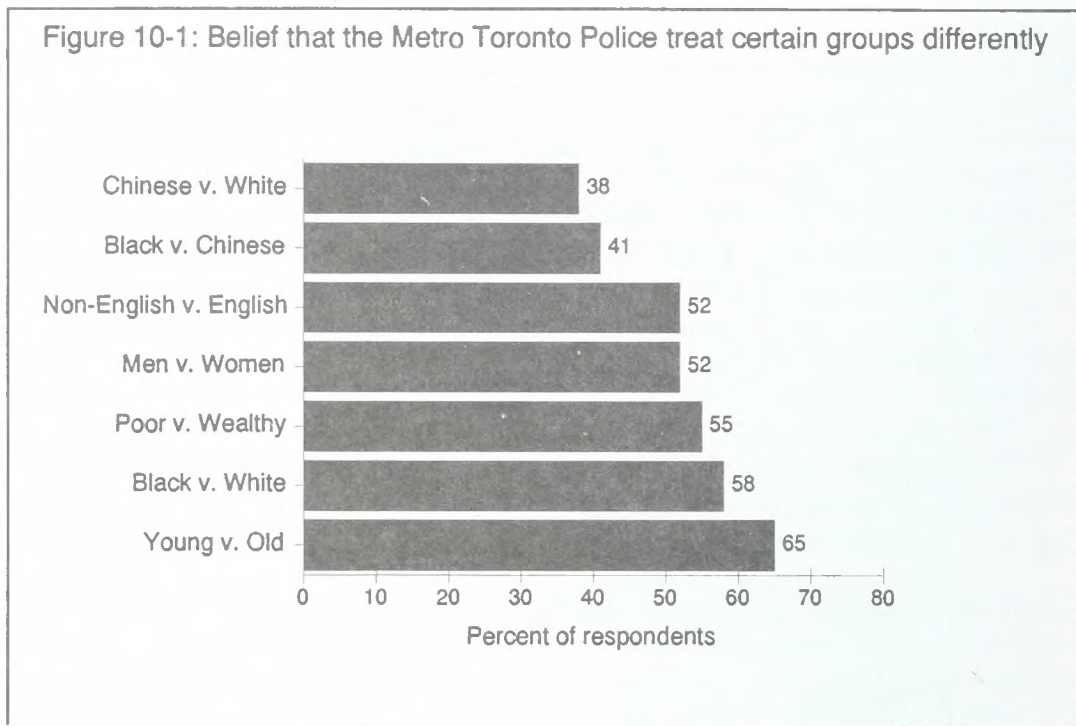
As Figure 10-1 shows, most white, black and Chinese Toronto residents think the police do not treat everyone the same. For all except two comparisons, at least half of those sampled perceive differential treatment.†

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\* The sample and study methodology are outlined in Chapter 2 and detailed further in our Technical Volume. See Appendix B.

† In general, people who think there is differential treatment believe the Metro Toronto police treat poor people worse than wealthy people, young people worse than older people, men worse than women, people who do not speak English worse than people who do speak English, black people worse than white people, Chinese people worse than white people and black people worse than Chinese people.





We analyzed perceptions of *racial* bias in police treatment in more detail. Asked to compare Metropolitan Toronto Police treatment of white people and black people, 74% of black, 54% of Chinese and 47% of white respondents replied that the police do not treat black people the same as white people. Among those who perceive differential treatment of black and white people, 93% of black, 91% of Chinese and 87% of white respondents think the Metro Toronto police treat black people worse than white people. Respondents who perceive differential police treatment of white and black people tend to think it happens routinely. The data show that 84% of black, 73% of Chinese and 72% of white respondents think differential treatment occurs “about half the time” or more.

Asked to compare Metropolitan Toronto Police treatment of white and Chinese people, 48% of black, 42% of Chinese and 24% of white respondents replied that the police do not treat Chinese people the same as white people. Among these who perceive differential treatment of white and Chinese people, 82% of black, 79% of Chinese and 79% of white respondents think the police treat Chinese people worse than white people. Again, respondents who perceive differential police treatment tend to think it occurs frequently. The data show that 71% of black, 52% of Chinese and 56% of white respondents think this differential treatment happens “about half the time” or more.

Asked about treatment of black and Chinese people, 51% of black, 38% of Chinese and 30% of white respondents think the police do not treat black people the same as Chinese people. Among these who perceive differential treatment of black and Chinese people, 90% of black, 74% of Chinese and 87% of white respondents think

the police treat black people worse than Chinese people. Once again, respondents who perceive differential treatment believe it happens regularly. The data show that 81% of black, 56% of Chinese and 74% of white respondents think the police treat black people differently from Chinese people “about half the time” or more.

It is clear from these findings that black, Chinese and white residents of Metro Toronto perceive racial bias in police practices, and that they perceive a hierarchy of racial bias. Though respondents think there is discrimination against Chinese people, they do not believe it is as common or as severe as discrimination against black people.

In sum, these findings confirm the view of the Task Force on Race Relations and Policing that “visible minority communities do not believe that they are policed in the same manner as the mainstream, white community.”<sup>14</sup> But our findings make two further points:

- not all racialized communities are perceived as equally vulnerable to unfair policing, and
- many white people share the perceptions of racial inequality in policing.

Widespread perceptions of police discrimination are a potentially significant obstacle to successful community policing. Solutions to this problem require the police to fully integrate commitments to racial equality into all aspects of policing practices, and to co-operate in developing new approaches to police governance.

## Integrating racial equality into policing services

Ontario’s large urban police forces, particularly the Metropolitan Toronto Police, unquestionably realize that they must integrate racial equality into their services. In the last few years they have made important changes in institutional policies and procedures, reformed and professionalized hiring and employment practices, and attempted to reach out to the black and other racialized communities. Nevertheless, our findings show that more needs to be done. As was succinctly put in a recent Metro Toronto Police report on race relations in policing, *Moving Forward Together*, “it is not a time for complacency .... the time is ripe for a new departure.”<sup>15</sup>

The new departure proposed in that report suggests that much has been learned from the failures as well as the successes of previous initiatives. *Moving Forward Together* sets out a comprehensive strategy to improve race relations and seeks to integrate the strategy into core policing. Moreover, it is a considered response to problems documented by other reports into policing, rather than a reaction to a specific conflict between the police and members of racialized communities. As such it presents a calm and realistic analysis of necessary changes and a coherent plan for achieving them. This approach contrasts with more limited and reactive police responses in the past, generally provoked by particular events.



The report was well received by the Metropolitan Toronto Police Services Board. In August 1994, the Board implemented a *Moving Forward Together* recommendation by approving this mission statement:

The Metropolitan Toronto Police is committed to providing an equitable service, by eliminating barriers to access and treating all persons within the community and the organization with respect and equality, with no expression or display of prejudice, bigotry, discrimination or harassment toward any person.

At the same meeting the Board also adopted the following "Achievable Implementation Objectives":

- "[s]enior management is committed to and accountable for the integration of race relations into core policing activities.
- "[w]ithin all of Metro Toronto's diverse neighbourhoods and communities, each member [police officer] performs his/her duties with sensitivity and effectiveness, consistent with community oriented policing.
- "[i]n a manner that is consistent with Board policy, the organization establishes structures and process to provide members with the necessary skills, resources, supports and rewards to ensure that members interact appropriately with all persons; the institution effectively supports community oriented policing.
- "[n]eighbourhoods and their communities are continually consulted and actively involved in supporting and enhancing members' ability to work effectively within diversity."

Planning for racial equality in policing services is not, of course, the same as achieving it. But with *Moving Forward Together*, the Metro Toronto Police have taken an important step towards making "race relations a non-issue" in policing.<sup>16</sup> The report suggests there is more interest in achieving this goal than evident in the past. By defining expectations and setting objectives for the integration of racial equality into all aspects of police services, the Metro Toronto Police have created a concrete basis for public accountability.

Greater steps should be taken to publicize this important report. Wider circulation of its recommended plan of action would show the public what has been achieved and would demonstrate commitment to change. It would also enable the public to provide useful feedback on the extent to which community policing services are fulfilling the expectations that have now been defined.

The process that resulted in *Moving Forward Together* is a useful model that police services across Ontario could adapt to their communities. The general purpose of such reviews would be to raise expectations of racial equality in policing and to improve police service accountability regarding racial equality. More specific goals would be to develop practical proposals to integrate racial equality into every aspect

of policing services, including implementation objectives, time frames and publicity measures.

**10.1 The Commission recommends that –**

- a) each Ontario police service that has not yet done so conduct a comprehensive review of its commitment to racial equality in policing that involves members of police services, community groups and interested individuals.
- b) police services widely publicize their action plans regarding equality in the most common languages spoken in their service areas.
- c) progress on implementing such action plans be reported to the local police services board quarterly and be publicized widely.

## Accounting to the community

A persistent complaint raised during the Commission's consultations is that traditional structures of police governance are insufficiently accountable and accessible to the community. Ontario's main institutions for civilian governance, police services boards, were said to be too weak to regulate effectively, too distant from the concerns of ordinary people, and too close to police leadership to provide necessary oversight. Complainants repeatedly referred to incidences of police services boards apparently failing to control abusive or provocative police actions.

One oft-cited example is the failure of the Metropolitan Toronto Police Services Board to take vigorous action when it was revealed in 1993 that the Metro Toronto Police had conducted secret surveillance of prominent black community organizations and leaders. The police "Intelligence Report" of April 25, 1989, which was shared with other police forces, contained information about these individuals such as dates of birth, social insurance numbers, addresses, organizational affiliations and automobile licence plates. All persons named were of African heritage and shared an interest in community-police relations. The Metro Police were publicly criticised,<sup>17</sup> and specific requests were made to the Police Services Board<sup>18</sup> for a justification from the Chief for this systematic invasion of privacy.

Failure such as this are seen as evidence that the Metro Toronto Police are not accountable to the Police Services Board, and that police services boards are insufficiently accountable to the community. Some blame these problems on ambiguities in how the *Police Services Act* defines the role of police services boards. While the Act holds the boards responsible for policy, it assigns exclusive control over "specific operational decisions" and "day-to-day operations" to the chiefs of police.<sup>19</sup> The rationale for this division of responsibility is that – "[d]ay-to-day professional policing decisions ... must not be interfered with by any political or administrative person or body."<sup>20</sup>



The distinction appears straightforward, but in practice it may be hard to determine which decisions involve policy and which are operational. Susan Eng, then Chair of the Metro Toronto Police Services Board, commented that –

The crux of the issue ... is how to distinguish an “operational” matter falling *outside* of board jurisdiction from general management policy matters that fall *within* board jurisdiction. It is this determination that lies at the heart of the relationship between the board and the force. For example, the board’s rejection of a planned computer project in the context of preparing the budget ... could be seen as a specific operational decision outside of the board’s jurisdiction. However, given that the board has the ultimate responsibility for the budget or to execute agreements as a distinct entity, this cannot be the type of decision intended to be restricted. Rather the intention is to avoid direct board interference in the actual policing function and not in the decisions governing the structure and milieu in which those policing functions occur.<sup>21</sup>

Routine policing activities are often of the greatest concern to the public.

One response to community concerns would be to bring operational aspects of policing under the control of the police services board. If this were done, the board’s governance mandate would likely be more comprehensive and complete. However, board control over operational activities would create a risk of illegitimate political interference with day-to-day policing. It also raises the question of how an all-powerful board could be fully accountable to the community.

Proponents of the existing system of divided responsibility maintain that the board’s authority over policy, objectives and priorities provides adequate civilian governance.<sup>22</sup> Even the most enthusiastic advocates of divided responsibility recognize, however, that a working partnership between the police chief and the police services board requires that board members have effective tools for policy-making and governance. According to this view, measures to strengthen the governance capacity of police services boards should emphasize training of board members to exercise their responsibilities and providing support for their efforts to supervise chiefs of police.

As this summary suggests, discussions of the powers of police services boards and police chiefs have tended to focus on the traditional policing system. In this system, a police services board is a “top-down” accountability mechanism in a centralized structure of police authority and service delivery. But community policing entails co-operative partnerships between local police officers and the neighbourhoods where they work. Community policing systems thus require a broader and more inclusive accountability mechanism that enables members of different local communities to participate in “the decision-making process which affects priorities, allocations, and the implementation of police services”<sup>23</sup> in their neighbourhoods. Such a mechanism would also assist police services boards in carrying out their more formal governance function.

Local community accountability in policing poses new challenges for both the police and the community. As an Ottawa Police report says, the police will “need to replace the authority that they previously derived from the criminal justice system with an even more powerful form of authority” – a relationship with the public.<sup>24</sup> The community, in turn, is expected to “accept its responsibility to actively participate in problem-solving.”<sup>25</sup> This responsibility is ongoing and requires a sustained commitment to work with other community members, as well as the police, “to achieve security and protection” within local areas.<sup>26</sup>

These challenges should not be underestimated. As one police advocate of community policing notes, police officers will have to change how they define their work:

Traditionally, police have decided, unilaterally, what is important. As a consequence, because we have a monopoly over our work and because policing has a very nebulous job description ... and mostly because we are human, to a large degree we have ended up doing the things we like to do, and that are quantifiable (an hour spent on radar is measurable, not so with a bunch of snotty-nosed kids bent on mischief), as opposed to what is best for the community. Over time, a space has developed between what we think is important and what the public thinks is important.<sup>27</sup>

The shift from unilateral police decision-making described by this officer to community-based governance requires a significantly different approach from the informal “consultations” of traditional policing. These initiatives were frequently ad hoc responses to stressful, high-profile incidents, or to lobbying from one segment of a diverse community. In many instances, the objectives of the consultation exercise have been poorly defined, as has been the role of police representatives. Community members often had conflicting expectations of these events and were disappointed by the process and the results.

If community-based accountability is to succeed where the old consultation exercises failed to make racial inequality “a non-issue” in policing, the limitations of past practices must be overcome. As a member of an Ontario police service board told the Commission, “attending a few community meetings does not mean community-based policing.”

Informal consultation exercises have failed to produce working partnerships, partly because community representatives lack the information they need to participate effectively in decisions about problems, priorities and policies. Though individuals and groups may know the concerns of local neighbourhoods, they are largely dependent on the police for systematic information about crimes, policing processes and policy options. This dependence makes it difficult for communities to debate or even question police justifications for their practices. Consequently, consultation is sometimes perceived as a means of rationalizing what the police do rather than as a partnership that jointly defines problems and develops solutions.



Another limitation of traditional consultation methods is their failure to address the complexity and diversity of the community involved. Even within the smallest policing areas, the community is rarely homogeneous. What some people view as a problem is a harmless social activity to others. Though community-based accountability demands that the police define their work in concert with the community, officers cannot act only on behalf of people who insist that the presence or activities of others is a problem. This was graphically illustrated in the tragic shooting of Vincent Gardner by a Nepean police officer in 1991.

The shooting occurred when the police raided a house where black people socialized and listened to a local reggae band. Neighbours had complained to the police about the noise, vehicles and the number of visitors to the house, and made allegations about drug trafficking. The police took the neighbours' complaints seriously and placed the house under surveillance. They also held a "community meeting" to discuss the concerns, but the people living at the house were not invited. Instead, the problem was defined in the absence of the people believed to be causing it. As a result, it was wrongly and stereotypically characterized as drug trafficking. This characterization of the problem led to a "solution" that ended in tragedy.<sup>28</sup>

Fortunately, shootings do not usually result when some people define the presence or activities of others as a problem. But conflicts among community members within a local area are common. For example, youths who "hang out" on street corners, sometimes in large numbers and often talking loudly, are frequently perceived as intimidating or a nuisance by merchants, older street users and residents. This type of conflict may occur in any urban centre, but in racially diverse communities it can be exacerbated.

A typical response under traditional policing is for the police to accept that the presence of the youths is a problem and to break up the groups or move them elsewhere. Predictably, youths may feel aggrieved by this treatment and resent the police role. Alternatively, traditional police officers who define their role exclusively in terms of law enforcement may decide that the concerns of other street users are trivial, and so ignore such complaints. In this case, other street users may continue to feel intimidated or irritated by the youths and may also lose confidence in the police.

Neither of these traditional policing responses is satisfactory because they do not address the heart of the conflict among people who use the streets in different ways. Moreover, neither response significantly involves the community or manifests police accountability to the community. By contrast, the following example, provided by a member of an Ontario police services board, illustrates how police officers working in a racially diverse location may facilitate community participation in problem-solving:

"In [one] urban area there is a variety of racial minorities. Through their Neighbourhood Watch program, the people from a lot of different cultural and racial backgrounds got together with the police on safety issues (break-ins). When race

issues came up, the police led them through these discussions. [The officers] did not regard this as separate from the other facilitation work they were doing and they didn't treat it as engaging in 'race relations' work. This example illustrates three things. First, the police were taking a preventive approach to safety issues. Second, they were doing anti-racist work [as part of their job]. And, finally, this was neighbourhood-based policing."

The Commission's research unearthed several other examples in which a variety of community members helped to define problems and develop solutions, and police officers facilitated and assisted in solving problems. In contrast, some purported partnerships between police and the community are incapable of fulfilling such functions because police dominate the relationship and community members lack the resources to participate effectively.

Clearly it is not enough merely to call for greater community involvement in problem-solving. Resources must be made available and new participatory structures created to match the needs of local communities. While community policing requires flexibility at the local level, the Commission also suggests a general framework for community involvement throughout the province.

This framework has two key elements to strengthen accountability and promote confidence in community policing among black and other racialized communities. We propose, first, the creation of local community policing committees (CPCs) organized around divisional levels of a police service or such smaller geographic areas or community groupings as may be appropriate. The second proposal, which draws on a model used in London, England, is to establish "community safety surveys" to provide the community with systematic information on local safety concerns and problems.<sup>29</sup>

Community policing committees would work directly with the local police division. Their responsibilities would include developing, in concert with the police, broad objectives, standards and specific policies for local policing, and monitoring successes and failures in achieving these objectives. The committees should also facilitate communication between the police and the local community – bringing community concerns to division staff and distributing information about community policing within the division. Other functions would include working with the police, members of the legal community and judges to educate people about safety issues and the criminal justice system. We also envisage that members of community policing committees might, if requested, assist in informally resolving complaints about the police.

Community policing committees should be constituted as sub-committees of police services boards, and function as liaisons between the boards and their local community. This would enable issues identified at the local level to influence board policies. Local boards should be responsible for monitoring the work of CPCs.



Members of community policing committees should be drawn from local community organizations, and appointed by police services boards after a full, open and publicly advertised search. Orientation programs for members should be provided and jointly administered by the boards and local divisions. Committees should be large enough to represent a diversity of groups within the service area, and every effort should be made to ensure that committees are gender-balanced and include members of local racialized communities and young persons. A criminal record should not bar appointment.

Community policing committees should have adequate resources to function independently of the police. Staffing needs may vary, depending on the size of the community served by the committee, but each CPC should have at minimum a co-ordinator to attend to administrative needs.

CPC meetings should generally be open to the public. If a majority of all members vote to meet in private, the committee should make known publicly what the general subject matter of the meeting was and the reason for meeting in camera. To avoid giving the impression that CPCs are part of the police, meetings should generally not be held in police stations.

**10.2 The Commission recommends that police services boards establish local community policing committees (CPCs) around either divisional levels of each police service or another geographical area or community grouping appropriate to the jurisdiction.**

- a) CPCs should have seven members, serving three-year terms.
- b) CPC members should be drawn from community organizations active in the jurisdiction of the division and appointed by police services boards after a full, open and publicly advertised search.
- c) Every effort should be made to ensure that CPCs are gender-balanced and include young persons and members of local racialized communities. A criminal record should not bar appointment.
- d) Each CPC should have a designated co-ordinator to attend to administrative needs.
- e) Members of CPCs should be paid reasonable expenses and offered honoraria.
- f) CPCs should meet monthly and be open to the public. Meetings should generally not occur in police stations.
- g) The local police services board should be responsible for monitoring the work of CPCs.

**10.3 The Commission recommends that each community policing committee have the following responsibilities –**

- a) to develop, in concert with the local police division and interested community organizations and individuals, agreements with the police that establish policing objectives and standards of police performance that reflect local community needs; and to monitor implementation of such objectives and standards.

- b) to develop, in concert with the local police division, specific policing policies and practices as needed. In this role, CPC members should be responsible for forwarding community concerns to division staff, formulating responses and communicating policies and procedures back to the local community.
- c) to act as a liaison between the police services boards and the local community. In this role, the CPC should be responsible for informing the community about police services board policies and informing the board about issues in that community.
- d) to assist in informally resolving complaints, if requested by both the divisional superintendent and the complainants.
- e) to work together with police, members of the legal community and the judiciary to promote legal and other forms of community education concerning security and the operation of the criminal justice system.

In order to work effectively, community policing committees and agencies that govern the police need reliable information about community safety concerns. Informal consultations by CPC members should be supplemented by information gathered more systematically. A community survey regarding safety should be held in each police jurisdiction at least once every five years.

These surveys should gather information on peacekeeping problems, reported and unreported crime, including racially motivated crimes, experiences with the police and evaluations of local police services. Data should be gathered independent of the police, but all results should be made available to the police service and the CPC. An ad hoc group representing community organizations, in consultation with experts from reputable polling organizations (preferably in the public sector), should determine the sampling and survey techniques in order to ensure that the views of youths and adults from racialized groups are fully represented.

**10.4 The Commission recommends that –**

- a) the Ministry of the Solicitor General and Correctional Services, in association with police services boards, fund community surveys regarding safety in each local community.
- b) the surveys occur at least once every five years in each local community.
- c) summaries of survey findings be widely distributed.

## **Racial inequality in police stops**

The police have long exercised discretion to stop and question people using roads, and other public places. These “police stops” are often experienced as an unwelcome intrusion by state officials. Repeated stops heighten the sense of intrusion, so that even a polite request may feel like harassment. Discourteous requests, aggression or violence by police officers make some police stops highly traumatic events fraught with fear and a sense of degradation.



The legal basis for the general police discretion to stop and question people is controversial,<sup>30</sup> but the *Canadian Charter of Rights and Freedoms* and human rights codes unquestionably forbid racial discrimination in the way the discretion is exercised. Unfortunately, there is seldom an effective remedy when this power is abused.

Studies from many jurisdictions show that police stopping of and aggression toward black and other racialized people and young working-class males of all origins serves purposes other than crime prevention and detection of offenders.<sup>31</sup> It allows the police to demonstrate to themselves, to people they stop, and to local residents and business people that the police control public spaces. Richard Ericson's study of police patrols in an Ontario jurisdiction shows that such demonstrations of authority are clearly evident (and deeply entrenched) in police practices. As he says,

Constant proactive stops are a not-so-subtle way of reminding marginal people of the "order of things." Here symbolic authority is paramount: for this reason, demeanour becomes an important variable. The person deemed "respectable-respectful" will nearly always avoid the full range of [police] actions while his opposite must endure personal and property searches, detention for [computerized immigration status] checks, and the possibility of minor charges as an "ordering device" ... In the jurisdiction we studied, the target is lower-class young persons ("punkers") who may be occasionally involved in drug and property-related offences and who appear to some to be offensive. Regardless of the community, some group will always be targeted.<sup>32</sup>

Ericson's study identified clear patterns of targeting young "lower-class" persons, mostly male, whose race is not specified. The Commission's findings show that police stops for the purpose of control are racialized.

The Commission received numerous complaints from across the province about excessive and demeaning police contacts with black and other racialized Ontarians. Many of these complaints are disturbingly similar to the ones made to the Task Force on Race Relations and Policing. They also illustrate the dynamics that Ericson identifies. Among the incidents reported to us were:

- A civilian police employee describes a "ride-along" with uniformed officers –

"This white police officer was giving me a lot of information. We stopped four cars, and three out of the four cars had black guys in them. Every time that he saw a black guy with a nice car, he said, 'That looks like trouble.' They weren't speeding, they weren't breaking any noise barrier with their radios; he still said this. I asked him why he says that, and he goes, 'Just the way they're dressed, and the way they're driving their cars.' I [ask if they're speeding], and he said no ....

One time we were on our way to a call, and there was a nice car that had four black guys in it. They were staring over at us. We couldn't have stopped them [because we were going to a call], but the officer called on the radio for another car."

- A researcher records a black university student's experience when he tried to be a good citizen –

“A black university student waiting for a bus decided to do a good deed, and moved three turned-over traffic cones left in the road which were causing traffic to swerve. As he put them on the sidewalk, a police car pulled up and two white male officers jumped out and asked him why he was moving the ‘fucking’ cones. He explained calmly, but was told in an aggressive manner to return them to the road. He refused, saying he didn’t want to be responsible if someone was hurt. One officer kept swearing at him, calling him a ‘fucking smart ass’ and started advancing towards him. At this time an elderly white woman came up and told the police she had seen him moving the cones and thought it was a good thing because there could have been an accident. The officers told her quite politely that they would handle the situation, and she shouldn’t be so quick to defend ‘these people’ because they were proven troublemakers. The officers then asked the student for [identification]. He refused, saying he had done nothing wrong. There were six other people at the bus stop (five of them white) and they all tried to explain to the officers that the student had done the right thing. When they heard this, the police officers stopped being so loud and threatening, but they were still angry. They went away, leaving the cones on the sidewalk, but none of them apologized for their insulting behaviour.”

- A Chinese man describes stops in Metro Toronto –

“I’ve had three run-ins with the police in the last two years, all of which occurred when I was driving alone. I drive a 1991 BMW 385. One officer told me he pulled me over because I looked too young to be driving. I showed him my driver’s licence and he was shocked to learn that I was 23 years old. Two more times almost exactly the same thing happened. All the officers were white, between 25 and 35. I can understand being stopped once, even twice, but three times in two years makes me believe those cops were racist. The stops happened twice in the Scarborough area, and once in Chinatown.”

- A lawyer describes her black client's experiences over 18 months in a complaint to the Metro Toronto Police Chief –

“My client is a young man, without a criminal record, who owns and operates his own business ... He tells me that since June of last year he has been pulled over 11 times by the police. This has happened in the Jane/Finch area, in Scarborough, out by the airport and in the downtown core. My client tells me that the police will see him drive by, they will then follow the car for a while, and eventually he is asked to pull over and produce identification. [He] has not been charged with any driving offences or criminal offences as a result of these incidents. The police officers who have pulled him over have been polite to him, and have indicated to him that ‘they are only doing their job.’ Nevertheless, my client does have a right not to be continually harassed in this fashion, and believes (I suspect, quite rightly) that the reason he is always being stopped is because he is a young black man driving a very nice car.”



These examples, from many incidents related to the Commission, illustrate various ways in which police-initiated contacts with black or other racialized people may be intrusive, harassing or intimidating.

To obtain a more systematic understanding of the problem, our survey of Metropolitan Toronto residents asked respondents about their experiences of being stopped by police in the past two years. In addition to the number of stops, we wanted to know if the respondent was in a car or on foot when each incident occurred, and whether the stop was perceived to be fair.

### ***Frequency of reported stops***

The basic findings for the entire sample show that –

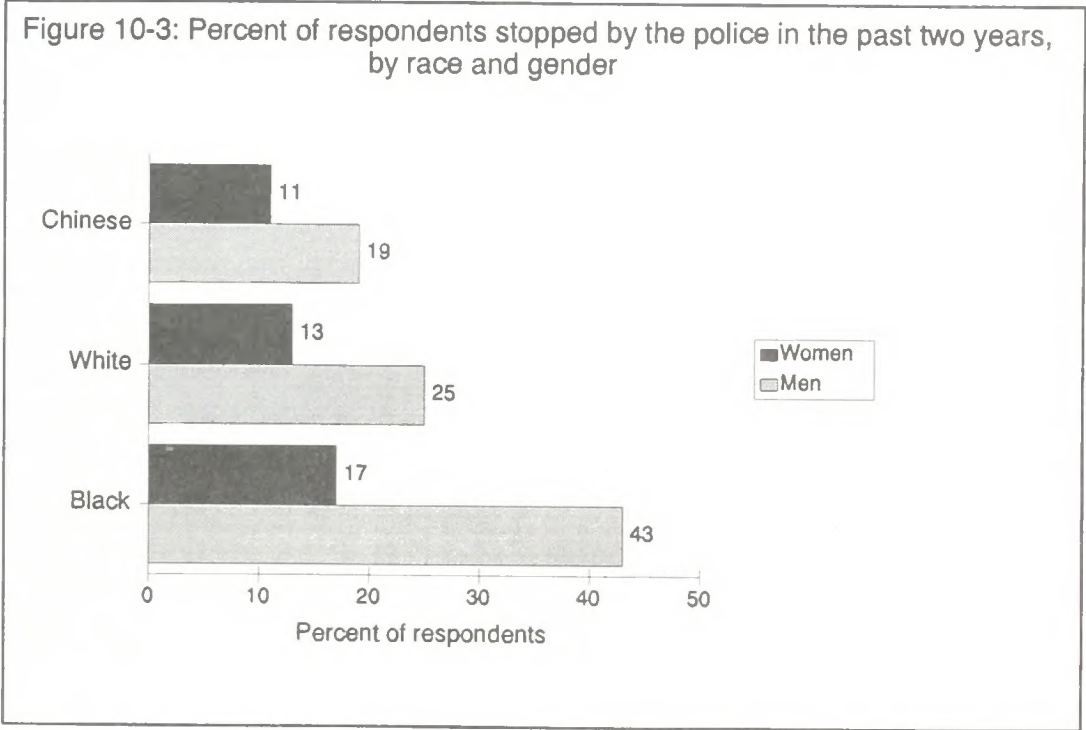
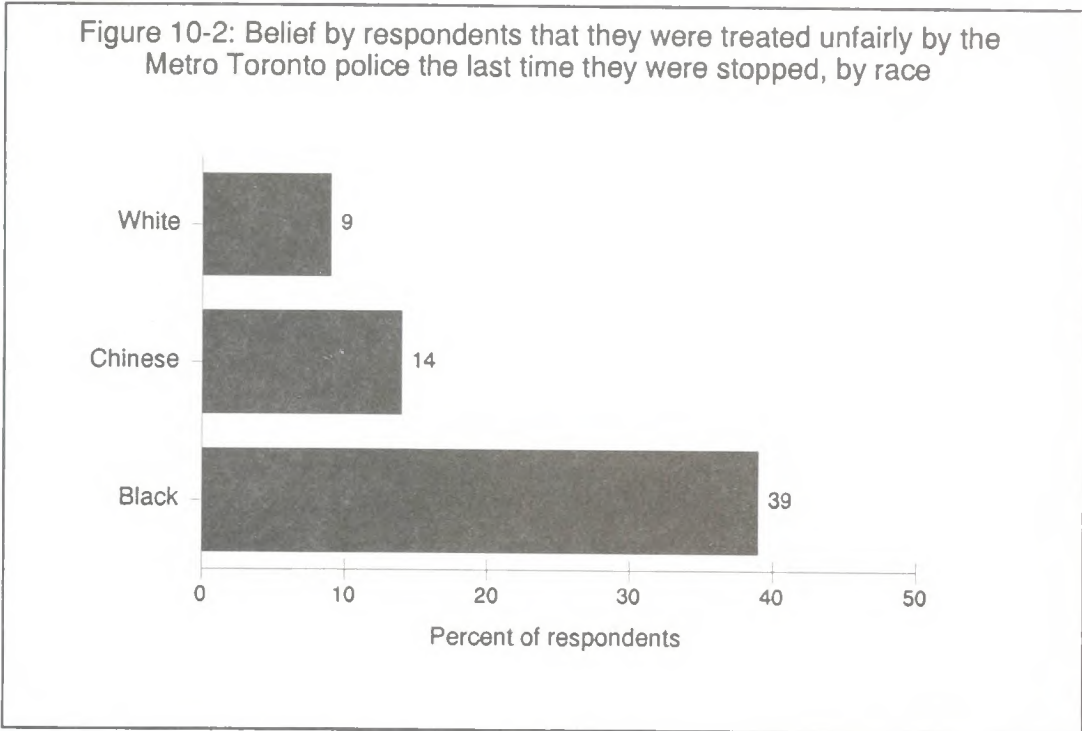
- More black Metro Toronto residents (28%) than white (18%) or Chinese residents (15%) report being stopped by the police in the past two years.
- More black residents (17%) than white (8%) or Chinese (5%) residents report being stopped more than once in the past two years.

**Table 10-1: Metro Toronto respondents stopped by the police in the past two years, by race**

	Black	Chinese	White
Never stopped	71.9%	85.4%	81.8%
Stopped once	11.3%	9.9%	10.2%
Stopped two or more times	16.8%	4.7%	8.0%
Number of respondents	417	405	435

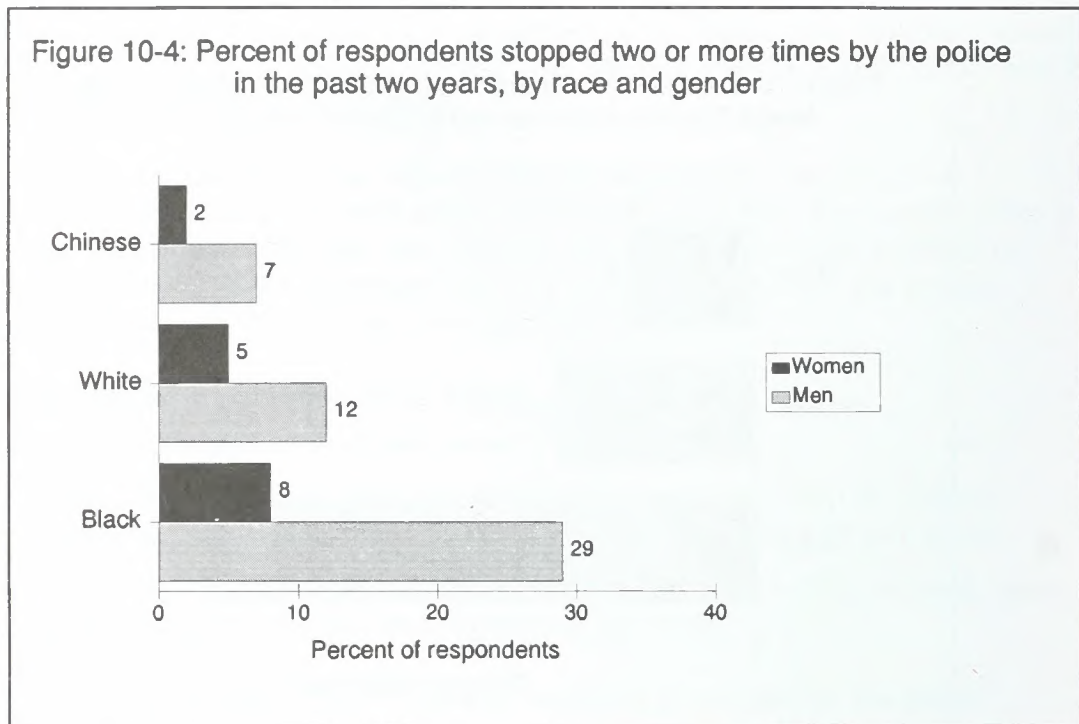
- Many more respondents report being stopped while in a vehicle (18%) than on foot (4%). More black respondents (25%) report being stopped while in a vehicle than white (17%) or Chinese respondents (13%); but there is no statistically significant difference in reported stops while on foot.
- Many more black respondents (39%) than white (9%) or Chinese (14%) respondents think officers who stopped them did not treat them fairly.

Analysis of reported stops by sex indicates that, across the sample as a whole, many more men (29%) than women (13%) report being stopped by the police in the past two years. When broken down by sex and race, the data suggest that black men are particularly vulnerable to being stopped by the police. About 43% of black male respondents, but only 25% of white male and 19% of Chinese male respondents, report being stopped by the police in the past two years. Also, significantly more black (29%) than white (12%) or Chinese (7%) men report being stopped by the police two or more times in the past two years. Consistent with the men's sample,



more black women (17%) report being stopped by the police than white (13%) or Chinese (11%) women, but the differences among women are not statistically significant.





Analysis of the male sample by age as well as race reveals distinctive patterns. Among men aged 18 to 24, black (50%) and white (48%) men are equally likely to report being stopped by police in the past two years,\* while Chinese men (22%) are less likely to report being stopped.

**Table 10-2: Metro Toronto male respondents stopped by the police in the past two years, by race and age**

Age groups	Black	Chinese	White
	%	%	%
18 to 24 years	50.0%	21.7%	47.6%
25 to 40 years	47.7%	19.4%	28.9%
41 years and over	33.9%	14.3%	17.0%
<b>Total male sample</b>	<b>42.7%</b>	<b>18.9%</b>	<b>25.1%</b>

\* This is the only category in which white and black male respondents report similarly high rates of police stops. A possible explanation is suggested by the finding that the police are more likely to stop people in vehicles than on foot. According to the most recent census data for Metropolitan Toronto, white respondents are generally wealthier than black respondents, which suggests that young white men are more likely than young black men to travel by car. Therefore one might expect young white men to experience more police stops than young black men.

Black men (50%) aged 18 to 24, however, are much more likely than both their white (24%) and Chinese (11%) counterparts to report two or more stops in the past two years. Every black man aged 18 to 24 who reported being stopped by the police said he was stopped more than once. By contrast, about half of the white or Chinese men in this age group who reported being stopped had been stopped on more than one occasion.

**Table 10-3: Metro Toronto male respondents stopped by the police two or more times in the past two years, by race and age**

Age groups	Black	Chinese	White
	%	%	%
18 to 24 years	46.2%	10.9%	23.8%
25 to 40 years	33.0%	6.9%	16.9%
41 years and over	15.3%	4.8%	5.7%
<b>Total male sample</b>	<b>28.7%</b>	<b>7.4%</b>	<b>12.3%</b>

Among men aged 25 to 40, black men (48%) are much more likely than white (29%) or Chinese (19%) men to report being stopped by the police in the past two years (Table 10-2). Black men (33%) in this age group are also much more likely than white (17%) or Chinese (7%) men in this age group to report two or more police stops (Table 10-3).

These differences persist into the oldest age group. Among men aged 41 and older, 34% of black men, compared with 17% of white and 14% of Chinese men report being stopped by the police in the past two years (Table 10-2). The data also show that 15% of black men aged 41 and older, compared with 6% of white and 5% of Chinese men in this age group report two or more police stops (Table 10-3).

We also analyzed data on police stops reported by the sub-sample of male university graduates from all three groups. These indicate that black males (48%) with a university degree are much more likely than white (19%) or Chinese (11%) male university graduates to report being stopped by the police in the past two years. Black male graduates (39%) are also much more likely than white (11%) or Chinese (7%) male graduates to report two or more police stops.



### ***Perceived fairness of police stops***

People stopped by the police may have many reasons to think they are treated unfairly. An officer may do or say something that embarrasses or humiliates them, or the real or perceived reason for the stop may seem unfair. To investigate this possibility, we asked everyone in the survey who had been stopped by the police in the past two years why they thought the police had stopped them.

Overall, most people from all three groups thought they were stopped for a legitimate reason, such as a traffic violation, a routine automobile spot check or being drunk in a car or in a public place. But many black respondents strongly believe the police stopped them partly or wholly because of their race. For example, a young black man said the police stopped him “just for the heck of it. It was just the usual ‘cops always stop black people’ routine.” And a young black woman said she was stopped because “I went to the Town Centre [shopping mall] on the wrong night. They [the police] call it ‘nigger night’ and they always stop black people. I wear a baseball cap so maybe I look tough to them. But I was just walking .... I used to want to be a cop but I forget it now, because I am black and it’s a no-win situation.”

Some respondents felt the combination of their race and other factors led to the police stop. Among the other factors they identified are:

- **expensive cars** – One black respondent said he was stopped “because we were three black guys in a BMW. We were not doing anything.” Another said the police stopped him “because they saw a Lexus with a black driver. We were not speeding or anything. They had no real reason to stop us.”
- **perceived association with drugs** – One man said he was stopped because “if you are black and you drive something good, the police pull you over to ask about drugs.” Another man said he was stopped while walking “because I am black and it was late at night, so the police had a suspicion that I was selling drugs.” Other black respondents said they were stopped because they were walking in areas perceived to be “drug infested.”
- **white female companion** – Some respondents felt that the police stop black men if they are accompanied by a white woman. One young man said he was stopped “because I was a black man in a car with a white woman.”

Some white people also mentioned race when asked why the police stopped them. But it was the race of their companion, not their own, that they said was significant. These respondents also connected race to other factors. For example, a young white male said he was stopped “because my friend was driving my Mercedes and he’s black,” and a white woman said she was stopped “because I was driving in a car with a black person.”

### *Implications of findings*

What should we make of this evidence that black people in Metro Toronto are more likely than white or Chinese residents to be stopped by the police, to be stopped more than once, and to experience the stops as unfair? Put more directly, why do black men in cars attract so much police attention? Are black men more likely than other people to drive unsafely, to travel in unsafe vehicles, or in some way to provide police officers with a legitimate reason to stop them? Or is the answer, as Mr. Justice Walter Tarnopolsky suggested, that officers exercising their “wide discretion” choose to stop “a person obviously visible as being of a minority group over one who is more clearly of the majority.”<sup>33</sup>

Clearly, the disparities in reported stops, particularly multiple stops, support complaints made to this Commission and previous inquiries that the police single out black men to display their authority and because they perceive the black men as warranting more scrutiny than other people. Furthermore, the differences in experiences of fairness suggest that some police officers make judgments based on race when deciding whom to stop.

These data do not suggest, however, that all Metro Toronto Police officers are overt racists who consciously stop black people simply because they are black. As Michael Keith says, “such a simplistic and fundamentally arrogant diagnosis is manifestly implausible.”<sup>34</sup> After all, many black respondents do not report being stopped by the police in the past two years. If all Metro Toronto Police officers were practicing racists who think black people are inherently criminal, then surely the differential between stops of white and black people would be much higher. Moreover, if racial hostility is the explanation, why would black women be stopped less frequently than black men?

Though it is wrong to conclude that all police officers are practicing racists, the possibility that some openly prejudiced officers are responsible for a disproportionate number of stops of black people cannot be ignored. Police officers who talked to the Commission conceded that people with such prejudices continue to work for the police (though some also insisted that their prejudiced colleagues do not show bias on the job). Furthermore, findings of a race relations audit of the Metro Toronto Police published in 1993 suggest that despite the force’s recent efforts to screen out candidates with racist attitudes when hiring, some officers show racial bias in their work.<sup>35</sup>

The racial difference in the number and perception of reported stops suggests that the cause is not “a few bad apples” among the police. A more plausible explanation is suggested by research into why police officers view a person or situation with suspicion. Studies show that police officers react to combinations of factors they observe in individuals when deciding whether to initiate contact.<sup>36</sup> They also show that in racialized societies, race may become a factor even if official rules prohibit discrimination.



The Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.

As these findings show, police discretion to stop and question people may produce racial inequality in the number and nature of such contacts. These stops (particularly if unpleasant and also if frequent) breed distrust and suspicion of the police among black and other racialized people. If community policing is to succeed where traditional policing has failed to produce racial equality, police exercise of their discretion to initiate contacts with people must change.

This task is particularly challenging because community policing promotes more, not less, contact between police officers and members of the community. Effective problem-solving and crime prevention, for example, requires close working relationships between police officers and members of local communities. Furthermore, the community policing model of law enforcement depends on considerable citizen co-operation with the police, particularly in supplying information about the activities of individuals or groups.<sup>37</sup>

Of course, police-citizen encounters in the community policing model are intended to be less confrontational and more constructive than under the traditional policing regime, and they are not intended to produce racial inequality. It is clear from the Commission's research, however, that while good intentions are important, they are not enough to overcome the barriers created by differential policing. Many black and other racialized people, particularly youths, are sceptical about the value of intentions alone. Consequently, as well as changing how officers exercise discretion, community policing must also build confidence in the community that such changes are real, meaningful and permanent. Police must, in short, find ways to demonstrate that differential stopping of people because of race alone or in combination with other discriminatory factors is unacceptable.

To achieve these goals, community policing requires practical guidelines for the exercise of police discretion, training to enable officers to avoid racial differentials in the exercise of their discretion, and monitoring of police practices. For increased effectiveness, popular education and outreach programs should inform community members of their rights and shared responsibility for community security, as well as the legitimate boundaries of police action.

The guidelines for police discretion should supplement and elaborate on the general standards set out in the *Canadian Charter of Rights and Freedoms*, the *Ontario*

*Human Rights Code*, and recent judicial decisions that require the police to have “articulable cause” to stop and question individuals.<sup>38</sup> Such guidelines should state clearly what factors do or do not give police officers grounds for exercising this powerful discretion, and illustrate prohibited factors with realistic examples. In developing appropriate guidelines, the test of “reasonable suspicion” currently employed by a United Kingdom *Code of Practice* governing police should be considered. This test states:

Reasonable suspicion cannot be supported on the basis simply of a higher than average chance that the person has committed or is committing an offence, for example, because he belongs to a group within which offenders of a certain kind are relatively common or because of a combination of factors such as these. For example, a person’s colour can never be a reasonable ground for suspicion. The mere fact that a person is carrying a particular kind of property or is dressed in a certain way or has a certain hairstyle is likewise not of itself sufficient.<sup>39</sup>

**10.5 The Commission recommends that –**

- a) **the Ministry of the Solicitor General and Correctional Services, in consultation with the police services and local community organizations, develop guidelines for the exercise of police discretion to stop and question people, with the goal of eliminating differential treatment of black and other racialized people.**
- b) **these guidelines be translated into the most common languages spoken in Ontario and circulated widely.**

Guidelines should be reinforced by monitoring. One method of monitoring practices is to solicit feedback on police officers’ performance from persons who have been stopped. At present, the main mechanism for obtaining feedback is the public complaints system, but it appears not to be effective.

There are two main problems with the complaints system. First, many people either do not know about it or have little confidence in it. Thus, vital feedback is lost to the police and the community. Second, its exclusive focus on finding individual fault sufficient to justify disciplinary action means that general problems arising from accepted practices and policies are not addressed.

The punitive dimension of the complaints system is clearly central to the police disciplinary process, and as such is seen as important for maintaining the accountability of individual officers. Without limiting this role, improvements in collecting and processing complaints would increase their effectiveness as a means of monitoring and then remedying racial inequality in police practices.

Openness, integrity and effectiveness of the complaint process are key to effective community policing. In this light, we note that the Metropolitan Toronto Police have recently adopted the principal recommendations proposed by the municipality’s auditor to enhance the effectiveness of complaints as a monitoring device.<sup>40</sup> These



measures should form the basis of a model for use throughout the province. The Ministry of the Solicitor General and Correctional Services is in the best position to implement such an initiative comprehensively.

To make this model more accessible, we also propose that community agencies be better equipped to encourage people to use complaints mechanisms. For example, community agencies (such as legal clinics, women's shelters, assault help-lines and youth groups) should receive funding that would allow them to provide information and advice about how to complain. A small booklet, for example, could provide information on complaints mechanisms for school courses as well as community education. The public responsibility and importance to the criminal justice system of pursuing valid complaints should be emphasized.

**10.6 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with community agencies –**

- a) formulate a Public Complaints Policy Statement and distribute it widely among their local communities. This statement should emphasize the function of complaints not only in responding to specific incidents, but also in helping to identify and resolve systemic problems.
- b) develop a comprehensive public complaints database that includes categories that would allow the police to monitor complaints about police stops of black or other racialized people. The database should be used to generate quarterly reports of patterns and trends.
- c) fund education on formal and informal police complaint mechanisms.

## **Community policing and school discipline**

Schools are central institutions of the community and dominant in the lives of young people. Attitudes formed during school years have a lasting impact, as do positive or negative experiences of the police within school settings. Consequently, community policing needs to pay special attention to relationships among the police, schools and students. In particular, the police, police services boards and the community policing committees we propose must take responsibility for shaping the police roles on school property.

Many Ontario schools have long-standing co-operative relationships with local police services. These relationships generally include an increased police presence in schools for personal and traffic safety education, to provide information about proactive and reactive police roles in communities and schools, and to respond to conflicts involving students.

In recent years, much discussion of the role of the police in schools has concerned violence among students and other forms of harmful behaviour. Initially, some school boards responded by creating policies for calling the police in some circumstances. These "safe schools" programs do not generally require police intervention or laying criminal charges – both the schools and the police retain

considerable discretion – but they explicitly accept that a range of harmful or inappropriate behaviours in schools should be treated as criminal offences.

In November 1993, the Ministry of Education made existing practices more formal when it directed school boards to complete (or review) their policies on violence prevention by September 1995.<sup>41</sup> While the boards have some flexibility over their policies, procedures and implementation plans, the Ministry requires police intervention for some types of in-school incidents, such as weapons and drug offences, and serious assaults. This approach is sometimes known as “zero tolerance” of violence, although police intervention is only one aspect of the initiative.

Safety in schools is obviously a vital issue, and the criminal process is sometimes an appropriate response to student behaviour. But the criminal law should be used with restraint so that “zero tolerance” does not become a vehicle for over-criminalization of students. During the Commission’s consultations across Ontario, many black youths and their parents voiced serious concerns that neither schools nor the police are exercising restraint. They said the police are often summoned for trivial incidents that schools once handled internally. For example, we received numerous accounts of police responses to playground fights that led to common assault charges, and of responses to students playing with penknives, which were viewed as weapons. Even if charges were not laid in such incidents, encounters with the police were deeply resented by black young people and their families.

Participants in our consultations believed that the application of safe school policies is targeting black students. They maintained that some schools are quick to summon the police when black students are alleged perpetrators of harmful or inappropriate behaviour, but are more likely to handle similar behaviour by white students or other racialized students internally. While anger was mainly directed at the schools, youths and their parents were also disturbed by what they perceived as police complicity in unjust treatment.

The Commission was surprised by the frequency with which this issue arose, and concerned about its implications for community policing. To find out more about the extent of perceived injustice in school disciplinary practices, we surveyed staff and students of 11 urban secondary schools under the jurisdiction of two boards of education.

The surveys produced 569 staff responses, from principals, vice-principals, classroom teachers, educational assistants and guidance counsellors. Most respondents (56%) have been employed as school staff for at least 16 years. Women (49%) and men (51%) are equally represented in the sample, and the majority of respondents are white (84%).



The student surveys obtained 2,172 secondary school responses, of which 44% are female and 56% male. Respondents' ages range from under 14 to over 20, but most (86%) are aged 15 to 18. White students make up 47% of the total sample, black students 14%, East Asian students 14% and South Asian students 10%. Students who identified themselves as members of "other racial minority groups" account for 15% of respondents. About a third (34%) of the sample come from a professional home, 40% have parents in supervisory or skilled occupations, and 19% have parents in semi-skilled or unskilled occupations; 7% have parents without paid work.

Analysis of survey responses reveals three disturbing findings. First, a third of staff members (35%) think black students are more involved than white students in incidents that "require" police intervention at school. Only 1% of staff members think black students are less involved in such incidents than white students. Despite this belief, the staff generally do not perceive "zero tolerance" policies to be targeting students from black or any other racialized communities. Three in four staff respondents (78%) believe the policies are not targeting students from any particular racial or ethnic group; only 5% believe the policies do target a particular group.

One interpretation of these apparently inconsistent opinions is that some staff think black students behave differently from others. To them a need for more frequent police intervention may simply reflect their judgments about students' conduct, rather than evidence of differential staff responses or targeting. A few staff members made remarks to this effect on their surveys. One was crudely racist: "Everyone wants to avoid the truth that certain black cultures are criminal and in conflict with most other cultures morally." Other staff distanced themselves from explicit racism, but still suggested that teachers and students believe black students are aggressive or violent. A white female staff member stated, for example, that "teachers are afraid of black students and are less likely to confront them for that reason." A white male staff member commented that "other ethnic and racial minorities have complained about the aggressiveness of black students, which frequently leads to confrontation."

By contrast, some staff commented on racialized dynamics that may lead teachers wrongly to perceive black students' behaviour as dangerous. These staff emphasized:

- **stereotyping** – "By default, the search for 'troublemakers' more often than not rests on the 'so-called' 'Jamaican' black kid – usually male, but sometimes females. It is as if we look for 'trouble' there first. I believe this is a 'perception' or stereotype that has emerged." (white male staff member)
- **racist provocation of students** – "Often black or other racial minority students seem to be more involved in incidents that require suspension because they are targeted by white students or pushed to physical responses by verbal barbs." (white female staff member)
- **teachers' misinterpretations of unfamiliar cultural norms** – "Fear is also a factor as to why teachers do not approach black students. If they understood

some cultural points, such as [that] the loudness of black youth is not something to fear, etc., then they would be a little less afraid to approach these young black students.” (black female staff member)

The second disturbing finding is that more than half (56%) of the staff respondents believe that teachers are less likely to confront black students for fear of being called racist and a third (33%) believe teachers may avoid confronting other racial minority students for that reason. Comments on student surveys suggest that teachers’ fears are known to their classes. A white male student stated, for example, “I feel that teachers are somewhat afraid to point the finger at minority students because they are afraid they will be called bigots.” A white female student remarked that “teachers are very careful around racial minority students because any little confrontation can be blown out of proportion and be looked at as racial discrimination.” A black student described the frustration he feels when teachers react apprehensively:

“As a black person I’ve noticed teachers taking two steps backward in dealing with me .... [I]f teachers automatically put their guard up every time a minority student walks into a classroom, then nothing will ever get done. The minute the teacher’s guard goes up, so does the student’s. Some black people might deem a teacher racist because the teacher deals with the student in such an apprehensive, ‘I’m not even going to try to reach out to you,’ kind of manner.”

Obviously, findings that school authorities are more likely to request police intervention for black students may be due to the reluctance of teachers to confront these students. For example, the possibility of calling the police offers staff an alternative to directly confronting black students whose behaviour is harmful or inappropriate. They may thus describe a student’s misbehaviour as sufficiently serious to persuade the principal or vice-principal to call the police. Police officers who are summoned in these circumstances may in turn learn to perceive black students as more troublesome, because a disproportionate number of school calls tend to concern them. This perception may then fuel even greater suspicion of black youths.

The third disturbing finding is that black students widely perceive racial differentials in their schools’ use of the police and in how police officers treat black students. For example, 50% of black students believe their school is “more likely” to call the police over incidents involving black students than students from other racial groups. By contrast, only 4% of white, 9% of East Asian and 17% of South Asian students believe their school is more likely to call the police over incidents involving members of their racial groups than students from other racial groups.\*

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\* These students were asked only about their own racial group. Thus we do not know if white, South Asian or East Asian students also think black students receive differential treatment.



Asked whether the police, once called to their school, treat all students the same regardless of race, 53% of black students responded that the police treat black students worse than those from other racial groups. A substantial proportion of South Asian students (28%) believe that the police treat members of their racial group worse than others. Only 4% of white students and 14% of East Asian students feel that the police treat members of their racial groups worse than others.

Though black students are much more likely than others to think the police are more suspicious of racial minority students than white students, this opinion was widespread. More than two-thirds of black students (69%), close to half of South Asian students (44%) and more than a third of East Asian (37%) and white (35%) students agree or strongly agree that “in general, the police seem more suspicious of racial minority students than white students.”

These findings are consistent with what the Commission heard during our consultations. They suggest that black students who attend these schools believe they are more likely than other students to be subjected to the criminal justice process and have little confidence that the police will correct unjust treatment by school authorities. The perception that the police discriminate against racial minority students is widespread among all students.

While this study is provisional and exploratory, its findings are cause for concern. That so many black students feel their schools and the police treat black students worse than others indicates a profound mistrust of these institutions, which may seriously impede black youths’ acceptance of community policing. The school system needs to find an effective response to this problem, but the Commission has no mandate to make recommendations for changes to schools. The implications for community policing, however, should be addressed by police service boards in concert with the community policing committees we propose.

Policies for involving the police in schools must not compromise community policing in the local area. Police agencies ought to be flexible in dealing with schools, just as with any other part of the community, but they also should ensure that the schools’ use of policing resources is consistent with locally defined policies, objectives and standards. We envisage detailed policy consultations between community policing committees and school boards, as well as CPC monitoring of practices. In addition, CPCs should inform youths and parents of policing policy in local schools and convey community concerns to appropriate school authorities. To ensure that policing in schools is a priority for CPCs, a committee position might be reserved for a student or staff member of a local school.

**10.7 The Commission recommends that police services boards, in concert with their community policing committees –**

- a) ensure that policies for policing schools reflect the goals of community policing policies and standards in the local area.**

- b) initiate consultations with school authorities regarding board of education or school-based policies on calling the police into schools.
- c) inform parents and youths about school policing issues, and convey concerns about the content or implementation of relevant policies to school authorities.

## Community policing and mall security

Poor relationships between private security officers and youths may have a significant impact on community policing. Young people often do not distinguish between police and private security officers because they are generally more concerned about what happens to them than whether officers are authorized to act by public or private employers. The Commission's research suggests that community policing authorities should be alert to the risk that negative experiences with private security officers may undermine initiatives to promote racialized youths' confidence in public policing services.

Many complaints about unfair policing of racialized young persons concern security officers employed in malls, universities, housing complexes and other publicly used spaces. Examples of abusive conduct reported to the Commission include name-calling using racial epithets, intrusive questioning, arbitrary requests to empty purses or pockets, excessive scrutiny and petty violence. As well as complaining about being "hassled" or harassed in these ways, youths bitterly resent being excluded from malls and other publicly used spaces, apparently at the whim of security officers.

The authority by which security officers eject or ban people from malls or other publicly used spaces is the provincial *Trespass to Property Act*.<sup>42</sup> This legislation provides that a legal occupier of property or a security guard (or other person) authorized by an occupier may direct a person to leave the property. No reason or justification for the decision need be given. If the person so directed does not leave immediately, he or she can be charged with the offence of trespassing. If convicted, the person can be fined up to \$1,000.

This legislation has been widely criticized on several grounds. First, many commentators have noted that concepts of public and private space have become increasingly blurred over the past few decades. In particular, shopping malls have in the public mind become facilities to which the public has virtually unlimited access, even though the malls are usually owned and leased out by private companies.

Second, the legislation does not require any objective evidence of misconduct or social harm before a person can be ordered to leave. Third, it contains no limitation on how long a person can be banned. Finally, when a security guard orders someone to leave and the person does not go immediately, and the security guard then



decides to arrest and charge the person, the police must be called in.\* The police involvement frequently feeds the perception, particularly among racialized youth, that the police are acting as agents of the private owner.

As noted in the report of the Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities (the *Anand Report*),

The evidence indicates that, far from avoiding escalation, the [*Trespass to Property Act*] is a cause of it. The disturbing gap between community expectations and the law concerning the rights of visitors to publicly-used property frequently results in frustration and verbal altercations between visitors and security guards, police officers and managers. The visitor's refusal to leave and the guard's refusal to give a reason lead inexorably to physical confrontation in the form of arrest, detention and removal. This tendency is particularly troubling in light of the frequent lack of training or sensitivity on the part of the owner's agent. For police officers as well, there is the unsettling reality that under the [Act], they must 'take sides' with the owner. Thus, trespass charges often accompany or are overtaken by more serious charges such as assault and obstruction of justice.<sup>43</sup>

The Task Force found considerable evidence of –

a widely held perception among minority groups and young people that the *Trespass to Property Act* is enforced in a discriminatory way against them. Congregating in groups is seen as acceptable for those who are white, normal or "middle class" in their appearance, but as threatening or disruptive for the young, for visible minorities, for the poor, and generally for those exhibiting an "alternative lifestyle."<sup>44</sup>

Little appears to have changed since the report was published in 1987. The Commission heard repeatedly from black and other racialized youths that mall security officers target them. They reported excessive scrutiny of their activities, rudeness and aggression on the part of security officers, and discrimination in issuing "banning orders" under the *Trespass to Property Act*. Many youths also maintain that security officers overreact and embarrass or humiliate them by calling for assistance from the publicly employed police. Two examples, drawn from many complaints we received, illustrate these experiences.

A young black man reported this incident:

"I've only had one experience with the police, and it also involved mall security. It was a Saturday morning, and me and my friends were meeting in front of the record store because we were planning to go to the beach that day. There were about nine of us. We were joking around when the record store owner came out and told us to get away from his store. We immediately took offence at that. He told us [that] if

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\* Section 9(2) of the Act provides that when a person enters premises where entry is prohibited, or refuses to leave after having been ordered to do so, that person may be arrested by a security officer. The security officer is then obligated to call the police and to turn the arrested person over to a police officer. The police officer is required to arrange for the alleged trespasser to attend court to face the trespass charge.

we didn't leave he would call mall security. We said 'go ahead.' About ten minutes after that, two security guards came and asked us to leave. We told the guards we weren't doing anything wrong and this was a public place. One of the guards called the police. Within 15 minutes there were six cops escorting us outside the mall. One of them said that we were disturbing the peace, and another that we were bad for store business if we remained inside."

One of our researchers interviewed a group of 16-year-olds consisting of three black males, three black females, one Chinese male and one white male. The researcher reported:

"They were all at a sports store looking around when a security guard told them to leave the mall because they were making a lot of noise and were a nuisance, and he didn't think they were buying anything. One of the girls refused to leave, saying it was not illegal to look ... Another guard came. The guards were adamant that the youths leave because they said that kids steal a lot of goods and the youths were dressed in clothes meant to conceal stuff. After much argument, the police came and the youths were ushered out. The police told the youths to leave the area and not to be seen hanging around the mall again. The police didn't even ask their side of the story, but just sided with [mall] security."

As part of a study funded by the Commission, a Filipino community organization documented the experiences of 33 Filipino youths who frequented a mall in Metro Toronto. Almost half (45%) reported harassment by security officers, which included racially abusive language, searches and inspections of their purchases. The youths also reported being refused entry, forcefully evicted and threatened with sanctions. Some had been banned from the mall for defined periods, or indefinitely.

An incident described by one young woman typifies the experience of youths in the study:

"I have had many experiences with the [mall] security guards. For example, one day I wanted to buy a pair of earrings, so after school my friends and I went to the [mall]. We bought some earrings and then went back to the Food Court to grab a bite to eat. We had just sat down to a table when a security guard came up to us and told us we should finish our meal quickly. I told him we had just sat down and we were going to do some more shopping. He then asked me what I had bought. I showed him my earrings and he told me to show him the receipt. I actually had to dig through my purse, find the receipt and show him. It was really annoying! I hate all these racial problems that the [mall] is experiencing now. I used to like going there; now it is no longer a pleasure."

Clearly, many racialized youths in Ontario urban centres deeply resent what they experience as over-policing by mall security officers. Our consultations also suggest that this resentment influences these youths' views of police officers, whom they perceive to be part of the system of unwelcome and intrusive authority. Thus, solutions to the problems of private policing of malls may both reduce tension



between youths and security officers, and also alleviate any spillover effect on community policing.

Despite the *Anand Report's* trenchant criticisms of this private security power as overly broad and highly susceptible to misuse, the Ontario legislature has not curtailed it. While some mall managers have greatly reduced their reliance on this power, in most malls the discretion is fully available and may be used arbitrarily or unreasonably.<sup>45</sup> The Commission fully endorses the *Anand Report's* recommendations for limiting the discretion to exclude persons from publicly used spaces, and urges the Government to implement them.

We propose reforms to two elements of the private policing system. The first would restrict the discretion to exclude persons from publicly used spaces. Exclusion should be possible only when based on an objective standard of misconduct. We see no need for banning orders in any circumstances, since repeated misconduct can be met by repeated invocation of the exclusion power.

**10.8 The Commission recommends that the *Trespass to Property Act* be amended –**

- a) to include a definition of misconduct sufficient to justify exclusion or detention of a visitor to publicly used space, and to make such misconduct a condition to ordering exclusion or detention.**
- b) to abolish the right to ban a visitor from publicly used space.**

A potential danger with this recommendation is that security officers may compensate for the loss of their private authority to ban individuals by requesting more frequent intervention of the public police. Accordingly, community policing committees should generally monitor the demands that private security officers place on community policing services.

Our second recommendation concerns licensing and training in the private policing industry, now as large as the public police service.<sup>46</sup> At present, Ontario requires security officers to be licensed if they work for specialized companies that supply security services. Directly employed security staff, however, need not be licensed by the province; and neither type of security officer is required to undergo training for serving diverse multiracial communities.

Some large organizations, such as universities, conduct in-house training on serving diverse communities, or engage an external security firm to supply trained officers. Security firms that bid for government contracts may also provide “race relations” training to comply with government demands. A private security expert who attended a Commission public forum suggested, however, that adequate training on anti-racism, serving diverse communities or “race relations” is the exception. This participant insisted that the security industry “cannot be trusted to be self-regulatory” in this matter.

The Ministry of the Solicitor General and Correctional Services is currently reviewing the legislation that governs this industry. In light of the complaints we received, it is crucial that this review be sensitive to the adverse experiences of black and other racialized youth under the current regime, so that new legislation may address the problems. In particular, we consider it important to establish an ongoing consultative mechanism so that these voices are heard throughout the review and any ensuing process of legislative change. We also propose that as part of its review, the Ministry should consider using the licensing regime to require all security officers to complete anti-racism training.

**10.9 The Commission recommends that as part of its review of the *Private Investigators and Security Guards Act*, the Ministry of the Solicitor General and Correctional Services –**

- a) undertake extensive consultation to ensure that the legislation responds to the needs of youths, and the particular concerns of black and other racialized youths.
- b) examine whether the legislation's licensing requirements should continue to exclude security officers who police publicly used space.
- c) consider requiring security officers policing publicly used space to complete anti-racism training programs in order to qualify for or keep their licence.
- d) consider having the Registrar of Private Investigators and Security Guards designate certain anti-racism programs as appropriate.

In addition to these recommendations to the Government of Ontario, the Commission has a suggestion for mall owners and managements. Clearly, their interests are not well served when security officers act abusively, harass visitors, or are otherwise unreasonable. However, mall owners and managers have little knowledge of the experiences of young mall-users, who in turn may not know their rights under the *Trespass to Property Act* or how to complain about security officers. While the current law may be of only limited assistance to youths who have concerns about their treatment, they should at least know where they stand. Mall owners could help by posting conspicuous signs that explain, in clear and simple language, the principal provisions of the *Trespass to Property Act*; and outline procedures for complaining about security officers.



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Ontario's trial courts have generally followed the lead of the Ontario Court of Appeal in refusing to admit evidence obtained as a result of an officer's hunch. See, for example, *R. v. Quach* (unreported, Nov. 19, 1993); *R. v. Yau* (unreported, Jan. 7, 1994); *R. v. Moore* (unreported, April 28, 1994); *R. v. Alfreida* (unreported, June 7, 1994); *R. v. Bolick* [1993] O.J. No. 2824; *R. v. Klys* [1993] O.J. No. 1597; *R. v. Simpson* [1993] O.J. No. 2845; *R. v. Gole* (1994) 1 M.V.R. (3d) 257 (Ont. Ct. Gen. Div.); *R. v. Jones* [1994] O.J. No. 2076; *R. v. K.G.* [1994] O.J. No. 514; *R. v. NXT* [1994] O.J. No. 2562; *R. v. St Denis* [1994] O.J. No. 2403.

Some trial and appellate judges in other provinces have admitted evidence discovered as a result of an officer's hunch, so long as the officer was found to be acting in good faith. However, this line of cases appears to have been overruled by the Supreme Court of Canada in *R. v. Montour* [1995] S.C.J. no. 48.

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# Chapter 11

## Systemic Responses to Police Shootings

Perhaps no incidents involving the criminal justice system generate as much public outcry, especially in the black community, as police shootings of civilians. In the past two decades, the number and circumstances of police shootings in Ontario have convinced many black Ontarians that they are disproportionately vulnerable to police violence. They conclude that the police are quicker to use their guns against black people and that the shootings are unduly harsh responses to the incidents under investigation. The resulting deaths and injuries have also come to represent the ultimate manifestation of daily discrimination and harassment that many black people experience, especially in interactions with the police. In short, the shootings are perceived not as isolated incidents, but as tragedies that affect the entire black community – and as a reflection of the destructive force of systemic racism.

These perceptions have spurred strong opinions about how the criminal justice system, and indeed the wider society, should respond to police shootings of black and other racialized people. One key demand is that any death or serious injury caused by the police be closely scrutinized in an open and fair process designed to determine if it was justified. Also crucial is that the search for the truth should explicitly examine the contribution, if any, of systemic racism to the death or injury.

Since 1978, on-duty police officers have shot at least 16 black people in Ontario, ten of them fatally. In nine cases, criminal charges were laid against the officers. Not one was convicted.



Name	Date of Shooting	Outcome	Police Force
Andrew "Buddy" Evans	August 9, 1978	killed	Metro Toronto
Albert Johnson	August 26, 1979	killed	Metro Toronto
Michael Sargeant	November 20, 1979	killed	Metro Toronto
Leander Savoury	January 30, 1985	killed	Metro Toronto
Lester Donaldson	August 9, 1988	killed	Metro Toronto
Earl Edwards	November 7, 1988	injured	Ottawa
Michael Wade Lawson	December 8, 1988	killed	Peel Region
Sophia Cook	October 27, 1989	injured	Metro Toronto
Marlon Neil	May 4, 1990	injured	Metro Toronto
T. T. (a young offender)	September 20, 1991	injured	Metro Toronto
Vincent Gardner	September 26, 1991	killed	Nepean
Royan Bagnaut	November 3, 1991	injured	Metro Toronto
Jonathan Howell	November 9, 1991	injured	Metro Toronto
Raymond Lawrence	May 2, 1992	killed	Metro Toronto
Ian Coley	April 20, 1993	killed	Metro Toronto
Albert Moses	September 29, 1994	killed	Metro Toronto

The response of the criminal justice system to these tragic events has been seen as reflecting a lack of accountability. Governments have responded to this failure by establishing several inquiries and task forces to examine police practices and police relations with minority communities.

The most recent of these was established by the Ontario Government in 1988, after police officers shot three black men in four months. The Task Force on Race Relations and Policing found that "visible minority communities do not believe they are policed fairly and they made a strong case for their view which cannot be ignored."<sup>1</sup> It recommended changes in the law and procedures governing police use of force, as well as reforms to police training to reduce the risk of police shootings. The Task Force also proposed creation of an independent agency to investigate police shootings and to determine whether charges should be laid.

Although these proposals were well received by black and other racialized Ontarians, many expressed scepticism about whether policing would change and about the willingness or capacity of other parts of the criminal justice system to address their concerns.<sup>2</sup> Police shootings of black persons under questionable

circumstances have continued to occur, and members of black and other communities have intensified their efforts to secure an effective response from the criminal justice system.

Within a 50-day period in late 1991, four more black Ontarians were shot by police officers. The subsequent response of the black community ultimately led to establishment of this Commission. As part of our mandate to investigate systemic racism in the criminal justice system, the Commission was directed to examine "how the criminal justice system should respond to future charges of criminal conduct against justice system officials and personnel involving racial minority victims."

The Commission retained Professor Harry Glasbeek<sup>\*</sup> to examine this issue.<sup>†</sup> In this chapter we address concerns about the investigation and charges, the criminal trial and the coroners' inquests.

### ***Investigation and charges***

Soon after a shooting by a police officer, the police normally release an explanation of what happened to the media. This version of the incident generally presents police officers as facing grave danger and acting legally and properly. The victim is usually portrayed as engaging in criminal activity, having a criminal record, or dangerous. The victim's immigration or refugee status is often stated, which implicitly characterizes the victim as "foreign" and a threat to Canadian society.

The information that the police distribute to the media may be selective. For example, in the death of Lee Savoury, Metro Toronto police released the basis for their suspicions of Savoury to the media soon after the shooting. The police had wire-tap evidence of Savoury's plan to rob a gas bar. They provided details of his criminal record and expressed suspicions that he was involved in other robberies and possibly a homicide. However, when the media questioned why the police had not taken preventive action, a police spokesperson declined further comment because of the pending inquest.

In the case of Raymond Lawrence, Metro Toronto police immediately released to the media an account that accorded completely with the eventual testimony given by the officers involved in the shooting, even though police investigators had not yet interviewed three of the officers. Another officer perpetrated a hoax by telling a

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<sup>\*</sup> Professor Glasbeek teaches at Osgoode Hall Law School, York University, in North York and has written extensively on evidence law and criminal liability.

<sup>†</sup> We asked Prof. Glasbeek to review files in possession of the Crown in ten police shooting cases: Evans, Johnson, Sargeant, Savoury, Donaldson, Edwards, Lawson, Neil, Gardner and Lawrence. He soon discovered that some files prepared prior to 1986 had been destroyed or were otherwise unavailable (Sargeant and Edwards), and that some other files were missing relevant data. Thus, his report ultimately dealt with eight cases. It is unfortunate that the crown files were not maintained more systematically. Prof. Glasbeek's report is available (see Appendix B).



journalist that a large knife (in his possession from another investigation) was the knife that Lawrence had brandished at the police officer who killed him. This story was widely and quickly circulated, and probably never was dispelled from the minds of many members of the public.

These examples show how the police can fall far below the standard of objectivity that might be expected of them by manipulating public perception through their control of information. Some members of the media, by uncritical reporting of selective information provided by the police, are in effect colluding with the police in moulding public perception. One result is the reinforcement of stereotypes about black people.

Such uncritical reporting in the wake of these shootings may prompt members of black communities to publicly protest and allege racism by the police. The media, in effect, provoke a public debate between the police and those communities. From a community perspective, the police should be focusing on getting an independent investigation done as quickly as possible. Instead, this powerful agency of the state is seen to be "bashing" immigrants and engaging in racial stereotyping, with the eager participation of some members of the media. This pattern casts doubt on the system's ability to scrutinize police conduct objectively and to address community concerns that police engage in racist violence.

The investigation of deaths and injuries caused by police officers also poses practical problems that concern members of black and other racialized communities. As highly trained investigative specialists, police officers may well have the best technical skills for what may be a difficult process of gathering evidence. They are experienced in obtaining information from reluctant suspects and witnesses, and in sorting out contradictions between accounts of what happened and physical evidence. On the other hand, the well-documented culture of closeness, loyalty and mutual support among working officers means that police investigations of police officers, even if properly conducted, may lack credibility. Thus some jurisdictions have established independent bodies to investigate deaths and injuries caused by the police.<sup>3</sup>

Files on the earlier cases in our study reveal little official concern about the independence of the investigation. For example, in 1978, counsel for the Buddy Evans family requested that an independent force investigate his killing. The chief coroner declined to direct such a change from "normal investigative practice," stating that nothing was exceptional about the case.

Forces other than the one that employed the officer have become involved in recent investigations into shootings by police. Often, however, the investigation was started by the employing force before being turned over to the other. For example, the killing of Lester Donaldson by a Metro Toronto police officer was initially investigated by his own force, which decided not to lay charges. In response to

strongly expressed community concerns, the investigation was turned over to the Ontario Provincial Police (OPP), which did lay charges.<sup>3</sup>

Police investigations of these shootings by police did little to inspire confidence that the criminal justice system treats these incidents with the seriousness they deserve. Members of black and other racialized communities, together with a coalition of community organizations, for many years advocated establishment of an independent civilian body to investigate police shootings. Although the Government established the Special Investigations Unit in 1990, its structure and performance have fallen short of satisfying the need for independent and effective investigations.

The Special Investigations Unit consists of a director (who cannot be a current or former police officer) and investigators (none of whom can be current police officers). Upon the director's own initiative or at the request of the Attorney General or the Solicitor General, the director is mandated to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers." In order to ensure that the SIU can conduct effective investigations, the legislation requires the full cooperation of all police officers.<sup>4</sup>

Many Ontarians had high expectations that independent investigation by the SIU would improve public accountability for police use of force. In turn, such accountability was expected to reduce the risk of racism in police practices. However, because the Government failed to give the SIU sufficient financial support to function properly, in April 1991 the SIU agreed to what has been described as a secret protocol between Ontario police forces and the Solicitor General's office. In effect, the protocol handed back to local forces the investigation of the very incidents that the SIU was created to investigate. This arrangement confirmed for many in the black community that criminal justice officials were prepared to create a public impression of openness while privately collaborating to avoid independent scrutiny and accountability.

The SIU is an essential component of Ontario's criminal justice system. An independent and effective investigation of allegations of improper police use of force, particularly shootings of civilians that may have a racial aspect, is central to public confidence in the integrity of the entire criminal justice system.

Three basic problems face the SIU in attempting to fulfill its role: inadequate funding, lack of co-operation from police services, and the refusal of individual officers to be interviewed.

The SIU's investigation of the police shooting of Vincent Gardner illustrates the difficulties imposed by limited resources. Long delays because of insufficient staff

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<sup>3</sup> In the 1988 death of Wade Lawson, Peel police started the investigation, but soon turned it over to the OPP. This pattern also obtained after the shooting of Marlon Neil in 1990.



inevitably lowered the quality of the investigation. The SIU took two months to report on the cause of death and about 80 days to recommend that the officer involved be charged.

**11.1 The Commission recommends that funding for the Special Investigation Unit be significantly increased to allow it to carry out its statutory function effectively.**

The SIU faces a fundamental problem of antagonism and obstruction from some police services. This has been expressed in various ways, including delays in notifying the SIU of an incident and reluctance to turn over notes, reports and other potential evidence. For example, the SIU has had to wait up to 18 days for responses to requests for notes and records compiled by officers from the first force on the scene of an incident.

Such delay raises suspicions that police “screen” or review the form and content of the information and evidence that is being transmitted, and that the police have something to hide. There is no justification for withholding such information and evidence, which should be produced immediately upon request. Although the *Police Services Act* requires police officers to “co-operate fully” with the SIU, experience indicates that a specific obligation is required to ensure the full and timely transfer of information.

**11.2 The Commission recommends that the *Police Services Act* be amended to require that any officer involved in an investigation falling within the jurisdiction of the SIU be required to turn any requested information and evidence over to the SIU forthwith, and in any event no later than 24 hours after the request.**

**11.3 The Commission recommends that the *Police Services Act Regulations* be amended to provide that the director of the SIU be authorized to charge any officer who fails to provide such information or evidence in a timely fashion with a misconduct offence.**

The third problem arises when police officers implicated in a shooting refuse to be interviewed by SIU investigators. In these cases the officers typically justify their refusal by reference to the constitutional right to remain silent.<sup>5</sup> A police officer in these circumstances might well be a suspect, and a suspect has no obligation to answer questions from investigating officers. However, a police officer who has used a weapon is not in the same position as other suspects.

All police officers must accept that the authority to carry and use a firearm in the course of their employment entails a duty to explain completely any circumstances in which it is discharged. A refusal to provide such an explanation prevents the SIU from conducting the thorough investigation required by law, and thwarts the accountability that police officers must have to their superiors in carrying out their

duties. Such accountability is crucial to public confidence. Suspects who wish to exercise their right to remain silent may do so. However, such a suspect should not also be entitled to continue to carry out the duties of a police officer. Officers in these circumstances should be suspended without pay.

**11.4 The Commission recommends that the *Police Services Act* be amended to require that any officer who fails to answer questions from an SIU investigator be suspended without pay.**

**11.5 The Commission recommends that the *Police Services Act Regulations* be amended to provide that when the director of the SIU informs a chief of police that an officer under the chief's command has failed to give a complete statement to an SIU investigator, the chief shall suspend the officer forthwith without pay.**

In many police shooting cases, public suspicion and mistrust of the police role has been compounded by the process of laying charges. Who decides if charges are warranted? Will the charges reflect the gravity of the incident? Delay in dealing with these issues leads to further anxiety and suspicion. The treatment of a police officer who may be a suspect is in stark contrast with the usual practice in laying charges. Suspects who are not police officers are usually charged immediately with the most serious offence applicable to the facts, while the investigation continues. Conversely, a full investigation in relation to police shootings is carried out before any charge is laid, and the charge often appears to be less serious than the facts warrant.

Many of the problems related to laying charges will be diminished if the SIU is able to carry out a speedy and thorough investigation. The director of the SIU will then be in a position to decide whether to lay charges, and, if so, which charges to lay. As an independent investigative body, the SIU should have greater public credibility in laying charges than the police service that employs the accused officer.

After charges have been laid, a crown attorney takes responsibility for them. In recent years, all charges laid by the SIU have been referred to a special group of crown attorneys that functions separately from individual police services. A crown attorney from this unit is responsible for prosecuting a police shooting case from the laying of charges to the ultimate disposition at trial.

This unit of crown attorneys has established a reputation for prosecuting such cases vigorously and fairly. However, its existence depends on an informal administrative practice within the Ministry of the Attorney General. In our view the independent status of this body should be formalized, and guidelines should establish its jurisdiction and relationship with police forces and the director of the SIU. For example, guidelines might allow the director to consult with this unit about laying charges. Guidelines should be developed in consultation with police services, the SIU, defence counsel and representatives of racialized communities. The existence



of this unit, as well as the guidelines under which it functions, should be widely publicized.

Members of racialized communities are frequently uncertain about why certain decisions have been made about charges in police shootings. Crown attorneys in these cases should be aware that their decisions and actions will be closely scrutinized and subject to public discussion. Whenever possible, crown attorneys should provide a full statement in open court explaining such decisions in order to minimize public uncertainty and suspicion.

**11.6 The Commission recommends that –**

- a) a Special Prosecutions Unit be established in the Ministry of the Attorney General to prosecute all charges laid by the SIU.**
- b) guidelines for this unit be established in consultation with police services, the SIU, defence counsel and representatives of racialized communities.**
- c) the existence of this unit, as well as the guidelines under which it functions, be made widely known to the public.**

### ***The criminal trial***

Members of racialized communities have high expectations of the courts as the stage of the criminal process at which justice ultimately will be served. They may suspect that the police will deny or “cover up” their misconduct. They may question the ability of crown attorneys to be completely objective in view of their close working relationships with the police. However, even if other justice officials are insensitive or act improperly, they expect the judge (and jury) to set things right at the criminal trial and to expose any racist conduct.

This is an unrealistic expectation. Unless blatantly racist behaviour is reported, systemic racism is seldom considered relevant to a criminal trial. In the shooting of Vincent Gardner, for example, there is little doubt that racism drove the events leading up to the fatal raid (see Chapter 10). However, in the eyes of the criminal justice system, this had no bearing on whether the accused police officer acted reasonably in self-defence when he discharged his weapon. Conversely, in the eyes of the black community, the character of those events had everything to do with whether the shooting was unjust.

While a criminal trial no doubt has many symbolic features, it deals only with strictly circumscribed issues in a strictly circumscribed manner. It decides whether the crown has proved every element of the charge beyond a reasonable doubt within the procedural and evidentiary rules established by the *Criminal Code*, other statutes, the common law and the *Charter of Rights and Freedoms*. A criminal trial cannot conduct a general inquiry into racism.

When the accused is a police officer charged with shooting a black person, many elements of the criminal trial process generate a sense of injustice amongst members of the black community and others. Usually, counsel for the officer attempts to

establish the defence of self defence, i.e., that the officer acted reasonably in the circumstances because of a fear for his own safety. The officer is characterized as a fine person who was only carrying out his duty to protect the public, including members of the jury. Defence counsel attempts to persuade the jurors to put themselves in the officer's position of feeling frightened and threatened. They are asked not to hold the officers to a standard of conduct that is too high because he really was just an ordinary human being faced with a crisis, who did what any reasonable person would do.

The crown attorney usually calls other police officers to reconstruct the circumstances of the shooting. However, they are likely to make every effort to present their colleague in a favourable light. Since these officers are usually called as witnesses for the prosecution, the crown attorney is restricted by the rules of evidence from challenging their bias or contradicting them. They are experienced witnesses and know how far they can go in assisting the accused.

This attitude may be reflected by the entire police service, and even the police services board, mobilizing in support of the accused officer. For example, a panel of the Ontario Civilian Commission on Police Services, appointed to examine the conduct of the Chief of the Nepean Police and the Nepean Police Services Board after the Gardner case, cited the Chief's comments to the effect that he viewed the prosecution of the officer as an attack on the City of Nepean and the Nepean Police Force rather than "an allegation of criminal conduct against one single individual."<sup>6</sup>

The defence strategy often includes attacking the character of the victim. Through evidence of previous convictions, character or mental instability, the victim may be characterized as being prone to violence. However, evidence of previous misconduct by the accused officer, such as other incidents of mistreating people in the course of duty, is normally excluded by the rules of evidence.<sup>7</sup> The contrast in the pictures that emerge of the victim and the police officer is stark.

When the judge, jury and accused are all white and the victim is black, these and other circumstances make it understandable that black community members may feel that the trial is not fair. Prosecution witnesses favour the accused. The character of the victim is attacked, while that of the accused is praised. The jury is urged to identify with the accused and is encouraged to dissociate from the victim. While the trial does not exhibit overt racism, the perception of exclusion, with race as a factor, is a reality.

Of course, the accused police officer is only taking advantage of the same rules available to any other accused person. But the rules do not have the same effect when the accused is a police officer. The status of the accused as a police officer may influence the judge in directing the jury on credibility and the jury in assessing it. Moreover, few accused persons have the comfort of the most important prosecution witnesses attempting to favour the defence.



Perhaps little can be done to change the dynamics of these prosecutions. Few would argue that a police officer charged with a criminal offence should be subject to a lower standard of proof or deprived of procedural safeguards. Nevertheless, many rules of evidence are made by the judges through case law and many provide a degree of discretion in their application.

For example, when police officers as crown witnesses are obviously not cooperating with the crown, more aggressive questioning should be permitted even though the witness may not be declared "hostile."<sup>8</sup> The purpose of such an exercise of discretion would be not to make the trial unfair to the accused but simply to make it fair. The police officer is in a uniquely favourable position as an accused person. Necessity has been recognized as an important principle to justify departing from the strict rules related to hearsay.<sup>9</sup> The same principle can be seen as relevant to these circumstances.

The same may be true with respect to some of the character evidence rules. The Supreme Court of Canada has ruled in favour of discretion to deny cross-examination of an accused person on previous convictions.<sup>10</sup> One factor recognized as appropriate in declining to exercise this discretion is the distortion that could be conveyed if the defence brought out the records of crown witnesses but the accused was not subjected to the same scrutiny. By similar logic, when an accused police officer attacks the character of a victim or other prosecution witnesses, perhaps the rule precluding character evidence about the accused should be relaxed. For example, perhaps evidence that the officer has engaged in other acts of violence against members of the public should be admissible even though these acts did not result in conviction.

Counsel and the judge could take other steps to avoid the perception that elements of race are introduced in favour of the police officer. For example, if the victim is black but the accused, judge and jury are all white, perhaps the crown should ask the judge to instruct defence counsel to avoid descriptions of the officer that even indirectly identify the accused as "like" the jury but "unlike" the victim.

The law of evidence at criminal trials falls within federal jurisdiction. Moreover, it is difficult to make specific recommendations on how judicial discretion should be exercised in a variety of circumstances. The point here is simply to acknowledge that members of racialized communities perceive these criminal trials as unfair. The element of race simply cannot be ignored in such situations. Moreover, its presence may well provide a sound reason for innovative exercises of judicial discretion to enhance both the reality and perception of fairness. The courts have been creative in developing new rules of evidence regarding the testimony of victim of sexual assault.<sup>11</sup> Similar openness to change and creativity is required to develop rules that are fair to the victim and others, as well as to the accused, when the accused is a police officer and race dynamics are present.

The development and sensitive application of rules of evidence and procedure could make these criminal trials fairer in the eyes of racialized communities. At the least, such steps would help reduce misunderstanding and mistrust. However, they cannot alter the basic character of the criminal trial, which will remain limited in purpose and scope. Effective and sensitive criminal prosecutions are of great importance in police shooting cases. However, a broad inquiry into all the circumstances related to police shootings, including race, requires another forum.

### *Coroners' inquests*

Unlike the criminal trial, coroners' inquests have a broader capacity to canvass issues of systemic racism. The *Coroners Act* provides that an inquest shall inquire into the circumstances of a death, determining who the deceased was and how, when, where and by what means death occurred. It has no fault-finding jurisdiction. However, it does encourage the jury to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest."<sup>12</sup> This mandate clearly could encompass issues of systemic racism in police shootings. Nevertheless, in spite of vigorous representations, coroners in some of the cases listed at the start of this chapter initially refused to consider race as an issue. They also declined to grant standing to individuals and groups who wished to raise such issues, a restrictive approach that was generally upheld by the courts.<sup>13</sup>

In recent years the courts have given greater leeway to applications for standing.<sup>14</sup> Consequently, applications on behalf of racialized community groups have been more frequent and successful. However, the coroner's inquest continues to be limited as a forum for exploring complex legal, procedural and social issues. Ontario is the only province in which only medically qualified people conduct inquests. This restriction limits the capacity of coroners to deal with such issues while maintaining a balance between conducting a full inquiry and establishing bounds of relevance. When particularly difficult and complex cases arise, an experienced member of the bar who is sensitive to such a broad range of issues should conduct the inquest.\*

#### **11.7 The Commission recommends that legally trained persons preside as coroners at inquests involving police shootings of civilians. The public should be consulted in the appointment of such persons.**

In the current system, medically trained coroners rely heavily on the crown attorney assigned to the inquest for legal advice and direction. The same perception of unfairness arises out of this relationship as with the relationship of police and crown attorneys in the police shooting prosecutions discussed earlier. The crown attorneys assigned to coroners in police shooting cases should be drawn exclusively from the

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\* Members of the Quebec bar have been appointed to conduct inquests in some recent high-profile cases in that province pursuant to *La Loi sur La Recherche des Causes et des Circonstances des Deces*, R.S.Q. c.R.-0.2, s.7.



Special Prosecutions Unit of the Ministry of the Attorney General. Similar perceptions of unfairness are likely if a coroner relies upon police investigators from the force of the officer who committed the shooting. Since the SIU already will have conducted an investigation, coroners should rely exclusively on SIU investigators in relation to these inquests.

**11.8 The Commission recommends that in cases involving police shooting of civilians, coroners rely exclusively on SIU investigators and crown attorneys from the Special Prosecutions Unit of the Ministry of the Attorney General.**

The Commission is concerned that although changes have been made in the way in which police shooting cases are now investigated, the issue of systemic racism remains unexamined. We therefore looked at other ways to address this issue.

Part II of the *Police Services Act* establishes the Ontario Civilian Commission on Police Services (OCCPS), which has broad powers to inquire into police conduct on its own initiative or at the request of others. The objectives of the Act include:

1. The need to ensure the safety and security of all persons and property in Ontario.
- ....
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.

Our Commission was surprised to learn that the Civilian Commission has never exercised these broad powers to examine racism in police shooting cases. OCCPS advised us that its current budget is grossly inadequate for extensive public inquiries. This is unfortunate since timely and thorough public inquiries into these cases could do much to establish the facts, identify the circumstances that led to the shooting and make recommendations to avoid similar tragedies in the future. One result would be enhancement of the perception of openness, fairness and integrity in the criminal justice system, which would relieve public and personal anxiety.

**11.9 The Commission recommends that the Ontario Civilian Commission on Police Services receive full funding, independent of its existing budget, for any inquiries it may initiate in relation to police conduct.**

Ultimately, implementation of community policing should improve police-community relations and mutual understanding. Ideally, police shootings of members of racialized communities (or anyone else) would not occur. Unfortunately, however, there is a need for public forums for police officers to account for their use of force, particularly when the consequences to citizens are tragic. The SIU, the Special Prosecutions Unit, changes to the coroner's inquest and an increased role for OCCPS should all contribute to greater public confidence in the criminal justice system, particularly as community policing becomes more effective.

However, what may be required is a new institution for police accountability with a specifically remedial mission. Models for anti-discrimination enforcement might be a useful starting point because they incorporate a variety of functions: investigation, conciliation, independent adjudication (if necessary) and the power to make broad remedial orders, including compensation for victims. The institution should have a broad mandate that goes beyond responding to a traditional complaint and instead addresses systemic issues. Turning the police and the community into adversaries should be avoided. The objective must be to identify problems and to deal with them rather than to be preoccupied with "blame."

While creation of such an institution may not be imminent, the police, lawyers, government officials, members of racialized communities and others should begin work on developing a model to achieve these goals.



## Endnotes

1. Province of Ontario, Task Force on Race Relations and Policing, *Report*, chair Clare Lewis (Toronto: Task Force, 1989).
2. Province of Ontario, Race Relations and Policing Task Force, *Report*, chair Clare Lewis (Toronto: 1992).
3. For a review of American jurisdictions see Jerome H. Skolnick and James J. Fyfe *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993).
4. *Police Services Act* R.S.O. 1990 c. P -15, s. 113(3), (5) and (9).
5. *Canadian Charter of Rights and Freedoms*, ss. 10(b) and 7.
6. Ontario Civilian Commission on Police Services, *Report of an Inquiry into the Nepean Police Service*, (July 1994), p.7.
7. Colin Tapper, ed., *Cross on Evidence*, seventh edition (London: Butterworths, 1990), pp. 312–36; Peter K. McWilliams, *Canadian Criminal Evidence*, third edition (Toronto: Canada Law Book, 1995).
8. See Professor A. Bryant, “The Common Law Rule Against Impeaching One’s Own Witness,” (1982) 32 U. of T. L.J. 412, and “The Statutory Rules Against Impeaching One’s Own Witness,” (1983) 33 U. of T. L.J.108.
9. *R. v. Khan* (1990) 59 C.C.C. (3d) 92 (S.C.C.); *R. v. B. (K.G.)* (1993) 79 C.C.C (3d) 257 (S.C.C.).
10. *R. v. Corbett* (1988) 41 C.C.C. (3d) 385 (S.C.C.).
11. *R. v. Seaboyer*; *R. v. Gayme* (1991) 66 C.C.C. (3d) 321 (S.C.C.).
12. *Coroners Act* R.S.O. 1990, c. 37, s. 31(3).
13. *Re Evans and Milton* (1979) 46 C.C.C. (2d) 129 (Ont. C.A.); *Black Action Defence Committee v. Huxter* (1992) 11 O.R. (3d) 641 (Div. Ct.).
14. See generally, Allan Manson “Standing in the Public Interest at Coroner’s Inquests in Ontario,” (1988) 20 Ottawa L. Rev. 637; *Stanford v. Harris* (1989) 38 Admin. L.R. 141 (Ont. Div. Ct.).

# Chapter 12

## An equality strategy for justice

Commission recommendations in earlier chapters that focus on stages of the criminal justice process, if implemented, should do much to reduce injustice. But in a society where some racial origins continue to be favoured over others and people subjected to the criminal justice system are mainly the least favoured and most marginal, these reforms need structural support to secure racial equality throughout the administration of justice. To achieve this, we see four key needs: anti-racism training of justice personnel, employment of racialized persons in the administration of justice, increased participation of racialized persons in developing justice policies, and monitoring of practices for evidence of racial inequality.

### Working for justice

Responsibility for securing racial equality in the criminal justice system inevitably falls heavily on the men and women who work within its administration. While policy and procedures underlie the system, its personnel visibly represent it. But these representatives may have little opportunity to communicate its core values directly to the communities they serve, or even to persons subjected to the administration of justice. Instead, these values are conveyed by who is represented in the justice system and how those officials conduct themselves.

The justice system is so large and fragmented that representing system-wide commitments to racial equality is challenging. People work for the justice system in a variety of professional and lay capacities, and within different organizational structures. Some justice occupations are managed within bureaucracies that employ hundreds or thousands of people. Others are staffed by individuals or small organizations on contract managed by the central administration. Judges are a special case: they are appointed, paid and administratively supported by government, but are formally independent of the state and other justice personnel. Furthermore, although the chief judge and chief justices have important responsibilities in the administration of justice, the doctrine of judicial independence means that no one can simply direct judges how to do their jobs.

One consequence of this fragmentation is the difficulty in establishing an overall vision of equality or agreement on the steps required to achieve it. Another is that progress towards racial equality in one part of the system may be overshadowed by



failures elsewhere in the system. Conversely, fragmentation may also create opportunities. Different occupational groups may take independent initiatives, and successes within some justice occupations may prove contagious.

The dominant model of institutional change to secure racial equality emphasizes training of existing personnel and eliminating discriminatory barriers to employment and appointment of racialized persons. Training is directly related to the delivery of services; its goals include eradicating biases that may lead to discrimination and enhancing the capacity of system personnel to serve diverse communities equally. Eliminating discriminatory barriers in hiring and promotion is generally viewed as a means of securing equity in employment, but it may also enhance confidence that the system is committed to equality in delivering services.

### ***Anti-racism training***

Many participants in Commission consultations and public forums proposed "anti-racism," "equity" or diversity training to counter systemic racism in the administration of justice.\* Commission surveys of judges also indicate considerable support for such training. More than three in four (77%) provincial division judges appointed since 1988 and one in two (54%) longer-serving judges agree that "anti-racism and equity training will improve the treatment of racial minority groups in the criminal justice system." More than two in five (43%) general division judges agreed that anti-racism training (they were not asked about equity training) would improve the treatment of racial minority groups in the criminal justice system.

No justice occupation in Ontario has a comprehensive, long-standing anti-racism program but most are planning or have recently begun some training. Responses to these initiatives are mixed. For example, an anti-racism program for crown attorneys, developed by a respected consultant, encountered considerable resistance from some participants and was suspended by the Ministry of the Attorney General late in 1994. By contrast, a training video on "Race, Culture and the Courts," prepared by the National Judicial Institute and given to all judges upon appointment, appears to be well received. In June 1994, the Institute conducted a successful two-day training session in Toronto on race and cultural awareness.

Evaluations of race relations training programs for police, which are the most well-established in the justice system, raise questions about their content and organization. For example, a recent review of the Ottawa police training program suggests that while it may demonstrate concern about good relations with the public, the program is unlikely to change police behaviour.<sup>1</sup> General research on race relations and intercultural training supports this conclusion. One study found that 30 percent of trainees exhibit more negative attitudes after training. A Canadian expert

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\* This continues a long tradition of viewing training as the best or most appropriate response. See Ungerleider, *Police Intercultural and Race Relations Training* (note 4), p. 16 and references.

concluded that “in their present form police intercultural and race relations programs are not particularly cost-effective.”<sup>2</sup>

While experts in the field continue to support training to combat systemic racism, they limit their expectations to realistic and achievable goals. Training is only one aspect of a comprehensive strategy to secure racial equality in the criminal justice system, and is most likely effective when policies and practices are equally committed.

The effectiveness of training also depends on what it seeks to change. Research into occupational training identifies three main models for enhancing racial equality in services.<sup>3</sup> One tries to increase trainees’ knowledge of other cultures, the second emphasizes changes in attitudes, and the third focuses directly on behaviour.

“Multicultural,” “cross-cultural” or “intercultural” training seeks to instruct participants about the lifestyles, values and beliefs of “culturally different” persons. These programs assume that knowledge will dispel prejudice and help participants be more sensitive when serving persons from different cultures. Some programs also include communication and interaction with individuals from different cultures, and exercises to develop participants’ awareness of their own cultural values and assumptions.

This model is widely used by police, but Charles Ungerleider cautions that it may inadvertently promote the very attitudes and behaviours it tries to prevent. While he focuses on the police, the problem may affect intercultural training within any occupation:

[Another] problem is the suggestion that individual police officers need knowledge of specific cultures for working with peers and citizens who differ from the police. Implicit in this assumption is the notion that what differences there are among people in culture and skin colour are significant differences to which the police should respond; that such attributes should be taken into account ... My first concern is with the likelihood of stereotyping and stigmatization. I am concerned that particular patterns of behaviour will be identified with persons of a particular skin colour. Rather than combat “racialization,” such a practice might increase the likelihood of its occurrence ... My second concern is that “police intercultural and race relations training” does not (and cannot) indicate which behaviours are relevant in particular situations. This almost certainly means that any supposedly culturally specific content that is taught is likely to stigmatize.<sup>4</sup>

“Racism awareness training” is concerned with attitudes rather than knowledge. This model attempts to tackle directly the perceived roots of racist conduct: beliefs and assumptions that are often subconscious. Participants learn about historical sources of beliefs that some races are superior or inferior to others. They are shown how subtle forms of such ideas pervade their culture and the systems in which they work, and are expected to confront their subconscious assumptions to rid themselves of implicitly racist attitudes. While racism awareness training primarily aims at



identifying and eliminating beliefs that may result in negative judgments about people who are perceived as different, many programs also emphasize that cultural diversity benefits society.

Some trainees find racism awareness training a source of important insights into relationships among history, culture, institutions, individual attitudes and discriminatory behaviour. But these programs have also spawned controversy, especially among trainees with little prior understanding of systemic racism. Many have difficulty relating histories of racist thinking to their everyday lives and work. Some find the approach too confrontational, reacting with defensiveness, denial or resistance to change.<sup>5</sup> Racism awareness training is also criticized by persons with a long history of working to combat racism. Ahmed Gurnah comments on such programs in Britain:

[I]t is doubtful that RAT [racism awareness training] can even achieve its modest objective to start anti-racist action and instead stands a good chance of diverting that action or even harming it. There seems no clear strategic route from this kind of consciousness-raising session to political action. This is not to imply that all anti-racist education and all anti-racist consciousness training is ineffectual and harmful. Quite the contrary: both are extremely important, but need to be done in the context of concrete action. Otherwise the undoubted sincerity and energies of these trainers is wasted, is misused, becomes harmful and sometimes is even more unethical. It is misused because it appeals to guilt; it is wasted because it is ineffective; it is harmful because it can be appropriated by the racist state; and it is unethical because it can lead to the commercialization of anti-racism.<sup>6</sup>

While understanding the subtleties of racism may be necessary to change attitudes and behaviour, racism awareness is limited as a comprehensive training strategy.

The third, behavioural, model of anti-racism training seeks to equip trainees with skills to recognize and correct actions that exclude or discriminate against racialized people. Programs may emphasize organizational and systemic factors that influence behaviour, as well as develop critical thinking and problem-solving techniques to prevent conduct with a racist impact. The content is largely drawn from occupational tasks that trainees perform in their working lives. The goals are to alert trainees to often subtle discriminatory practices that they or their colleagues may engage in, and develop skills for adjusting behaviour.

One advantage of focusing on job performance is that it avoids ethical concerns arising from attempts to change beliefs or attitudes. Though personal beliefs may be viewed as private, the conduct of justice officials is of vital concern to the public and an appropriate object of training. In addition, many experts believe a behavioural approach is more likely to have the desired effect on systemic practices than attempts to change attitudes. Ungerleider argues that –

behavioural goals are more realistic than attitudinal goals. For example, training a police officer how to proceed when searching a Sikh home will be more effective than trying to directly change his or her attitudes towards South Asian-Canadians.<sup>7</sup>

An English expert on training to prevent racism has also found a behavioural model of training more effective than knowledge or attitude models, and notes that it may also change attitudes:

... [I]t has long been established that an increase in knowledge does not necessarily affect attitudes and that attitudes do not necessarily determine behaviour .... [B]ehaviouristic psychology provides good theoretical grounds for considering that attitude change is more likely to be achieved as a *result* of behaviour change, and not the other way round. ... A more reasonable and practical objective with regard to attitudes is not that training should seek to change them, but that it should enable trainees ... to be capable of managing [attitudes] so that they do not obstruct non-discriminatory practice in their professional and occupational roles.<sup>8</sup>

Anti-racism training – whichever combination of models is adopted – has a vital role to play in securing racial equality in the criminal justice system. All justice personnel should be equipped with skills to recognize and respond to conduct that may be discriminatory, disrespectful or exclusionary in their own and others' work. They should also be trained to adapt services where necessary, to ensure that all users are treated equally. For example, crown attorneys and judges should learn to identify when an unrepresented person with only a surface command of English needs an interpreter, and probation officers should learn to assess whether a client from a racialized community would benefit from programs at an agency specializing in serving that community. In short, effective job-related training in anti-racism skills should help all justice personnel understand the practical implications of what Justice Rosalie Abella describes as “the substantial difference between making distinctions to accommodate real differences in order to minimize disadvantage, and making distinctions based on perceived differences which have the effect of unduly perpetuating it.”<sup>9</sup>

Training programs based on a behavioural model of anti-racism skills should be developed by the offices responsible for professional development and education within each justice occupation. Participation in such programs should be mandatory for employees and lay appointees, and strongly encouraged for others. In addition, the ministries of the Attorney General and the Solicitor General and Correctional Services should establish an advisory board on anti-racism training throughout the criminal justice system. The board would collect information about successful programs in Ontario and other jurisdictions, summarize and distribute emerging knowledge about securing equality in the criminal justice system, assist those responsible for training to find resources and evaluate programs, develop and publicize good models, and solicit information about training needs from system users, community groups and professional bodies within the justice system.



We envisage the advisory board as a short-term catalyst to ensure that effective anti-racism training is integrated into all aspects of the criminal justice system. Responsibility for organizing and delivering training should remain with the bodies responsible for education and training within each justice occupation, since a successful board that receives appropriate support should be able to fulfill its mandate within five to 15 years. We therefore propose a review of anti-racism training in the Ontario criminal justice system after six years and, if necessary, every three years thereafter to determine whether the advisory board could be disbanded.

Half of the board should consist of community members with expertise in anti-racism, while the remainder should include representatives of judges, lawyers and correctional personnel.\* The board should be jointly chaired by a judge and a community member. All members should receive a thorough orientation to each professional occupation under the board's auspices, including observing their daily routines. Board members should be paid for their expenses and offered honoraria.

The board should report annually to the legislature and regularly publicize its activities, in a variety of languages that reflect Ontario's linguistic diversity. Both professional and community-based board members, particularly the chairs, should be available to speak with community groups.

**12.1 The Commission recommends that anti-racism training programs based on a behavioural model be established for each justice occupation.**

**12.2 The Commission recommends that –**

- a) the ministries of the Attorney General and the Solicitor General and Correctional Services establish an advisory board to provide guidance on anti-racism training throughout the criminal justice system.
- b) half of the board members be drawn from community agencies with expertise in anti-racism, the other half consisting of representative judges, lawyers and correctional personnel. The board should be jointly chaired by a judge and a community member.
- c) an orientation program for advisory board members be established.
- d) board members be paid reasonable expenses and offered honoraria.

## ***Equality in employment and appointments***

### **Representation**

Equality in employment means that no one is denied opportunity for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstruction .... If access is genuinely available in a way that permits anyone who so

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\* We have omitted the police because their training is not within the Commission's mandate. But the advisory board could and perhaps should include the police.

wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality.<sup>10</sup>

As noted in Chapter 7, one reason for the strong sense of exclusion from justice experienced by many black and other racialized persons is under-representation of members of their communities among those who work in the justice system. Other Commission findings suggest that increased representation of racialized people in the justice system is widely perceived as desirable. Our survey of black, white and Chinese residents of Metro Toronto, for example, indicates substantial agreement that the criminal justice system should hire more racial minorities.<sup>\*</sup> The findings show that –

- 82% of black, 75% of Chinese and 43% of white respondents strongly or somewhat agree that the justice system needs more racial minority lawyers.
- 84% of black, 79% of Chinese and 47% of white respondents strongly or somewhat agree that the government should make a serious effort to increase the role played by racial minorities in the justice system.
- 68% of black, 63% of Chinese and 40% of white respondents strongly or somewhat agree that the criminal courts would benefit from appointments of more racial minority judges.<sup>†</sup>

Many judges in our survey also supported increased representation of racialized persons in the criminal justice system:

- 44% of general division, 40% of longer-serving provincial division and 70% of recently appointed provincial division judges think the criminal justice system needs more racial minority lawyers.
- 49% of general division, 44% of longer-serving provincial division and 75% of recently appointed provincial division judges think the courts would benefit from the appointment of more racial minority judges.

Some barriers responsible for under-representation of racialized people in the criminal justice system are being dismantled gradually. Justice ministries have implemented employment equity policies for the police, correctional staff management and appointments, crown attorneys and court officials. Revised provincial procedures for appointing judges and justices of the peace, intended to eliminate the taint of political patronage, have created more openness and

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<sup>\*</sup> The methodology of the survey is summarized in Chapter 2, and described in more detail in our Technical Volume. See Appendix B.

<sup>†</sup> For each question, black respondents were asked specifically about increasing the number of black persons, and Chinese respondents about increasing the number of Chinese persons. Half of the white respondents were asked about increasing the number of black persons, and the other half about increasing the number of Chinese persons. White respondents asked about black persons were much more likely to think the numbers should be increased than those asked about Chinese persons.



accessibility to qualified individuals from racialized communities. The Equity Committee of the Law Society of Upper Canada is scrutinizing barriers to entry and progress in the legal profession, and some Ontario law schools have revised their admissions procedures to promote equal access.

These efforts have had notable results. Before 1989, for example, few provincially appointed judges were members of racialized communities, but 11 percent of new appointments in the first five years of the new appointments procedures were members of groups defined as "visible minorities" in Canada.<sup>11</sup> In a 1993 round of appointments, eight of 21 new justices of the peace were members of racialized communities. Finally, a recent employment systems review indicates that across its workforce as a whole, racial minorities are no longer under-represented at the Ministry of the Attorney General, although they remain under-represented among crown counsel.<sup>12</sup>

No one actively seeking equality denies, however, that more needs to be done. Within government bureaucracies, employees from racialized communities are generally recent appointments, on the lowest rungs of the ladder and often hired on limited-term contracts. Fiscal constraints have blocked promotions and jeopardized retention of existing employees from racialized communities as well as further recruitment.

The Commission does not propose growth in the criminal justice system in order to increase the number of racialized people in justice occupations, since growth would conflict with the fundamental principle of restraint in applying the criminal process. However, any recruitment and promotion that occurs should reflect the principles of equity in employment. Arbitrary barriers to recruitment, employment, retention or promotion of racialized people should be identified and eliminated, and progress towards achieving appropriate representation in justice occupations should be monitored.

As this Report was being finalized, the Ontario Government introduced a bill to repeal the *Employment Equity Act*, which provides a framework to accelerate the dismantling of arbitrary employment barriers. With or without the legislation, equity in employment must be pursued. Racial equality is a fundamental right in Canada, guaranteed by the *Canadian Charter of Rights and Freedoms*, and is fundamental to the integrity of the criminal justice system.

**12.3 The Commission recommends that criminal justice officials responsible for appointments and employment intensify efforts to dismantle barriers to recruitment, hiring, retention and promotion of racialized people, and continue to monitor progress in achieving appropriate representation.**

## Equality in workplaces

Criminal justice employees from racialized communities often experience lack of support from colleagues and questioning of their credentials, abilities or suitability for their jobs. A recent task force found, for example, that at the Ministry of the Attorney General –

- a major issue for racial minorities was the extent to which they were seen as ‘token’ employees rather than qualified employees ... Employees experienced “dismissive” behaviour and assumptions about their intelligence because of the colour of their skin.
- [white, able-bodied, English-speaking males], along with white able-bodied women, believed that employment equity had “gone too far,” that standards had been lowered.<sup>13</sup>

Commission consultations with and submissions from correctional staff disclosed widespread experiences of demeaning, insulting and disrespectful treatment. Some talked about the negative effects of being perceived as token employees, hired or promoted to meet a quota:

“There is a perception that black people don’t have brains or they shouldn’t have reached the level they have because they are not smart enough. Racial minorities [in corrections] have a higher level of qualification, but they are perceived to have much lower levels of qualifications. This type of mentality is throughout the system ... It causes racial minorities to feel that they are the problem.”

“Employment equity in corrections has been abused. It has been used to aggravate racial tensions. It hasn’t been properly explained to anyone. You now have women and blacks who don’t want promotions because someone will say, ‘oh you only got it because you are a woman or a black.’ Management has done nothing to dispel this illusion.”

“Now that I have been promoted, I feel like I am under scrutiny. If someone white had received the position, he or she would have been perceived as obviously qualified. They are watching me very closely - every move that I make, every decision that I make. I can’t walk into a room and not think about being black. I have not heard anything directly but there is all the stuff that goes through the grapevine. This makes it more difficult because you are aware that things are said, but because they are not said to you directly, you have no avenue for dealing with it.”

Other examples of insulting treatment and the effects of harassment were reported in a brief to the Commission by the union that represents correctional workers:

“They make you feel inferior because you are a black person. One correctional officer called me ‘boy’ in front of an inmate and management staff. I told him off. I do not believe from the way I’m treated that I’m welcome here.”



“During the shift all the officers got together to plan a potluck supper for the break. I, a black officer, was the only one of 18 (managers and staff) not asked to participate. I was, however, offered any leftovers I might want after everyone had finished eating and left the area.”

“They should have to pay damages for the mental anguish I have suffered. I have had to get up at 2:00 a.m. on many mornings and go down to the basement so my family wouldn’t see or hear me cry.”

“I am undergoing therapy .... and I was rather surprised to hear that other patients who are black employees of the Ministry seem to share the same basic story. I [had] thought it was a case of me suffering from my own paranoia.”

Workplace harassment is unlawful and specifically prohibited by the Workplace Discrimination and Harassment Prevention Policy of the Ontario government. This policy defines harassment as comment or conduct that is offensive, known or should reasonably have been known to be unwelcome and based on a variety of grounds including “race/colour, ancestry, place of origin, ethnic origin, language or dialect spoken, citizenship or religion.” It provides for formal and informal resolutions of complaints, and confidentiality and fair treatment of the complainant (and the alleged offender); imposes clear and specific duties on managers; and requires all employees to be trained to fulfil their obligations to ensure a harassment-free work environment.

Despite this policy, criminal justice employees from racialized communities continue to be subjected to offensive and demoralizing treatment. The behavioural model of anti-racism training we propose should assist all employees to comply with their obligations to treat racialized colleagues equally, and enhance managers’ capacity to identify and respond to demeaning treatment of racialized staff. But the extent of the problem in the prisons, as reported by the union, calls for more specific monitoring.

The Commission’s *Interim Report* recommended that Anti-Racism Co-ordinators be established for adult and youth correctional services. One of the functions we proposed for the co-ordinators is “conducting periodic and random audits of prison conditions, programs, practices and services.”

This role should be expanded and the Offices of the co-ordinators funded to include a systematic program of “anti-racism auditing” of the workplace environments of Ontario prisons. Audits should not document individual experiences of harassment and discrimination but focus on systemic characteristics and problems in the workplace. Initial audits of each institution in the Ontario system should be completed within 12 months, and thereafter carried out every two years in randomly selected institutions. The auditing program should be developed in consultation with community-based experts in anti-racism and organizational environments. Audit findings should be made available in a variety of languages representing Ontario’s diversity, and widely distributed.

#### 12.4 The Commission recommends that –

- a) the Offices of the Anti-Racism Co-Ordinators establish systematic programs of anti-racism auditing of the workplace environments of Ontario prisons.
- b) initial audits of each institution be completed within 12 months, and follow-up audits carried out every two years in randomly selected institutions.
- c) the auditing program be developed in consultation with community-based experts on anti-racism and organizational environments.
- d) audit findings be made available in a variety of languages and widely distributed.

### Participation in policy-making

Participation of members of racialized communities in the policy-making process is vital to secure equality in the criminal justice system. Policy provides structure and direction for the system, and reflects choices about how the system should operate. Inclusion of community members in policy-making may enhance knowledge about and confidence in the criminal justice process, while exclusion may breed suspicion and alienate people from the system.

The Commission received numerous complaints about barriers to participation by members of racialized communities in the development of criminal justice policy. Four main barriers were identified. The first is lack of general information about how to participate effectively in the process. Members of racialized communities often do not know how policy is made, which means that their views and concerns do not reach policy-makers. A related barrier is lack of information about specific policy issues under consideration. If policy proposals are not shared with the communities in a timely fashion, even those with some knowledge and expertise in policy development will be unable to make a useful contribution.

A third barrier is that members of racialized communities generally lack the resources to obtain professional and technical advice on gaining access to decision-makers and in developing positions in relation to policy issues. Such advice is vital to effective intervention. The final barrier we identified is the legacy of previous sporadic attempts to consult members of racialized communities about criminal justice policy. These have often been organized hurriedly and late in the process, leading participants to conclude that their input had little or no importance. Participants in these exercises generally feel they have been treated disrespectfully and resent the wasting of their time. Many are cynical about working within the system again.

We commissioned a study of opportunities and barriers to the participation of racialized people in criminal justice policy-making from lawyers with considerable expertise in this area. Analyzing several policy initiatives in criminal justice, they found that –<sup>14</sup>



the involvement of racial minorities in criminal justice policy development over the last decade has been random, ad hoc, and, at times, non-existent ..... [M]ost justice policy [is] developed first, *then* reaction sought, thereby leading to “hit and miss” results.

This hit and miss approach has had three consequences. First, inappropriate or insensitive justice policies have been allowed to proceed. Secondly, it has led to marginalization of racial minorities and their treatment as special interest groups ... Thirdly, it has resulted in too much emphasis being placed on process and bureaucratic mechanisms for enhancing racial minority participation, and not enough emphasis on actual consultation/collaboration in the development of policy. The net effect of the [approach] to date ... has been the diffusing rather than enhancing of racial minority voices in the development of justice policy.

The study also found that –

- policy consultations with members of racialized communities are normally the result of direct and forceful pressure from these communities.
- failure fully to include racialized people in policy development may threaten the viability of such initiatives.
- once genuine opportunities for meaningful participation have been offered, members of racialized communities have made important and effective contributions to policy development.

These findings indicate a need for a comprehensive strategy to enhance the participation of racialized people in developing criminal justice policy, which should be part of a broader commitment to consult the people of Ontario. The strategy should promote concrete expectations for community participation in criminal justice policy-making and include training to assist community members to participate effectively.

Government bodies should be required to publish standards for community participation in policy-making, for which ministers are held accountable. The standards should deal with informing communities of the process as early as possible, allotting sufficient time for responding to proposals, and internal ministry alerts to policy-makers regarding policy that may be of particular concern to racialized communities. They should also encourage innovative methods of including racialized communities in developing routine policies. Performance against the standards should be evaluated at the conclusion of every policy-making exercise. When developing the standards, ministries should draw on government agencies, such as the Ontario Women’s Directorate and the Ontario Native Affairs Secretariat, which have expertise in serving and consulting historically excluded groups.

Community members who wish to play an ongoing role in developing criminal justice policy should receive training on the policy-making process and education on

policy initiatives as they arise. The goal of training is to develop powerful voices within racialized communities who know how to communicate with government on the concerns of their constituencies. These programs should include explanations of the justice system as a whole, the role of justice policy, the structure of the Ontario public service, political and legislative processes, and the development and channelling of policy through to implementation. Different opportunities for participation and structures for securing community input should also be included. The ministries of the Attorney General, the Solicitor General and Correctional Services, and Community and Social Services should develop the training program, and draw on resources such as Ontario law schools, lawyers' associations, judges and policy-makers to formulate the curriculum and deliver instruction.

**12.5 The Commission recommends that the ministries of the Attorney General, the Solicitor General and Correctional Services, and Community and Social Services –**

- a) establish standards for securing community participation in developing criminal justice policies.
- b) develop a training program for community members who wish to participate in developing criminal justice policy.

## **Monitoring outcomes**

Commission findings of racially discriminatory outcomes at key points in the criminal justice process raise the question of whether monitoring to secure equality should permit ongoing statistical comparisons of the treatment of racialized and white persons. Such monitoring would provide a means of assessing the performance of the criminal justice system against the goal of equality, identifying areas of failure and evaluating the effects of reforms on equality.

The principal argument against gathering statistics on the treatment of racialized persons within the criminal justice system is that such data are often misinterpreted and misused to posit spurious links between race and criminality. Thus a measure intended to combat systemic racism may end up promoting it. The Commission found considerable fears among racialized communities that any recording of race in the criminal justice system would ultimately be used perniciously, rather than to eliminate discrimination. For example, participants in a Commission focus group said:

“No stereotype follows black people around more than criminality .... Statistics will mean that ... we are going to get over-policed and heavier sentencing.”

“The negative portrayal of black people in society makes the collection of statistics problematic. Black people become the target of police because of this negative portrayal. Numbers are used to justify continued existence of this belief.”



Some participants pointed out that even if the danger of racist misinterpretation was small, monitoring may not be useful because data are incomplete or difficult to interpret:

“Race statistics capture only one area of a person ... It is important not to highlight just race but to look at other variables [such as] class, socio-economic background and education.”

“The question should be posed as to what kind of statistics for what purposes. In particular, without data it is difficult to identify differential treatment, but with data it is [also] difficult to identify differential treatment .... For example, suppose you find that a bigger percentage of the black population in Toronto commit crimes ... Is the cause racism? Is the cause discrimination? Is the cause poverty? [The data] wouldn't tell you if there is differential treatment or not.”

Others consulted by the Commission were prepared to consider comprehensive monitoring, so long as the underlying assumptions and goals of data collection and analysis are directed at addressing racism, and community-based controls limit the risk of harmful uses of the data:

“When we talk about collection of stats or any other kinds of data in relation to racism, there has to be ... some acknowledgment that racism is an issue and that you are looking for information that will help you fix the particular problem – in this particular instance in the criminal justice system. The purpose is not to collect race stats. It is to collect data to help you fix the criminal justice system. That also presumes that you have a commitment to actually do something to fix this.”

“You cannot ask institutions that are racist to compile stats. It has to be done in an impartial/objective manner – to [allow] accountability .... It is important that the communities and people being studied and who are affected by those stats have a voice in all aspects of the collection.”

“Black and racial minority groups would need to be involved in policy development about collecting statistics to monitor the system. When the policy directly affects the lives of blacks and [other] racial minorities, there is a need for those communities to have some control.”

A recent British Royal Commission strongly recommends systematic monitoring “to establish how minorities are treated, and thus to identify the measures which are needed to ensure as far as possible that the rules, procedures and practices of the criminal justice system are applied and seen to be applied, in the same way to all.”<sup>15</sup> This recommendation endorses the position of Britain's Commission on Racial Equality, whose brief argued,

If any reforms are to achieve greater effectiveness and fairness in any part of the criminal justice system, then a consistent and comprehensive system of ethnic record-keeping and monitoring is ... a prerequisite.<sup>16</sup>

.... Ethnic data should be integrated into all normal procedures to facilitate continuity and consistency. The information will be of value to each of the principal justice agencies. Each of them would be able to evaluate those decision-making areas for which they alone are responsible .... Additionally, since criminal justice is a process, it would be possible to assess the effects of decisions made by several agencies. For example, rates of acquittals could be compared with those concerning charges and prosecutions. This is essential to establish how some ethnic groups are propelled through the criminal justice system at a much faster rate than others.<sup>17</sup>

Findings documented earlier in this Report clearly demonstrate that the Ontario criminal justice system could benefit from carefully planned and controlled systematic monitoring. But monitoring, of course, only assists in identifying problems; it does not guarantee they will be solved. Moreover, community concerns about the risk that data will be misused may present a significant barrier to acceptance of such monitoring. This problem is hard to overcome. Racialized assumptions about criminality are widespread in Ontario despite the absence of local data. Canadians have easy access to information about the United States and may simply assume that Ontario statistics are similar.

Media scare stories about “ethnic” crimes may also fuel racialized beliefs about the criminality of particular races or cultures. Would such assumptions and beliefs become more pervasive if statistics comparing criminal justice processing of white and racialized people in Ontario were available? Or would such information provoke action to eliminate discrimination and address other factors that contribute to differential representation in the administration of justice? At present, answers to these questions can only be speculative.

The Commission believes that comprehensive monitoring of criminal justice outcomes should be attempted, through a pilot project. Data on decisions at key stages of the justice process should be collected, analyzed and distributed by an agency independent of provincial justice authorities. Guidelines should be established in collaboration with racialized communities to collect, maintain and distribute such information in a manner that minimizes the danger of their misinterpretation or misuse. After five years the project’s contribution to achieving racial equality in the criminal justice system should be evaluated, and its monitoring scrutinized for any adverse impact on black and other racialized people.

Members of racialized communities should be involved in developing and evaluating the project. If possible, the Canadian Centre for Justice Statistics should be commissioned to run this program. The Centre has a strong reputation for high-quality, rigorous data collection, and its data security is unrivalled in Canada. In addition, as a branch of Statistics Canada, the centre has ready access to other relevant data, particularly demographic variables, that are significant to interpreting criminal justice processing. If the centre is unable to undertake the project, a publicly funded research body such as a university institute should be engaged.



**12.6 The Commission recommends that –**

- a) the ministries of the Attorney General and the Solicitor General and Correctional Services fund a pilot project to monitor treatment of racialized people in the Ontario criminal justice system. The project should be conducted by a public sector research agency that is independent of the provincial justice authorities.**
- b) the impact of the project on racial equality in the criminal justice system and on racialized people in Ontario be evaluated after five years.**
- c) members of racialized communities be involved in developing and evaluating the project. Safeguards against misuse of this information should be developed for its collection, maintenance and distribution.**

## Endnotes

1. Charles S. Ungerleider, "A Program Review of the Ottawa and Vancouver Police Race Relations Initiatives (Final Report)," submitted to the Ministry of the Solicitor General of Canada, March 1993 (manuscript on file).
2. *Ibid.*, p. 19.
3. See generally, Robin Oakley, "Race Training in the Criminal Justice System: Lessons from the Police," in *Minority Ethnic Groups in the Criminal Justice System: Papers Presented to the 21st Cropwood Roundtable Conference*, ed. Loraine Gelsthorpe (Cambridge, U.K.: University of Cambridge, Institute of Criminology, 1993).
4. Charles S. Ungerleider, "Issues in Police Intercultural and Race Relations Training in Canada," a report prepared for the Solicitor General of Canada, October 1991 (manuscript on file), p. 22.
5. S.S. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (New York: Academic Press, 1981), cited in Ungerleider, "Program Review" (note 1).
6. Ahmed Gurnah, "The Politics of Racism Awareness Training," in London Strategic Policy Unit, *Racism Awareness Training – A Critique* (London, U.K.: Hansib Publishing, 1987).
7. Ungerleider, "Police Intercultural and Race Relations Training" (note 4), p. 32.
8. "Race Training in the Criminal Justice System" (note 3), p. 62.
9. *R. v. M. (C.)* (1995) 98 C.C.C. (3d) 481 at 486.
10. Canada, Royal Commission on Equality in Employment, *Report*, chair Rosalie Abella (Ottawa: Supply and Services, 1984), p. 2.
11. Province of Ontario, Judicial Appointments Advisory Committee, *The Judicial Appointments Advisory Committee: Final Report and Recommendations* (Toronto: Queen's Printer, 1992).
12. Ontario Ministry of the Attorney General and Ontario Native Affairs Secretariat, *Employment Systems Review Task Force Report*, January 1994.



<sup>13</sup> Ibid., p. 61.

<sup>14</sup> Scott and Ayles, "Routine and Everyday Policy Development in Ontario Criminal Justice Ministries: Non-Legislative Points of Influence," March 21, 1994 (manuscript on file), p. 1.

<sup>15</sup> United Kingdom, Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice*, chair Viscount Runciman of Doxford, (London: HMSO, 1993), Cm. 2263.

<sup>16</sup> United Kingdom, Royal Commission on Criminal Justice, *Lost in the System: Evidence to the Royal Commission on Criminal Justice* (Commission on Racial Equality: November 1991), p. 4.

<sup>17</sup> Ibid., p. 6, para. 2.7.

## Chapter 13

# Looking Forward

*As operators [of the criminal justice system] we might well tend to be defensive of our portion of the process and quite generous with blame when directed to others .... The public is not interested in the distribution of blame ... the public will not stand for a "not me, it's him" attitude .... The public expects from all of us collectively direction, remedies, reform – but most of all results. We must not, however, fall into a state of collective guilt and find nothing right with our court system .... We have one of the best court systems in the ... world. But that does not ... make it better than it is, nor as good as it should be.*

*– Mr. Justice Antonio Lamer,  
then president of the Law Reform Commission of Canada,  
now Chief Justice of Canada<sup>1</sup>*

Systemic racism, the social process that produces racial inequality in how people are treated, exists in the Ontario criminal justice system. Commission findings leave no doubt that racialized people experience the system as unfair and that at key points in the administration of justice, the exercise of discretion has a harsher impact on black than white people.

We have shown that perceptions of unequal treatment in the criminal justice system are by no means confined to a small and unrepresentative minority of racialized persons. They are widely held within the black and Chinese communities of Metro Toronto, and shared by significant proportions of white Metro residents, defence counsel and recently appointed judges of the provincial division. They are also recognized by some other provincial division judges, some general division judges, and crown attorneys, correctional officials and police officers.

We have documented massive differentials in prison admission rates between white and black men, women and youths, and dramatic growth in this disparity in recent years. We have reported examples of irrelevant references to the presumed foreignness of racialized persons in administrative files and in open court. We have found evidence of differential treatment of white and black men by the police and



crown attorneys, and at bail and sentencing hearings. The conclusion is inescapable: the practices of the criminal justice system tolerate racialization.

What should be done?

Should we look for scapegoats to take the blame? Obviously not. Systemic racism is a social process. Eliminating its effects from the criminal justice system requires collective action by all its members.

Should acknowledgement of collective guilt be demanded? This would clearly be pointless. The goal is not proof of remorse, but change. Lessons from the past must be learned, but the debilitating effects of guilt, which too often clouds vision and inhibits action, should be avoided.

Neither recrimination nor guilt is a foundation for the necessary “direction, remedies, reform – but most of all results.” What is needed instead is an aggressive commitment to the task of securing racial equality. This will require integrating principles of inclusion, responsiveness and accountability into all aspects of the criminal justice system, together with an overriding commitment to restraint when invoking the criminal process.

Twenty years ago, Justice Lamer, now Chief Justice of Canada, described over-use, or as he put it, “abuse,” of the criminal law as a sickness plaguing the criminal court system:

Because we have not restrained the criminal law to its proper function – that is the protection of those values which are important to our kind of society – much of the marginality which is now being inadequately dealt with through the criminal courts should have either not been criminalized legislatively or, if properly criminalized, should not have been prosecuted, and should have been dealt with through diversion and other social means of coping with marginality. Many trials are about situations which should not be in criminal court .... This abuse of the criminal law and the criminal process has ... deformed our perceptions of what a criminal trial is all about .... Because of this our criminal courts are incapable of dealing efficiently with those cases which they should not be getting, but worse, they are incapable of efficiently dealing with those cases which they should be getting ....

A criminal court is not and should not be a purely fact-finding committee with a decisional power to which a dispositional power is added. A criminal trial is a place of teaching and a criminal trial is a demonstration of the respect we hold for our society's cultural and moral values that have come under attack. It is not merely a process by which we find out if that is the person with whose life we are going to fiddle.<sup>2</sup>

The “sickness” described by Justice Lamer continues. The criminal justice system is still used excessively to deal inadequately with minor social problems. Its

proceedings too often amount to little more than verification that grounds exist for “fiddling” with the life of the person before the court. Restraint is fundamental if the criminal justice system is to resist demands to invoke it for every social problem, including the many it cannot solve.

Restraint is also essential to ensure that petty problems, conflicts and disputes do not overwhelm the system’s capacity to deal effectively and sensitively with those situations properly before it. If criminal justice is indeed about declaring and demonstrating respect for fundamental social values, its moral force should not be diluted by overuse when such values are not at stake.

Finally, while lack of restraint may reinforce racialization, restraint helps the justice system repudiate it. An unrestrained system may contribute to racialization in society at large through heedless application of its might to even the most trivial incidents that are recorded as offences. Because a racialized person, unlike a white person, is viewed as representing his or her race, the processing of each trivial offence by a racialized person reinforces stereotypes about inherent criminality of the person’s community. While the criminal justice system is obviously not accountable for social inequalities that may cause Aboriginal and some racialized persons to be over-represented among marginal people in our society, it must take responsibility for how it treats this clientele.

An unrestrained system also creates conditions for tolerating racialization internally. The personnel of an overloaded system may be forced to take shortcuts simply to manage their work. Snap judgments based on perceived patterns and unexamined assumptions flourish in such an environment. Officials may be too busy even to reflect on the risk of discrimination or inappropriate actions in their own practices, still less to detect evidence of bias elsewhere in the system.

Conversely, a restrained criminal justice system may repudiate racialization by refusing to exercise petty control of people perceived as a nuisance. The personnel of a restrained system have time and resources to exercise discretion with greater care. They have the capacity to respond promptly to indications that services must be changed to secure equality in an increasingly diverse community. Officials of a restrained system may have the time to monitor their own practices for evidence of discrimination, as well as those of others.

In addition to exercising restraint, our criminal justice system should strive to be inclusive, responsive and accountable.

An **inclusive** criminal justice system integrates the needs of all users into a seamless whole. The system adapts to the cultural, linguistic and religious diversity of users, rather than forcing them through an unfamiliar and inflexible system. Such adaptation is incorporated into routine practices rather than being viewed as special



treatment. The personnel of an inclusive system are alert to signs of greater diversity in the community they serve, so that systemic changes to accommodate diversity are introduced early and smoothly. By anticipating and integrating the needs of all users, an inclusive system avoids favouring only those who fit into a uniform mould.

An **inclusive** criminal justice system secures the fullest possible participation from diverse communities in policy-making, management of the system and service delivery. An inclusive system reaches out to those who may be or may feel excluded, and encourages their involvement. Securing participation of diverse communities enhances confidence that justice is open to all.

A **responsive** criminal justice system is open to criticism. It solicits and gives equal respect to the views of everyone affected by the system. Willingness to learn, as opposed to denial or defensiveness, is the hallmark of a responsive system. By being open to criticism, a responsive system reduces the risk that its practices passively tolerate racialization.

A **responsive** criminal justice system is committed to addressing the concerns of its users. It treats criticism as a challenge to do better, and takes responsibility for improving its practices. The needs of its users rather than the convenience of its personnel determine its priorities. A responsive system is attuned to symptoms of racialization in its practices.

An **accountable** criminal justice system works in partnership with the community it serves, and treats racialized persons as full members of the partnership. It reports, explains and justifies its actions and decisions, and collaborates with the community in setting directions. An accountable system reduces the risk of inadvertent acceptance of practices that produce racial inequality.

An **accountable** criminal justice system adheres to publicly known standards of equality that have been developed with its community partners. Practices are monitored and failures to meet the standards are corrected. By adhering to such standards, an accountable system enhances confidence in its commitment to racial equality.

## Endnotes

1. Antonio Lamer, "The Courts and the Community," in *The Community and the Administration of Justice: Proceedings of the Second Conference of Applied Criminology, May 5, 6 and 7, 1976*, ed. C.H.S. Jayewardene, (Ottawa: University of Ottawa Department of Criminology, 1976), p. 25.
2. *Ibid.*, pp. 26-7.





# Recommendations

## Chapter 5 Imprisonment before Trial

5.1 The Commission recommends that –

- a) the Ministry of the Solicitor General and Correctional Services, in consultation with interested community organizations, lawyers, police services and police associations, develop operating guidelines based on the principle of restraint in exercising powers to detain arrested persons and to impose conduct restrictions upon release. The guidelines should be made public.
- b) police officer training materials and programs be modified and standardized to reflect the principle of restraint in exercising the arrest power and the duty to release arrested persons.
- c) the Ministry of the Solicitor General and Correctional Services monitor operating guidelines and training programs to ensure that all materials on police detention and release reflect the principle of restraint embodied in the *Criminal Code*.

5.2 The Commission recommends that –

- a) upon arrival at a police station with a detained person, an arresting officer be required to complete a form explaining why the accused has not been released. The form should be counter-signed by the officer in charge.
- b) an officer in charge who decides not to release the accused be required to record an explanation of the decision on the form used by the arresting officer. The officer in charge should also be required to explain the reason for detention to the accused and provide an opportunity to respond. Any response by an accused should be recorded on the same form as the reasons given by the police officers.
- c) crown attorneys at the bail hearing be required to disclose to defence or duty counsel the written police explanations for using arrest and detention powers, as well as the response, if any, of the accused.



- d) police explanations for detention and responses of accused persons be videotaped whenever possible. The existence of such a videotape should be disclosed in writing to crown counsel at the bail hearing, who in turn should be required to disclose it to duty or defence counsel.

5.3 The Commission recommends that –

- a) upon deciding to impose conditions on the release of an accused, the officer in charge be required to complete a form explaining why each condition is deemed necessary.
- b) an officer in charge who imposes conditions on the release of an accused be required to explain why and provide an opportunity for the accused to object. Any objection by an accused person should be recorded on the same form as the reasons given by the officer in charge.
- c) any accused subject to police-imposed conditions be given a copy of the form explaining the reasons for each condition.

5.4 The Commission recommends that –

- a) release documents issued by the police contain printed advice that an accused may apply to be relieved of release conditions on any appearance in court.
- b) duty counsel adopt the routine practice of asking accused persons whether they are aware of the right to apply to be relieved of release conditions imposed by the police. If requested by an accused person, duty counsel should assist in applying for relief.

5.5 The Commission recommends that –

- a) the Ministry of the Solicitor General and Correctional Services, in consultation with interested community organizations, lawyers, police services and police associations, develop a checklist of information about an accused person relevant to show cause reports.
- b) crown attorneys request the police to explain in writing the relevance of any reference to an accused person's immigration status, nationality, race, ethnicity, religion, place of origin or birth that is contained in a show cause report.

5.6 The Commission recommends that police not refer to an accused person as being under a removal order in show cause reports without verifying that Citizenship and Immigration Canada intends to remove the person from Canada.

5.7 The Commission recommends that –

- a) the Ontario Legal Aid Plan establish the position of “bail interview officer” to assist persons detained by the police to prepare for bail hearings.
- b) legal aid area directors work together with members of the local bar, crown attorneys and representatives of interested community organizations to establish a training program for bail interview officers. The program should include working with interpreters and interviewing skills, as well as information on the bail system and anti-racism.
- c) legal aid area directors establish co-operation protocols with local police services to secure access to police holding cells for bail interview officers and to arrange for interviews to be conducted in private.

5.8 The Commission recommends that the Government of Ontario propose to the Government of Canada that it repeal the reverse onus provision of the *Criminal Code* for importing, trafficking and related charges under the *Narcotic Control Act*.

5.9 The Commission recommends that the *Crown Policy Manual’s* provisions regarding bail be amended to –

- a) eliminate general and irrelevant references to immigration or citizenship status.
- b) warn of the potential for inadvertent discrimination inherent in relying on such factors as residence and employment history to predict whether an accused person will appear in court.
- c) warn crown attorneys that evidence relating to the accused’s “roots in the community” generally should not be used to seek detention on the secondary ground.
- d) direct crown attorneys to treat refugee claimants as ordinarily resident for the purposes of bail hearings.
- e) require crown attorneys to ensure that an accused person is not unnecessarily detained because a surety bail is set too high.
- f) require crown attorneys to ensure that conditions placed upon release are directly and substantially related only to securing the accused’s attendance in court or to preventing the commission of offences or interference with the administration of justice while on bail. Unnecessary and intrusive conditions such as “carry bail papers” should be avoided.
- g) direct crown counsel that expeditious processing of bail variation applications in provincial division courts be a high priority.



5.10 The Commission recommends that education for justices of the peace and judges regarding bail include training to –

- a) avoid assumptions that may subtly discriminate against racialized persons.
- b) avoid discriminatory application of criteria related to community ties.
- c) assess occupation, place of residence and cultural background of accused persons to ensure that financial release conditions do not impose needlessly onerous burdens.
- d) ensure that conduct restrictions imposed upon release do not interfere with the lives of accused persons any more than is strictly required.

5.11 The Commission recommends that the Ministries of the Solicitor General and Correctional Services and the Attorney General sponsor research into empirically based indicators to assist the courts in deciding whether to grant pre-trial release.

5.12 The Commission recommends that –

- a) the Government of Ontario guarantee funding for existing bail programs and increase the number of bail programs to ensure adequate supervision services in all urban centres.
- b) bail programs be funded to assist racial and linguistic minority communities and, in concert with interested individuals and community groups, develop culturally inclusive bail supervision.
- c) bail programs be funded to retain interpretation services.
- d) responsibility for bail programs be transferred to the Ministry of the Attorney General and include supervision of persons awaiting disposition of immigration and refugee hearings.
- e) the Ministry of Community and Social Services, in concert with existing bail programs and interested community organizations, consider the feasibility of a bail supervision program for youths aged 12 to 15.

5.13 The Commission recommends that –

- a) under the supervision of the local administrative judge, court administrators develop procedures to ensure early notification of the impending arrival of a linguistic minority accused for a bail hearing.
- b) wherever possible, interpreters be available to assist counsel and crown attorneys communicate with an accused person outside the bail hearing. If an interpreter cannot personally attend, telephone access to an interpreter should be available.

## Chapter 6

### Charge Management

6.1 The Commission recommends that –

- a) the Ministry of the Solicitor General and Correctional Services establish provincial guidelines for a formal police cautioning system.
- b) the guidelines require police officers to use the cautioning power instead of charges unless the need for charges is justified in writing.
- c) the use of the cautioning power and its relationship to charging practices be monitored for evidence of “net-widening” and racial bias.

6.2 The Commission recommends that –

- a) the Ministries of the Solicitor General and Correctional Services and the Attorney General develop general criteria for Ontario police services to establish enhanced cautioning systems that include community accountability conferences.
- b) Ontario police services, in concert with interested community organizations and individuals, establish enhanced cautioning systems that include community accountability conferences.
- c) the Ministry of the Solicitor General and Correctional Services provide start-up and training funds for enhanced cautioning systems.
- d) enhanced cautioning systems be monitored for recidivism rates and satisfaction with the process, and for evidence of net-widening and racial bias.

6.3 The Commission recommends that the Ministry of the Attorney General establish a committee that includes crown attorneys and other Ministry officials, defence counsel, and representatives from racialized communities to advise on revisions to the *Crown Policy Manual*.

6.4 The Commission recommends that the Ministry of the Attorney General establish a protocol with the federal Department of Justice to allow young persons charged with drug offences to be diverted from the criminal process and into the Alternative Measures Program.

6.5 The Commission recommends that the Ministry of the Solicitor General and Correctional Services –

- a) translate the formal caution given to a suspect on detention or arrest into the principal languages spoken in various Ontario police jurisdictions.



- b) direct police services to provide this caution to suspects in the appropriate languages before questioning them.

6.6 The Commission recommends that police personnel receive training about the dangers of assuming competence in English when an arrested or detained person from a linguistic minority community has a surface grasp of English.

6.7 The Commission recommends that the Ontario Legal Aid Plan be funded to establish three-way telephone communications to allow accused persons from linguistic minority communities who are in custody to speak with duty counsel through an interpreter.

6.8 The Commission recommends that –

- a) the Ministry of the Attorney General allocate additional funding to enable the Ontario Legal Aid Plan to have a duty counsel available to give advice in multi-court facilities. Such “advice duty counsel” would not generally appear in court, but would be available in private offices in or near the courthouse to provide immediate advice to accused persons, their supporters and family members.
- b) the Ministry of the Attorney General make provision to expand duty counsel clinics in response to changing community needs, after broad consultation and subject to review.
- c) where “advice duty counsel” or duty counsel clinics are not available, Legal Aid area directors publicize the availability of and issue legal advice certificates to accused persons and their families or supporters who request legal advice in criminal matters.

6.9 The Commission recommends that the Ontario Legal Aid Plan –

- a) make linguistic and cultural interpretation services available during application interviews.
- b) prepare and widely distribute brochures and videos in the principal languages served by each area office that explain the range of services available through the plan, and the purpose and likely content of interviews to be conducted by staff.

6.10 The Commission recommends that the Ontario Legal Aid Plan direct area directors to take a flexible approach to requests for a change of lawyer if the client maintains that racism has caused the relationship with the lawyer to break down.

6.11 The Commission recommends that –

- a) the Ontario Legal Aid Plan be specially funded to ensure that duty counsel is able to assist unrepresented accused persons to obtain disclosure of the case against them.

- b) information about such duty counsel services be included in all official documents given to accused persons. This information should use plain language and be available in a variety of languages that reflect Ontario's linguistic diversity.
- c) Legal Aid area directors work together with local court administration committees and interested individuals and community groups to ensure that unrepresented accused obtain disclosure in a complete and timely fashion. The views of unrepresented accused persons should be surveyed, and an annual report should be published as part of the Legal Aid Plan's annual report.

6.12 The Commission recommends that –

- a) pilot projects in which accused persons attend pre-trial conferences be established. Interpreters should be present if necessary.
- b) in cases involving accused persons charged under the *Young Offenders Act*, parents or guardians be entitled to attend such conferences, unless the Act would exclude them from court proceedings.
- c) surveys of all participants in these pilot projects be regularly conducted. Outcomes of these surveys should be reviewed by a consultative committee, which should report to the Attorney General after two years.

6.13 The Commission recommends that a police officer connected with a prosecution should not participate in pre-trial conferences unless the accused person is present.

6.14 The Commission recommends that –

- a) before accepting any plea of guilty, the presiding judge conduct an inquiry to ascertain the accused's comprehension of the nature and implications of the plea, voluntariness and understanding of the independence of the judge. This plea comprehension inquiry should be conducted in language appropriate to the age, education level and linguistic skills of the accused.
- b) the Ministry of the Attorney General collect written examples of plea comprehension inquiries for rewriting into plain language, and translate standard questions into various languages that reflect Ontario's linguistic diversity.
- c) the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to conduct a plea comprehension inquiry whenever an accused pleads guilty, regardless of whether the accused is represented by counsel.

6.15 The Commission recommends that whenever crown attorneys are satisfied that a woman has decided voluntarily, and not as a result of coercion by the accused or



others, that prosecution of an assault charge will harm her, her decision should be treated as constituting “exceptional circumstances” requiring withdrawal of the charges.

6.16 The Commission recommends that regional senior crown attorneys –

- a) conduct annual surveys of local crown attorneys, staff and users of the Victim/Witness Assistance Program to determine linguistic needs of victims and witnesses in each region and identify deficiencies in the provision of translated information.
- b) work with the Victim/Witness Assistance Program, community-based agencies and the police to expand the distribution and dissemination of information about the program to racialized communities.

6.17 The Commission recommends that the Victim/Witness Assistance Program be expanded to serve all of Ontario’s trial courts and to include cultural interpretation services.

## Chapter 7 Court Dynamics

7.1 The Commission recommends that –

- a) the Law Society of Upper Canada establish a complaints office where anonymous or confidential complaints about racist conduct by judges or lawyers may be filed.
- b) this office informally investigate such complaints and, where they are confirmed, file a formal complaint with the Ontario or Canadian Judicial Council in the case of a judge, or initiate disciplinary proceedings in the case of a lawyer.
- c) the confidentiality of the complainant be protected. When a factual dispute arises the complainant should be advised that further processing of the complaint requires filing it directly with the appropriate body.
- d) lawyers be under an ethical obligation to report to the complaints office any racist conduct they observe on the part of a judge, lawyer, other officer or employee of the courts.
- e) all other officers and employees of the courts also be encouraged to report any racist conduct to the complaints office.

7.2 The Commission recommends that the Law Society widely publish information about itself and the complaints mechanism, including information about how to obtain assistance in making complaints. In providing such information, the Law

Society should strive to eliminate cultural and linguistic barriers and, where necessary, help members of the public in preparing formal complaints.

7.3 The Commission recommends that –

- a) the Law Society of Upper Canada establish an ethical obligation, together with practical guidelines, to govern lawyers' conduct when they observe racist acts.
- b) judges and lawyers take every available opportunity to counsel any colleagues who make racist comments, even outside the courtroom, that such statements are unacceptable and reflect badly on the Ontario criminal justice system.

7.4 The Commission recommends that judges, justices of the peace and counsel adopt an approach of scrupulously identifying the relevance of any reference to race before it is introduced in court.

7.5 The Commission recommends that –

- a) existing courtworker programs be maintained and guaranteed funding by the Ministry of the Attorney General.
- b) additional courtworker programs be established, particularly those offering services to youth.

7.6 The Commission recommends that the Ministry of the Attorney General –

- a) develop objective and consistent accreditation standards for interpretation and translation, which should be used to certify training programs for court interpreters. Such programs should include specific instruction on issues of violence against women, and a practicum funded by the Ministry in which trainee interpreters “shadow” experienced accredited interpreters in courtrooms for up to three months.
- b) fund translation of a glossary of legal terms and phrases in common court usage into the principal source languages used in Ontario.

7.7 The Commission recommends that whenever an interpreter is used, the trial judge or bail justice explain the role and expectations of an interpreter in open court. The judge or justice should –

- a) state that the interpreter is a neutral professional, employed by the court to translate what is being said. In jury trials, this explanation should be given in the presence of the jury.
- b) inform the accused person and any witness that he or she may apply to the presiding judicial officer to replace an interpreter whom he or she feels has a conflict of interest or may otherwise not be impartial;



- c) verify that the accused and the interpreter have had sufficient opportunity to ascertain mutual understanding;
- d) advise the accused person and the interpreter to alert the judge and request clarification if at any time either is unable to understand or hear what is being said;
- e) request that observers who have concerns about the quality of interpretation inform crown or defence counsel.

7.8 The Commission recommends that all court testimony and interpretation be audiotaped and retained as part of the official record of proceedings.

7.9 The Commission recommends that judges, crown counsel, employed duty counsel and justices of the peace receive training in working with interpreters.

7.10 The Commission recommends that court personnel ensure that interpretation be audible to persons in the court.

7.11 The Commission recommends that the *Juries Act* be amended to permit landed immigrants to serve as jurors if they have lived in Canada for three years and are otherwise eligible.

7.12 The Commission therefore recommends that the *Juries Act* be amended to establish the Ontario Health Insurance Plan database as the source for jury pools in Ontario.

## **Chapter 8**

### **Imprisonment after Conviction**

8.1 The Commission recommends that –

- a) the Ontario Legal Aid Plan be specially funded for a program of test cases that may contribute to greater racial equality in sentencing.
- b) the Plan publicize this special initiative to lawyers, legal clinics and interested community groups.
- c) intervenor funding be available from the Plan for legal clinics and other interested groups to seek leave to raise systemic issues regarding racial equality before the Court of Appeal.
- d) the Attorney General of Ontario seek intervenor status on sentencing appeals from federal prosecutions to submit evidence of systemic discrimination.

8.2 The Commission recommends that –

- a) regional senior judges maintain an up-to-date catalogue of community services available for non-prison sentences. The catalogue should be distributed to all sentencing judges at local courts, circulated to local probation offices and made available to lawyers and members of the public attending courthouses.
- b) regional senior judges prepare an annual report on local services for non-prison sentences that should be filed with the Chief Judge for analysis and distribution.

8.3 The Commission recommends that –

- a) the Chief Judge of the provincial division and the Chief Justice of the general division establish programs for judges to visit provincial adult and youth institutions in the regions where the judges sit.
- b) educational programs should provide for judges who preside over criminal cases to make such visits within one year of their appointment and at least every five years thereafter.

8.4 The Commission recommends that the *Crown Policy Manual* –

- a) require crown attorneys to obtain and present to a sentencing judge information about any time spent by a convicted person in pre-sentence custody.
- b) direct that when a convicted person is unrepresented, crown counsel should not seek a higher sentence simply because the person does not indicate an intention to plead guilty before a trial or preliminary hearing date is set.
- c) direct that when seeking more than the minimum appropriate sentence for a similar offender for a similar offence committed in similar circumstances, a crown attorney state the reasons in open court.

8.5 The Commission recommends that Ontario correctional ministries and the Ministry of the Attorney General conduct research into race differentials in pre-sentence and pre-disposition reports, and into the relationship between pre-sentence and pre-disposition reports and sentencing outcomes.

8.6 The Commission recommends that Ontario correctional ministries –

- a) direct probation officers to request an explanation in writing whenever a pre-sentence report source provides material that refers to a convicted person's race, ethnicity, immigration status, religion or nationality.
- b) direct probation officers to review with their area manager any unsatisfactory explanation of such a reference provided by a source in a public sector



agency. If the area manager agrees that the explanation is inappropriate, this should be communicated to a senior supervisor of the source.

## **Chapter 9**

### **Racism Behind Bars Revisited**

9.1 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with the Ministry's Anti-Racism Co-ordinator –

- (a) review the Ministry of Correctional Services Regulations in order to eliminate subjective elements of the definitions of misconduct wherever possible.
- (b) review policies for resorting to the disciplinary process and imposing penalties in order to achieve greater restraint and consistency.

9.2 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, advised and assisted by the Ministry's Anti-Racism Co-ordinator, review policies and procedures respecting the temporary absence system in order to establish ministry-wide core standards that include removal of communication barriers.

9.3 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with the Ministry's Anti-Racism Co-ordinator, establish a case management system in all prisons to ensure that every prisoner is advised and counselled about available prison services and programs.

9.4 The Commission recommends that the Ministry of the Solicitor General and Correctional Services and the Ontario Board of Parole, in consultation with the Ministry's Anti-Racism Co-ordinator, assign a formal role to Institutional Liaison Officers in a case management system such as in Recommendation 9.3. In particular, these officers should assist prisoners in preparing parole applications, and work to remove communication barriers.

9.5 The Commission recommends that –

- a) the Solicitor General, in consultation with the Office of the Anti-Racism Co-ordinator and local community organizations, establish a community advisory committee for every provincial correctional institution.
- b) committee members reflect a variety of skills and backgrounds, and the diversity of the local community. A criminal record should not prevent membership.

- c) committee members be given inspection powers under the *Public Institutions Inspection Act* and have access to all parts of the institution, including disciplinary and release hearings if the prisoners involved consent.
- d) committee functions include informal resolution of complaints and other assistance to prisoners, and encouraging community education about the correctional system.
- e) committees be specifically authorized to advise institutional heads and to require a full, written response to any such advice.

9.6 The Commission recommends that –

- a) the Solicitor General establish an Ontario Council of Advisory Committees consisting of representatives of the community advisory committees from all regions of the province.
- b) the Council establish liaison and communicate information amongst local advisory committees, organize annual meetings to disseminate information and exchange ideas, and work with the Anti-Racism Co-ordinator in monitoring province-wide problems and making recommendations to the minister.

9.7 The Commission recommends that the Ontario Legal Aid Plan establish a pilot correctional legal clinic in the Toronto area staffed by full-time, salaried lawyers and paralegals.

## **Chapter 10**

### **Community Policing**

10.1 The Commission recommends that –

- a) each Ontario police service that has not yet done so conduct a comprehensive review of its commitment to racial equality in policing that involves members of police services, community groups and interested individuals.
- b) police services widely publicize their action plans regarding equality in the most common languages spoken in their service areas.
- c) progress on implementing such action plans be reported to the local police services board quarterly and be publicized widely.

10.2 The Commission recommends that police services boards establish local community policing committees (CPCs) around either divisional levels of each police service or another geographical area or community grouping appropriate to the jurisdiction.



- a) CPCs should have seven members, serving three-year terms.
- b) CPC members should be drawn from community organizations active in the jurisdiction of the division and appointed by police services boards after a full, open and publicly advertised search.
- c) Every effort should be made to ensure that CPCs are gender-balanced and include young persons and members of local racialized communities. A criminal record should not bar appointment.
- d) Each CPC should have a designated co-ordinator to attend to administrative needs.
- e) Members of CPCs should be paid reasonable expenses and offered honoraria.
- f) CPCs should meet monthly and be open to the public. Meetings should generally not occur in police stations.
- g) The local police services board should be responsible for monitoring the work of CPCs.

10.3 The Commission recommends that each community policing committee have the following responsibilities –

- a) to develop, in concert with the local police division and interested community organizations and individuals, agreements with the police that establish policing objectives and standards of police performance that reflect local community needs; and to monitor implementation of such objectives and standards.
- b) to develop, in concert with the local police division, specific policing policies and practices as needed. In this role, CPC members should be responsible for forwarding community concerns to division staff, formulating responses and communicating policies and procedures back to the local community.
- c) to act as a liaison between the police services boards and the local community. In this role, the CPC should be responsible for informing the community about police services board policies and informing the board about issues in that community.
- d) to assist in informally resolving complaints, if requested by both the divisional superintendent and the complainants.
- e) to work together with police, members of the legal community and the judiciary to promote legal and other forms of community education concerning security and the operation of the criminal justice system.

10.4 The Commission recommends that –

- a) the Ministry of the Solicitor General and Correctional Services, in association with police services boards, fund community surveys regarding safety in each local community.
- b) the surveys occur at least once every five years in each local community.
- c) summaries of survey findings be widely distributed.

10.5 The Commission recommends that –

- a) the Ministry of the Solicitor General and Correctional Services, in consultation with the police services and local community organizations, develop guidelines for the exercise of police discretion to stop and question people, with the goal of eliminating differential treatment of black and other racialized people.
- b) these guidelines be translated into the most common languages spoken in Ontario and circulated widely.

10.6 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with community agencies –

- a) formulate a Public Complaints Policy Statement and distribute it widely among their local communities. This statement should emphasize the function of complaints not only in responding to specific incidents, but also in helping to identify and resolve systemic problems.
- b) develop a comprehensive public complaints database that includes categories that would allow the police to monitor complaints about police stops of black or other racialized people. The database should be used to generate quarterly reports of patterns and trends.
- c) fund education on formal and informal police complaint mechanisms.

10.7 The Commission recommends that police services boards, in concert with their community policing committees –

- a) ensure that policies for policing schools reflect the goals of community policing policies and standards in the local area.
- b) initiate consultations with school authorities regarding board of education or school-based policies on calling the police into schools.
- c) inform parents and youths about school policing issues, and convey concerns about the content or implementation of relevant policies to school authorities.



10.8 The Commission recommends that the *Trespass to Property Act* be amended –

- a) to include a definition of misconduct sufficient to justify exclusion or detention of a visitor to publicly used space, and to make such misconduct a condition to ordering exclusion or detention.
- b) to abolish the right to ban a visitor from publicly used space.

10.9 The Commission recommends that as part of its review of the *Private Investigators and Security Guards Act*, the Ministry of the Solicitor General and Correctional Services –

- a) undertake extensive consultation to ensure that the legislation responds to the needs of youths, and the particular concerns of black and other racialized youths.
- b) examine whether the legislation's licensing requirements should continue to exclude security officers who police publicly used space.
- c) consider requiring security officers policing publicly used space to complete anti-racism training programs in order to qualify for or keep their licence.
- d) consider having the Registrar of Private Investigators and Security Guards designate certain anti-racism programs as appropriate.

## Chapter 11

### Systemic Response to Police Shootings

11.1 The Commission recommends that funding for the Special Investigation Unit be significantly increased to allow it to carry out its statutory function effectively.

11.2 The Commission recommends that the *Police Services Act* be amended to require that any officer involved in an investigation falling within the jurisdiction of the SIU be required to turn any requested information and evidence over to the SIU forthwith, and in any event no later than 24 hours after the request.

11.3 The Commission recommends that the *Police Services Act* Regulations be amended to provide that the director of the SIU be authorized to charge any officer who fails to provide such information or evidence in a timely fashion with a misconduct offence.

11.4 The Commission recommends that the *Police Services Act* be amended to require that any officer who fails to answer questions from an SIU investigator be suspended without pay.

11.5 The Commission recommends that the *Police Services Act* Regulations be amended to provide that when the director of the SIU informs a chief of police that

an officer under the chief's command has failed to give a complete statement to an SIU investigator, the chief shall suspend the officer forthwith without pay.

11.6 The Commission recommends that –

- a) a Special Prosecutions Unit be established in the Ministry of the Attorney General to prosecute all charges laid by the SIU.
- b) guidelines for this unit be established in consultation with police services, the SIU, defence counsel and representatives of racialized communities.
- c) the existence of this unit, as well as the guidelines under which it functions, be made widely known to the public.

11.7 The Commission recommends that legally trained persons preside as coroners at inquests involving police shootings of civilians. The public should be consulted in the appointment of such persons.

11.8 The Commission recommends that in cases involving police shooting of civilians, coroners rely exclusively on SIU investigators and crown attorneys from the Special Prosecutions Unit of the Ministry of the Attorney General.

11.9 The Commission recommends that the Ontario Civilian Commission on Police Services receive full funding, independent of its existing budget, for any inquiries it may initiate in relation to police conduct.

## **Chapter 12**

### **An Equality Strategy for Justice**

12.1 The Commission recommends that anti-racism training programs based on a behavioural model be established for each justice occupation.

12.2 The Commission recommends that –

- a) the ministries of the Attorney General and the Solicitor General and Correctional Services establish an advisory board to provide guidance on anti-racism training throughout the criminal justice system.
- b) half of the board members be drawn from community agencies with expertise in anti-racism, the other half consisting of representative judges, lawyers and correctional personnel. The board should be jointly chaired by a judge and a community member.
- c) an orientation program for advisory board members be established.
- d) board members be paid reasonable expenses and offered honoraria.



12.3 The Commission recommends that criminal justice officials responsible for appointments and employment intensify efforts to dismantle barriers to recruitment, hiring, retention and promotion of racialized people, and continue to monitor progress in achieving appropriate representation.

12.4 The Commission recommends that –

- a) the Offices of the Anti-Racism Co-Ordinators establish systematic programs of anti-racism auditing of the workplace environments of Ontario prisons.
- b) initial audits of each institution be completed within 12 months, and follow-up audits carried out every two years in randomly selected institutions.
- c) the auditing program be developed in consultation with community-based experts on anti-racism and organizational environments.
- d) audit findings be made available in a variety of languages and widely distributed.

12.5 The Commission recommends that the ministries of the Attorney General, the Solicitor General and Correctional Services, and Community and Social Services –

- a) establish standards for securing community participation in developing criminal justice policies.
- b) develop a training program for community members who wish to participate in developing criminal justice policy.

12.6 The Commission recommends that –

- a) the ministries of the Attorney General and the Solicitor General and Correctional Services fund a pilot project to monitor treatment of racialized people in the Ontario criminal justice system. The project should be conducted by a public sector research agency that is independent of the provincial justice authorities.
- b) the impact of the project on racial equality in the criminal justice system and on racialized people in Ontario be evaluated after five years.
- c) members of racialized communities be involved in developing and evaluating the project. Safeguards against misuse of this information should be developed for its collection, maintenance and distribution.

# Appendices

**Appendix A Terms of Reference**

**Appendix B Background Papers**

**Appendix C Consultations and Public Forums**

**Appendix D Submissions**





# Appendix A

## Terms of Reference

### Establishment of Commission

The Government of Ontario established the Commission by Order in Council no. 2909/92, dated October 1, 1992, on the recommendation of the Attorney General.

### Commission's Terms of Reference

**WHEREAS** Stephen Lewis, in his Report to the Premier of Ontario, has recommended the establishment of an inquiry into racism and the criminal justice system;

**AND WHEREAS** the government recognizes that throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such patterns and practices as they affect racial minorities being known as systemic racism);

**AND WHEREAS** it is deemed advisable in the public interest to conduct an inquiry into systemic racism and the criminal justice system in Ontario;

**NOW THEREFORE**, David Cole and Margaret Gittens shall be appointed Co-Chairs and Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam and Ed Ratushny shall be appointed members of a Commission established to inquire into, report and make recommendations on systemic racism and the criminal justice system in accordance with the following terms of reference:

1. The Commission shall, without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization:
  - a) Inquire into, report and make recommendations on the extent to which the exercise of discretion, at important decision making points in the criminal justice system, has an adverse impact on racial minorities. This inquiry shall include empirical research.
  - b) Inquire into, report, and make recommendations on the treatment of racial minorities in both adult and youth correctional facilities. Other corrections issues shall be dealt with in conjunction with other criminal justice system issues being reviewed by the Commission, as set out in these terms of reference.
  - c) Inquire into, report, and make recommendations on the policies of the Ministry of the Solicitor General with respect to community policing and inquire into, report, and make recommendations with respect to the implementation of community policing in Ontario, including existing community policing models being utilized by police services boards.
  - d) Inquire into, (by means of a comparative research study only and without hearings), report and make recommendations on how the criminal justice system should respond to future charges of criminal conduct against justice system officials and personnel involving racial minority victims. No findings or recommendations about any ongoing or completed case are to be made. The Commission shall make recommendations on how the practices, rules and procedures of the justice system should operate to address these charges in the future.



- e) Inquire into current measures that address the issue of preventing systemic racism through the selection, education, training, promotion, and discipline of justice system officials and personnel; report and make recommendations for the improvement of these measures or for the development of others. The selection, education, training, promotion and discipline of police addressed by the Task Force on Race Relations and Policing should be excluded.
  - f) Inquire into, report, and make recommendations on the policy making practices of government ministries and agencies with criminal justice responsibilities, and how they could be improved to avoid reflecting or reinforcing systemic racism;
  - g) Inquire into, report, and make recommendations on how racial minority communities can participate in the development and implementation of current and future criminal justice system reforms.
  - h) Inquire into, report and make recommendations on access to justice services with respect to criminal matters, including criminal legal aid, by racial minorities.
  - i) While the issue is not within the mandate of the Commission, the Commission shall consider and make recommendations on the need for future studies into racism inherent in the law.
2. The Commission shall conduct the inquiry in an innovative and creative way, by such means as public meetings, focus group sessions, written submissions and empirical research studies. The Commission shall consult widely with justice system officials and personnel and shall seek out and use creative methods of ensuring community participation in its process. The Commission may return to the government to request powers under the *Public Inquiries Act* in relation to specific bodies or issues.
  3. The Commission shall utilize anti-black racism as a focal point for their analysis of systemic racism, also recognizing the various experiences and vulnerabilities of all racial minority communities, including racial minority women.
  4. The Commission shall pay particular attention to the impact of systemic racism on racial minority youth.
  5. The Commission shall not duplicate existing studies and shall take into account current government initiatives, where they reflect a systemic analysis, include community participation and address community concerns.
  6. While the subject matter of the Commission shall be systemic racism in the criminal justice system throughout Ontario, the Commission shall focus on urban centres in Ontario.
  7. The Commission, in cooperation with the Provincial Government, shall engage in discussions with the Federal Government with respect to the extent to which the Commission will consider institutions under Federal jurisdiction as they affect the administration of justice in Ontario.
  8. The Commission shall submit an interim report on treatment of racial minorities in both adult and youth correctional facilities to the Lieutenant Governor-in-Council within four months from the date of its appointment. The Commission shall submit its final report to the Lieutenant Governor-in-Council within one year from the date of its appointment.
  9. If allegations regarding individual incidents of wrongdoing are brought to the attention of the Commission, the Commission shall not attempt to investigate them, or make findings of fact about them, and shall refer them to the appropriate bodies.

All government ministries, boards, commissions, agencies are directed to cooperate fully with the Commission and, more specifically, to provide all relevant information to the Commission, and to exercise their discretion under the Freedom of Information and Protection of Privacy Act in a way which facilitates the work of the Commission. All others involved in the criminal justice system who are independent of government are requested to cooperate fully with the Commission. The Commission shall have authority to engage such counsel, advisors, researchers and other staff and consultants as it deems proper within its budget at rates of remuneration to be approved by the Management Board of Cabinet.

# Appendix B

## Background Papers

### Technical Volume

This volume outlines the research methodologies used on the major research projects conducted by the Commission. It describes such research-related matters as problem identification, sampling techniques, questionnaire construction, variable definitions and data availability. This volume also contains copies of all survey instruments used in selected Commission studies.

The research projects described are:

- Integrated Analysis of Decision-Making in the Criminal Justice System
- Public Opinion Survey of Metropolitan Toronto Residents
- Surveys of Legal Professionals
- Correctional Statistics
- Prison Discipline Study
- Public Forums and Focus Groups
- Surveys of High School Staff and Students
- Racial Minority Police Officers Survey

The Technical Volume is available at:

- Metropolitan Toronto Reference Library
- North York Central Library
- Ryerson Polytechnic University Library
- University of Toronto Centre of Criminology Library
- Osgoode Hall Law School Library

The Technical Volume does not discuss research results. These are discussed in our Report and in the individual research papers that were prepared for each of the projects described.

### Research Papers

The following background papers are also available at the above sites:

- Race, Bail, and Imprisonment - Anthony N. Doob



The Influence of Race on Sentencing Patterns in Toronto - Julian V. Roberts  
Perceptions of Bias and Racism within the Ontario Criminal Justice System:  
Results from a Public Opinion Survey - Scot Wortley  
The Collection and Use of Race Crime Statistics - Scot Wortley  
Staff and Students' Perceptions of Disciplinary Practices, the Use of Police,  
and Race Relations at School: A Preliminary Report - Martin Ruck  
Report on Jury Representativeness in Ontario - Langston Sibblies  
Report on Youth and Street Harassment - Katherine Liao  
Police Services Boards and Police Governance in Ontario - Katherine Liao  
Interpretation Services in the Criminal Justice System - Siu Fong  
Use of Force in Ontario Prisons - Sadian Campbell  
Participation by Racial Community Groups in Criminal Justice Policy  
Development - Scott & Aylen  
Crime and Colour, Cops and Courts - Systemic Racism in the Ontario Criminal  
Justice System in Social and Historical Context - 1892-1961 - Clayton Mosher  
Police Shootings of Black People in Ontario - Harry Glasbeek

## **Bibliography**

A bibliography, prepared for the Commission by the Centre of Criminology, University of Toronto, has been published by the Centre under the title:

Racism in the Criminal Justice System: A Bibliography

## **Other Background Material**

Other Commission studies, research papers and background material will be retained at the Records Management Unit until the end of 1998 and then permanently stored at the Archives of Ontario.

# Appendix C

## Consultations and Public Forums

### Consultations

Aboriginal Consultation  
 Aboriginal Consultation, Interim Steering Committee  
 Academics, Lawyers & Community Members  
 Advocates' Society  
 Alternative Measures & Bail  
 Anti-Racism Co-ordinators Corrections  
 Area Manager, Ministry of Solicitor General and  
 Correctional Services  
 Asian Group, Prisoners Collins Bay Institution  
 Assistant Deputy Ministers, Correctional Services  
 Association of Correctional Managers  
 Association of Black Law Enforcers  
 Attorney General, Policy Development Branch  
 Attorney General, Research Services  
 Attorney General, Legal Services Branch  
 Bangladesh Awami Society  
 Bias Crime Unit, Ottawa Police Force  
 BIFA Group, Prisoners Joyceville Institution  
 BIFA IndoPersian Group, Prisoners Collins Bay  
 Institution  
 Black Inmates & Friends Assembly, Executive Director  
 Black Coalition for AIDS Prevention  
 Black Clergy  
 Black Youth Achievements, Law Awareness Group  
 Black Inmates & Friends Assembly, (BIFA) Group,  
 Prisoners Warkworth Institution  
 Board of Police Commissioners, Metro Toronto Police  
 Brampton Crown Attorney  
 Canadian Alliance of Black Educators  
 Canadian Centre on Police Race Relations  
 Canadian Centre for Justice Statistics  
 Canadian Bar Association  
 Caribbean Association of Peel  
 Central Toronto Youth Services  
 Central Region, Ontario Board of Parole  
 Centre for Criminology, researcher Tammy Landau  
 Chair, Race Relations and Police Monitoring and Audit  
 Board,  
 Chair & Vice-Chair, Ontario Board of Parole  
 Chair, Criminal Injuries Compensation Board  
 Charitable Organization of Jamaican Ex-Policemen and  
 Associates (COJEPJA)  
 Chief Legal Counsel to Correctional Services  
 Chief Coroner  
 Child & Family Services Advocate Manager  
 Chinese Canadian National Council  
 Classification Officers  
 Community Policing, Racial Minority Police Officers  
 Community Policing, Community Activists &  
 Representatives  
 Community Policing, Black & Other Racial Minority  
 Community Activist, Black Police Officers, Senior  
 Police Management & Police Service Board  
 Members  
 Community Groups Involved with Adult Corrections  
 Conflict Resolution Team, Toronto Board of Education  
 Coordinator Multicultural and Race Relations,  
 Scarborough Board of Education  
 Correctional managers  
 Correctional Staff, Guelph Correctional Centre  
 Correctional Officers  
 Correctional managers  
 Correctional Services Official  
 Correctional Officers  
 Correctional Official  
 Correctional Staff, Mimico Correctional Centre  
 Correctional Services, Deputy Minister  
 Correctional Staff, East Detention Centre  
 Correctional Services Division Psychologists and officials  
 Correctional Law Project lawyers  
 Correctional Staff & Management Vanier Centre for  
 Women  
 Correctional Staff, Maplehurst Correctional Centre  
 Correctional volunteers  
 Correctional staff, Ministry of the Solicitor General and  
 Correctional Services and Ministry of Community  
 and Social Services  
 Corrections Staff Training & Recruitment Unit  
 Court Interpreters  
 Court of Appeal Judges  
 Court Liaison Officer, Probation Services, Ministry of  
 Solicitor General and Correctional Services  
 Criminal Lawyers, Collective of the Ontario Law Union  
 Criminal Justice Professionals  
 Criminal Lawyer  
 Crown Attorneys  
 Crown Attorney  
 Curriculum Division, Toronto Board of Education



David Hall, Manager of Dufferin Mall  
 Deputy Superintendent, Maplehurst Correctional Centre  
 Deputy Solicitor General & Senior Staff  
 Deputy Minister, Correctional Services  
 Director, Metro Toronto School Board  
 Duty Counsel  
 Elizabeth Fry Society, Executive Director  
 Elizabeth Fry Society, Senior Staff  
 Elizabeth Fry Society, Residents  
 Employment Equity manager, Ministry of the Solicitor  
 General and Correctional Services  
 Employment Equity Program, Correctional Services  
 Equity Officer, Attorney General  
 Equity experts and advocates  
 Executive Director, Metro Toronto Chinese & Southeast  
 Asian Legal Clinic  
 Executive Committee, Ontario Association of Chiefs of  
 Police  
 Federal Prosecutors  
 Federal Correctional Services, Ontario Region  
 Female Racial Minority Police Officers  
 Feminist Working Group on the Criminal Justice System  
 Attorney General & Ontario Women's Directorate  
 Fresh Arts  
 Gay-Lesbian Police Liaison Committee  
 Gerald Lapkin, Co-ordinator of Justices of the Peace  
 Gloucester Police Force  
 Grievance Administration Branch, MSGSC, Staff  
 Guelph Correctional Centre Prisoners, Superintendent,  
 Deputy & Senior Staff  
 Harambee Centre Youth Group  
 Harbourfront Forum  
 Harbourfront Community Centre  
 Heritage Canada  
 Immigrant and Visible Minority Women Against Abuse  
 Immigration and Corrections  
 Implementation of Martins Report Legal professionals  
 Inspector, Metropolitan Toronto Police Force  
 Inspector Frank, Amsterdam Police (Holland)  
 Institute of Social Research, York University  
 Interpretation and Translation Services, Ministry of the  
 Attorney General  
 Interpretation Services: Service Providers in the Criminal  
 Justice System  
 Interpreter Services: Social Service Providers  
 Jail Superintendent (Federal & Provincial Corrections)  
 Jamaican Canadian Association  
 Judge, Judicial Legal Education  
 Justice C.L. Dubin  
 Justice Review Project, Director  
 Justice Review Project, Staff  
 Justice for Graciela Montans: Meeting Violence Against  
 Women-Systemic Racism in the Criminal Justice  
 System  
 Justices of the Peace  
 Kababayan-Filipino Youth Group  
 Kingston Penitentiary  
 Law Society Representatives  
 Law Society of Upper Canada Equity Committee, Chair  
 Law Enforcement Personnel & Youth  
 Lawrence Heights: Black Youth & Coping  
 Legal Aid  
 London Coordinating Committee to End Women Abuse,  
 Multicultural Subcommittee  
 London Cultural Interpretation Service  
 London Coordinating Committee to End Women Abuse  
 London Inter-Community Health Centre  
 London Psychiatric Hospital Administration  
 Management Board Secretariat, Employment Equity  
 Branch  
 Management Board Secretariat, Employee Counselling  
 Services  
 Maplehurst Correctional Centre Prisoners,  
 Superintendent, Deputy & Senior Staff  
 Members of the local Bar Association  
 Metro East Detention Centre  
 Metro West Detention Centre, Vanier Centre for Women  
 Metro Youth Council  
 Metro Toronto Police Street Crime Unit Officers  
 Metro Police  
 Metropolitan Toronto Police Services Board  
 Millbrook Correctional Centre Prisoners, Superintendent,  
 Deputy & Senior Staff  
 Minister of Community and Social Services staff and  
 representatives of Ontario Public Service  
 Employees Union (OPSEU)  
 Ministers Advisory Committee on Corrections  
 Multicultural Group, Prisoners Pittsburgh Institution  
 National Council of Jamaicans and Supportive  
 Organizations in Canada  
 National Black Police Association  
 National Black Law Students Association  
 National Joint Committee of the Canadian Association of  
 Chiefs of Police and the  
 National Capital Alliance on Race Relations  
 National Council of Jamaicans and Supportive  
 Organizations Canada  
 Native Court Workers Conference  
 NOW Magazine, Journalist  
 Offender Programming Staff, Correctional Services;  
 Policy and Corporate Planning Secretariat,  
 Correctional Services; Childrens Services Branch,  
 Community & Social Services  
 Office of Child and Family Advocacy  
 Office of the Public Complaints Commission  
 Office of the Anti-Racism Secretariat  
 Office of Youth Justice  
 Office of Race Relations University of Western Ontario  
 Ombudsman & Staff  
 Ontario Multifaith Committee  
 Ontario Court of Justice (Provincial Division), Toronto  
 Regional Senior Judges  
 Ontario Civilian Commission on Police Services, Chair  
 and staff  
 Ontario Human Rights Commission Policy Division  
 Ontario Anti-Racism Secretariat, Youth Community  
 Placement Program Participants  
 Ontario Parole Board Member  
 Ontario Association of Interval and Transition Houses  
 Ontario Legal Aid Plan, Senior officials  
 Ontario Public Service Employees Union (OPSEU)  
 Ontario Anti-Racism Secretariat, Public Sector Unit

- Ontario Black Coalition for Employment Equity  
 Ontario Correctional Institute Prisoners, Superintendent,  
 Deputy & Senior Staff  
 Ontario Anti-Racism Secretariat  
 Ontario Public Service Employees Union (OPSEU) -  
 Grievance Officer  
 Ontario Association of Police Services Boards, Executive  
 Ontario Board of Parole, Anti-Racism Committee  
 Operation Springboard  
 OPP officers, Larry Killens, Elliot Lake  
 OPP Chief, Tom O'Grady  
 OPS Network for Racial Minorities  
 Organizations of Parents of Black Children  
 Organizations Working with Youth Exposed to the  
 Criminal Justice System  
 Ottawa Bail Program  
 Ottawa-Carleton Immigrant Services Organization  
 Ottawa Police Force, Senior Officer  
 Ottawa Police Service Board  
 Ottawa-Carleton Area Police and Community Council  
 Over-policing of Youth in Public Spaces-JOY Change of  
 Future  
 Over-policing of Youth in Public Spaces-Metro Police  
 Headquarters, Police Officers  
 Over-policing of Youth in Public Spaces-Youth  
 Parole Board Members, West Central  
 Parole Board Member, Western Region  
 Parole Board Member, West Central  
 Parole Board Member, Central  
 Parole Board Member, Central Toronto  
 Parole Board Member, West Central  
 Patricia Erickson, Senior Researcher, Addiction Research  
 Foundation and Benedikt Fischer (Germany)  
 researcher  
 Peel Region, Elizabeth Fry Society  
 Police Services Board, London  
 President, Community Service Association  
 Probation Officer, Ministry of Community and Social  
 Services  
 Probation Officer, Ministry of Solicitor General and  
 Correctional Services  
 Probation Manager, Young Offenders  
 Probation Officer, Ministry of Community and Social  
 Services  
 Probation Officer, Ministry of Community and Social  
 Services  
 Probation officers  
 Probation Officer, Young Offenders  
 Prof. Michael Tonry, Centre of Criminology  
 Professor Andrew Ashworth, Professor of Law,  
 Cambridge University, UK  
 Professor Simon Holdaway, University of Leeds  
 Professor David Denney - University Lecturer in social  
 work, (London, England)  
 Provincial Council of Elizabeth Fry Societies  
 Provincial Division Judges  
 Race Statistics-Community Members, Academics,  
 Government Officials, Police Personnel  
 Racial Minority Lawyers  
 Regional Directors & Managers of Correctional  
 Institutions  
 Representative, Canadian Translators & Interpreters  
 Council  
 Representative, Canadian Translators & Interpreters  
 Council  
 Representatives of Aboriginal groups  
 Research Director, Ottawa Police Force  
 Roundtable Discussion on Juries  
 Royal Commission on Learning, Commissioners  
 Royal Commission on Learning, Research Team  
 Safe School Coalition  
 Scarborough Board, Research Unit  
 Scarborough Board, Student and Community Services  
 Scarborough Board, Secondary School Principals  
 Scarborough Probation Officers  
 Scarborough Probation Officers  
 Senior Officers, London Police Force  
 Senior Judges  
 Senior Advisor, Research & Statistics, Solicitor General  
 Senior Correctional Officers  
 SIU Director  
 Special Investigations Unit, Director  
 Sprucedale Youth Centre, Superintendent, Deputy  
 Superintendent, Programming and Placement  
 Officer  
 Staff Sergeant, Metropolitan Toronto Police Force  
 Staff, African Canadian Court-Workers Program,  
 Ministry of the Attorney General  
 Staff Interpreter, Ministry of the Attorney General  
 Stephen Lewis  
 Street Outreach Services  
 Street Crime Unit - 5 District  
 Student Program Worker, Toronto Board of Education  
 Students at Rosedale Heights  
 Superintendent, Mimico Correctional Centre  
 Superintendents of Metro Correctional Institutions  
 Syl Apps, Senior Staff  
 Teaching Staff, Scarborough Board  
 Temporary Absence Board, Mimico Correctional Centre  
 Terry O'Connell-Police officer, Wagga, Wagga, New  
 South Wales  
 Toronto Bail Program Officials  
 Toronto Bail Program, senior staff  
 Toronto Board of Education, Pat Case, Ester Cole  
 Toronto Board of Education, Community Service Office  
 Toronto Board Anti-Racism Camp - Students & Teachers  
 Toronto Board Teachers and School Personnel  
 Toronto Board Teachers and School Personnel  
 Toronto School Board Teachers and School Personnel  
 Trustee (Ward 7), Toronto Board of Education  
 Urban Alliance of London  
 Vice-Chair, Central Region Parole Board  
 Vice-Chair, Western Region Parole Board  
 Violence Prevention Secretariat, Ministry of Education  
 Western Region, Ontario Board of Parole  
 Women Immigrants of London  
 Youth Link, Counsellor  
 Youth Community Services, North York Public Libraries  
 Youth Link  
 Youth in Alternative Measures Program, North York  
 Probation Services, Ministry of Community and  
 Social Services  
 Youth Unity Symposium  
 Youth Exposed to the Criminal Justice System



Youth in Alternative Measures Program, Scarborough  
 Probation Services, Ministry of Community and  
 Social Services  
 Youth & Pre-Trial Encounters, Defence Counsel  
 Youths-Scarborough Civic Centre  
 Youths-Central Neighbourhood House, Front Line Staff  
 Youths-Woodgreen Community Centre  
 Youths-African Cultural Organization  
 Youths-Central Neighbourhood House, Youth Workers  
 Youths-Alert Program  
 Youths-Change of Future/Youth  
 Youths-Filipino Youth  
 Youths-Lesbians/Gays of Colour  
 Youths-Marcus Garvey Home  
 Youths-Parents of Black Youth  
 Youths-South Asian Centre

## Public Forums

Thunder Bay - West Thunder Bay Community Centre, October 4, 1993  
 Sudbury - Civic Square, October 6, 1993  
 Ottawa - Sandy Hill Community Centre, October 8, 1993  
 Windsor - Mackenzie Hall, October 13, 1993  
 Chatham - Chatham Cultural Centre, October 14, 1993  
 London, London Urban Resource Centre, October 15, 1993  
 Ottawa - Dalhousie Community Centre, October 16, 1993  
 Kingston - Kingston Public Library, October 19, 1993  
 Hamilton - YMCA, October 21, 1993  
 Toronto - Regent Park Community Centre, October 28, 1993  
 Scarborough - Warden Woods Community Centre, October 28, 1993  
 North York - Memorial Hall, November 2, 1993  
 Mississauga - Noel Ryan Auditorium, November 2, 1993  
 Brampton - Century Gardens Recreation Centre, November 3, 1993  
 City of York - Jamaican Canadian Association, November 3, 1993  
 Oshawa/Durham - Oshawa Public Library, November 4, 1993  
 Toronto - Parkdale Public Library, November 4, 1993  
 Pickering/Ajax - Pickering Public Library, November 6, 1993  
 Brampton - Century Gardens Recreation Centre, November 6, 1993  
 North York - Westview Centennial High School, November 9, 1993  
 Toronto - Ontario Science Centre, November 9, 1993  
 Etobicoke - Elmbank Community Centre, November 10, 1993  
 Mississauga - Burnhamthorpe Community Centre, November 10, 1993  
 Toronto - Scadding Court Community Centre, November 13, 1993  
 Scarborough - Tall Pines Community Centre, November 13, 1993  
 Oshawa/Durham - Simcoe Hall Settlement House, November 16, 1993  
 Pickering/Ajax - Pickering Recreation Centre, November 16, 1993  
 Napanee - Family and Children Services of Lennox and Addington, November 22, 1993  
 Kingston - Kingston Global Community Centre, November 22, 1993

# Appendix D

## Submissions

- Aboriginal Justice Consulate, Native Council of Canada  
 African Community Organization of Windsor  
 Ahmed, Zakir, *Hamilton*  
 Ames, Robert-Steward Toronto Jail (OPSEU Local 530)  
 Association of Black Law Enforcers, *Mississauga*  
 Bald, Hilary, *Beamsville*  
 Balloosingh, Neal, *Scarborough*  
 Balm, Gerald N., *Kitchener*  
 Bell, Don, *Mississauga*  
 Bennett, Michael, *Sault Ste. Marie*  
 Black Action Defence Committee, *Toronto*  
 Black Inmates and Friends Assembly, *Toronto*  
 Boulay, Michel, *Whitby*  
 Brantford Ethnic and Race Relations Committee  
 Briggs, Genevieve, *Windsor*  
 Canadian Alliance for Visible Minorities, *Ottawa*  
 Canadian Bar Association, *Ottawa*  
 Canadian Civil Liberties Association, *North York*  
 Caribbean Association of Peel, *Mississauga*  
 Carr, Don, *Brantford*  
 Centre for Intercultural Development, *Winnipeg*  
 Chacko, James-School of Social Work, University of Windsor  
 Chaplaincy Services Ontario  
 Children's Aid Society of Metropolitan Toronto  
 Chinese-Canadian National Council, *Ottawa*  
 Chow, Yuen-Ching, *Rexdale*  
 Church Council of Justice and Corrections, *Ottawa*  
 Ciona, Dan, County of Brant, *Burford*  
 Cochrane, Michael G.-Scott and Ayles, *Toronto*  
 Cohen, Howard-Barrister, *Toronto*  
 Cole, Ester, *Toronto*  
 Coll, Philip, *Guelph*  
 Community Service Order Association of Ontario  
 Community Unity Alliance, *North York*  
 Congress of Black Women, *Mississauga*  
 Connor, Patrick J., *Toronto*  
 Copeland, Paul  
 Criminal Lawyers Association, *Toronto*  
 Cross Cultural Youth Alliance, *Ottawa*  
 Day, Mrs. Jean, *Sarnia*  
 Deitch, James S.-Barrister, *Toronto*  
 DeRusha, Haig, *Brampton*  
 Doan, Kevin Khoa, *Toronto*  
 Doyle, Denise, *Oshawa*  
 Doyle-Marshall, William, *Toronto*  
 Duffy, Kevin, *Mississauga*  
 Elizabeth Fry Society, *Toronto*  
 Embury, Randy, *Frankford*  
 Eshkibok, Michael, *Sudbury*  
 Etherington, Brian-Faculty of Law, University of Windsor  
 Ethnocultural Council of London  
 Fagan, John F.-Barrister and Solicitor, *Willowdale*  
 Family and Credit Counselling Service (RESOLVE program), *Richmond Hill*  
 Federation of Sikh Societies of Canada, *Ottawa*  
 Fiji, Gurdial Singh, *Rexdale*  
 Findlay, James W., *Agincourt*  
 Francis, Verlyn F., *Toronto*  
 Giroux, Denise and June Ineson, *Hamilton*  
 Halton Regional Police Service and Halton Multicultural Council Race Relations Committee, *Mississauga*  
 Hamilton-Wentworth Regional Police Services on behalf of the Ontario Association of Chiefs of Police  
 Hamilton, Carla, *Kingston*  
 Hawthorn, Felicity-Barrister and Solicitor  
 Horvath, Louis, *Don Mills*  
 Howard, Janet-Barrister, *Toronto*  
 Iggers, Daniel P., *North York*  
 Inkumsah, Eben, *North York*  
 Islamic Co-ordinating Council of Imams, *Toronto*  
 Jacobson, Sheila, *Brampton*  
 Jamaican Canadian Association, *City of York*  
 Jane-Finch Community Legal Services, *North York*  
 Jayewardine, Dr. C.H.S.-Faculty of Social Sciences, University of Ottawa  
 Jewiss, Tom-Native Law, Trent University, *Peterborough*  
 John Howard Society of Kingston District  
 John Howard Society of Ontario/Reform Office, *Kingston*  
 Kababayan Community Centre, *Toronto*  
 Kay, Gary P., *Oshawa*  
 Kaye, F. Dan, *Gloucester*  
 Keep, Evelyn, *London*  
 Kellway, Donna Killalea, *Toronto*  
 Kiederowski, John-Department of Criminology, University of Ottawa  
 King, Winston, *Hamilton*  
 Korean Canadian Women's Association, *Don Mills*  
 Krueger, Ronald A.-Barrister and Solicitor, *Toronto*  
 Labatt, L. M., *Toronto*  
 League for Human Rights of B'Nai Brith, *North York*  
 London Alliance on Race Relations  
 Lockyer, James-Pinkofsky, Lockyer, Kwinter, *Toronto*  
 Loss Protection Services Training Institute, *Etobicoke*



- Lumley, Fernando, *Scarborough*  
 Lynch, Gray, *Kingston*  
 Magee, Martin, *Brampton*  
 Mahoney, Robert, *Windsor*  
 Maidment, J.M.—Martial Arts Instruction and Consultation,  
*Etobicoke*  
 Mayor's Race Relations Committee, *Hamilton*  
 McGarvey, Matthew, *Toronto*  
 McMahan, John B., *Toronto*  
 McMullen, Shirley  
 Medford, Denys, *Immiskillen*  
 Meltziner, Julius  
 Mennonite Central Committee Ontario, *Kitchener*  
 Ministry of Citizenship, Employment Equity  
 Commission—Juanita Westmoreland-Traore, *Toronto*  
 Ministry of Community and Social Services, Probation and  
 Community Services—Marc Levine, *Toronto*  
 Ministry of the Attorney General, Crown Law Office,  
 Criminal—Feroza Bhabha, *Toronto*  
 Ministry of the Attorney General, Office of Equality  
 Rights, Policy Development Division—Thea Herman,  
*Toronto*  
 Ministry of Correctional Services—Deborah Newman,  
*Toronto*  
 Ministry of the Solicitor General and Correctional Services,  
 Chief Coroner for Ontario—James Young, M.D.,  
*Toronto*  
 Minority Advocacy and Rights Council, *Ottawa*  
 Mohr, Renate H.  
 Moore, John Caleb, *Sudbury*  
 Morris, Deborah, *Ottawa*  
 Moustacalis, Anthony, Defence Counsel  
 Musbah, Mohamed, *Windsor*  
 National Symposium of Community Safety and Crime  
 Prevention  
 National Association of Women and the Law, National  
 Organization of Immigrant and Visible Minority  
 Women of Canada and the Canadian Association of  
 Elizabeth Fry Societies, *Ottawa*  
 National Council of Canadian Filipino Associates, *Toronto*  
 Native African Inmates and Families Association,  
*Willowdale*  
 Norris, John—Barrister, Ruby & Edwardh, *Toronto*  
 North York Committee on Community Ethnic and Race  
 Relations  
 Obembe, Bolaji, *Brampton*  
 Onkwehohwe Anti-Racism, *Barrie*  
 Ontario Association of Correctional Managers, *Burlington*  
 Ontario Association of Corrections and Criminology,  
*Toronto*  
 Ontario Association of Police Services Boards, *Toronto*  
 Ontario Board of Parole (Central Region), *Toronto*  
 Ontario Conference of Catholic Bishops, Committee on  
 Institutional Chaplaincy, *Toronto*  
 Ontario Court of Justice (General Division)—The  
 Honourable Mr. Justice Dennis O'Leary, *Toronto*  
 Ontario Court of Justice (Provincial Division)—The  
 Honourable Mr. Maryka Omatsu, *North York*  
 Ontario Court of Justice (General Division)—The  
 Honourable Mr. Justice Roger E. Salhany, *Kitchener*  
 Ontario Court of Justice, (General Division)—The  
 Honourable Mr. Justice J. deP. Wright, *Thunder Bay*  
 Ontario Court of Justice, (General Division)—The  
 Honourable Mr. Justice T. Zuber, *Windsor*  
 Ontario Human Rights Commission, *Toronto Central*  
 Ontario Multifaith Council on Spiritual and Religious Care,  
*Toronto*  
 Ontario Public Service Employees Union (OPSEU), *North  
 York*  
 Ontario Public Service Employees Union - Human Rights  
 Committee - Region 2  
 Ontario Public Service Network for Racial Minorities  
 Ottawa Carleton Immigrant Services Organization, *Ottawa*  
 Ottawa Police  
 Peabody, Al, *Toronto*  
 Perera, Ranjit, *Orleans*  
 Piccinin, Nilo A., *Willowdale*  
 Police Association of Ontario, *Mississauga*  
 Police Complaints Commissioner, *Toronto*  
 Prison Violence Project, *Kingston*  
 Probation Officers Association of Ontario, Policy &  
 Planning, *Scarborough*  
 Queen Street Mental Health Centre, Pastoral Services,  
*Toronto*  
 Quinte United Immigrant Services, *Belleville*  
 Race Relations Committee, *Kitchener-Waterloo*  
 Regional Multicultural Youth Council, *Thunder Bay*  
 Regional Multifaith Committee on Chaplaincy Windsor-  
 Woodstock Region  
 Regional Municipality of Ottawa-Carleton  
 Réseau des Femmes du Sud de l'Ontario, *Hastings*  
 Rodd, Jane, *Guelph*  
 Sabsay, Lorne—Barrister and Solicitor, *Toronto*  
 Samuels, Althea, *Ottawa*  
 Schrama, Peter, *Toronto*  
 Shearing, Clifford  
 Singh, Gurnam, *Guelph*  
 Skorpid, Doris, *Hamilton*  
 Spiritual Assembly of the Baha'is of Hamilton  
 Stacey, M. Lorraine, *Chatham*  
 Students of Law for the Advancement of Minorities,  
 Faculty of Law, University of Toronto  
 Sudbury Multicultural Association  
 Sudbury Race Relations Committee  
 Sudbury Regional Police Service  
 Suriya, Senaka K., *Ottawa*  
 Tanovich, David M., *Toronto*  
 Tye, Robert, *Etobicoke*  
 Ukrainian Canadian Civil Liberties Association, *Toronto*  
 Urban Alliance on Race Relations, *Toronto*  
 USWA-Local 1405, District 6, *Windsor*  
 Valentine, Robert, *Oakville*  
 Van Egmond, John  
 Verbrugge, Marcus, *Hamilton*  
 Vietnamese Association, *Toronto*  
 Walters, Ewart, *Ottawa*  
 Warmington, Cleveland, *Toronto*  
 Waterloo Regional Police Services Board, *Kitchener,  
 Cambridge, Waterloo*  
 Whittingham, Jane, *St. Catherines*

Why Mee Family Counselling Foundation of Metropolitan  
Toronto

Williams, Jasmine, *Ottawa*

Willing, Stephen H., *Windsor*

Woolner, Susan J.-Barrister and Solicitor, *Toronto*

Working Group on Criminal Justice and Mental Health,  
*Toronto*

Xavier, Pat, *Toronto*

Yachetti, Roger D.,-Yachetti, Lanza & Restivo, *Hamilton*









