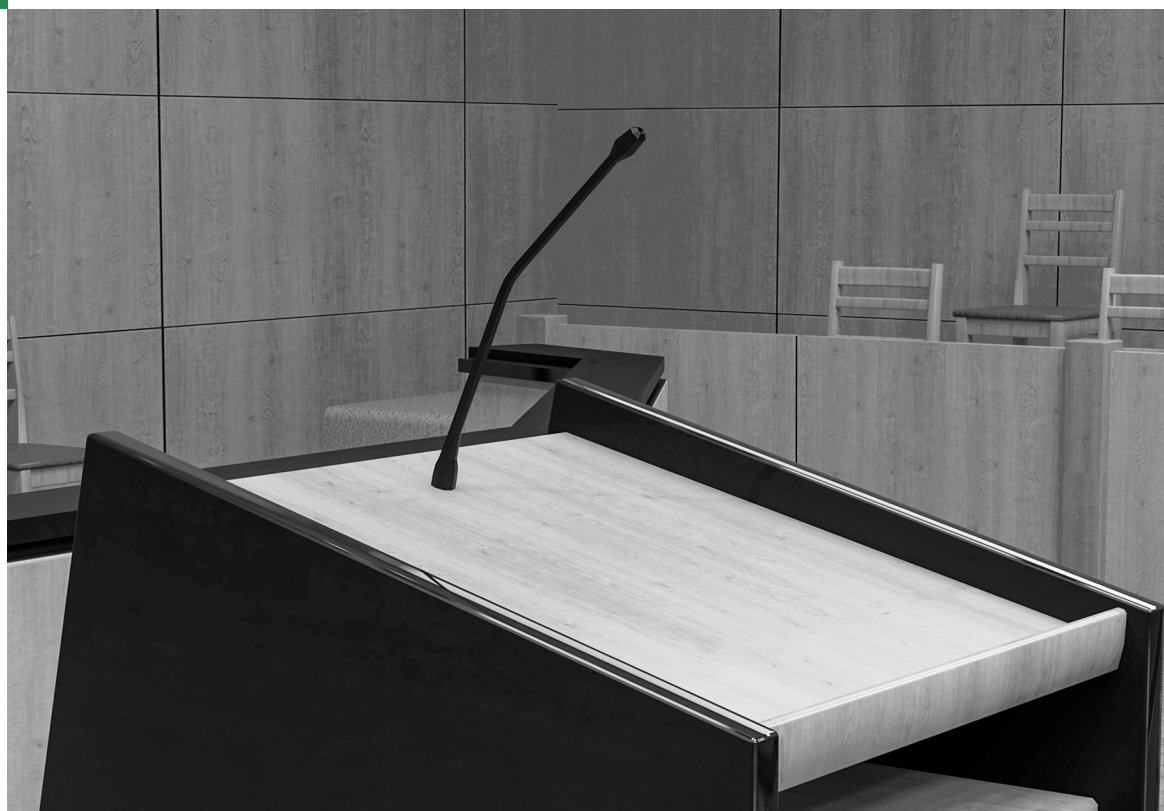
CANADIAN CENTRE FOR ELDER LAW
BRITISH COLUMBIA LAW INSTITUTE

*CCEL Study Paper 12*

# STUDY PAPER ON SUPPORTING VULNERABLE VICTIMS & WITNESSES



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# BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

822-0142 | bcli@bcli.org https://www.bcli.org

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# Table of Contents


Executive Summary ..... 7

List of Abbreviations & Tems ..... 9

Chapter 1. Background ..... 11
1.1 Introduction ..... 11
1.2 Reasons for this Study Paper ..... 11
1.2.1 An Aging Population ..... 12
1.2.2 Risk of Harm ..... 12
1.2.3 Difficulty in Justice System Participation ..... 13
1.3 Outline of this Study Paper ..... 14

Chapter 2. Canadian Legal Landscape ..... 16
2.1 Criminal Law ..... 16
2.1.1 Basics ..... 16
2.1.2 Key Players ..... 16
2.1.3 Relevant Elements of Criminal Law ..... 21
2.1.4 Relevant Criminal Code Provisions ..... 24
2.2 Human Rights ..... 29
2.2.1 Human rights In Canada ..... 29
2.2.2 UN Documents ..... 34

Chapter 3. Key Players & Current Policy ..... 37
3.1 Crown Counsel ..... 37
3.1.1 Ethical and Legal Obligations ..... 37
3.1.2 Definition of Capacity ..... 39
3.1.3 British Columbia ..... 40
3.1.4 Ontario ..... 46
3.1.5 New Brunswick ..... 48
3.1.6 Nova Scotia ..... 48
3.1.7 Interaction with Other Professions ..... 49
3.2 Victim Services ..... 50
3.2.1 Legal Basis ..... 50
3.2.2 Relevant Policies ..... 52
3.3 Police ..... 50
3.3.1 Legal Basis ..... 52
3.2.2 Relevant Policies ..... 53
3.3.3 Federal Police ..... 54

Chapter 4. Best Practices from the United Kingdom ..... 55
4.1 United Kingdom ..... 55
4.1.1 Liverpool Model ..... 55
4.1.2 Crown Counsel Policies and Guidance ..... 56

# Table of Contents


**Chapter 5: Considerations for Professionals and Policy-makers in British Columbia ..... 59**
5.1 Barriers to Access to Justice in the Current Canadian Model ..... 59
5.1.1 Silos: Privacy and Lack of Information Sharing ..... 59
5.1.2 Intersections ..... 60
5.1.3 Lack of Policy Direction ..... 61
5.1.4 Lack of Documentation and Transparency ..... 61
5.1.5 Inconsistencies between Professions ..... 63
5.1.6 Lack of Training ..... 64

**Chapter 6: Suggested Best Practices for British Columbia ..... 65**
6.1 The Flow of a Criminal Matter in BC ..... 65
Stage 1: Reporting ..... 65
Issue 1: Lack of reporting ..... 65
Issue 2: Third party reporting ..... 66
Issue 3: Self-reporting ..... 66
Suggested Best Practices ..... 66
Stage 2: Investigation ..... 67
Issue 1: Supporting evidence ..... 67
Issue 2: Recording statements ..... 68
Issue 3: Accurately identifying vulnerable victims needs and abilities ..... 68
Suggested Best Practices ..... 69
Stage 3: Charge Assessment and Approval ..... 70
Issue 1: Testimonial Capacity ..... 70
Suggested Best Practices ..... 71
Issue 2: Crown Counsel Policy Manual Cross-References ..... 72
Suggested Best Practices ..... 72
Stage 4: Court Process ..... 72
Issue 1: Testimonial Aids ..... 73
Suggested Best Practices ..... 73
Issue 2: Trial prep ..... 73
Suggested Best Practices ..... 74
Issue 3: At Trial ..... 74
Suggested Best Practices: ..... 76
Issue 4: Judicial Intervention and Objections to Questioning ..... 77
6.2 Further Considerations ..... 79
6.2.1 Common Definitions and Understandings ..... 79
6.2.2 Training ..... 80
6.3 Challenges in Implementing Best Practices ..... 81
6.3.1 Legislative Amendments ..... 81
6.3.2 Jury Instructions ..... 82

**Chapter 7: Conclusion ..... 84**

# Executive Summary

This study paper analyzes the current framework for supporting vulnerable adult victims and witnesses, with an emphasis on older adults and adults with disabilities. Support for older adults in the criminal justice system is ever more important, as demographics indicate an increasing proportion of adults are over the age of 65 in Canada.[1] The rise in Canada's elderly population has coincided with an increase in the rate of victimization of seniors in every province and territory across Canada.[2] Alongside this trend, the justice system can expect to see more witnesses with vulnerability indicators, such as age, disability, and cognitive impairments. The criminal justice system will need to adjust to meet the needs of these vulnerable witnesses and victims.

We acknowledge that many of the criminal justice system participants in British Columbia – police, victim services, criminal law practitioners, and the judiciary – work diligently to accommodate vulnerable witnesses and victims. We also acknowledge that lack of reporting of criminal matters does not necessarily lie with the participants. Participants are in a difficult position where they must work within the confines of the criminal justice system. The need for additional resources for all criminal justice system participants is supported by our research and conversations with informants.

The Canadian Centre for Elder Law conducted research and confidential consultations with informants working within the criminal justice system to gain a better understanding of shortcomings in the framework for working with vulnerable witnesses and victims. Through this work, we have identified specific stages within the flow of a criminal matter where vulnerable adults could be better supported to ensure their participation.

Our research indicates there is a large gap in support for vulnerable witnesses and victims originating at the first stage in the flow of a criminal matter – reporting.[3] If a vulnerable adult or a person close to them reports a crime,

[1] As of July 1, 2022, nearly one in five Canadians is 65 years or older: Statistics Canada, "Canada's Population Estimates: Age and Sex, July 1, 2022", online: https://www150.statcan.gc.ca/n1/en/daily-quotidien/220928/dq220928c-eng.pdf?st=OiC5fJO7.

[2] Shana Conroy and Danielle Sutton, "Violence Against Seniors and Their Perceptions of Safety in Canada", Canadian Centre for Justice and Community Safety Statistics, Statistics Canada, online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00011-eng.htm#n40 (**"Conroy"**).

[3] Isabel Grant & Janine Benedet, "Sexual Assault of Older Women: Criminal Justice Responses in Canada" (2016) 62:1 McGill LJ 41 at 57 ("Grant"). Grant and Benedet referred to a study by Ann Burgess and Steven Phillips (Ann Wolbert Burgess et al, "Sexual Abuse of Older Adults: Assessing for Signs of a Serious Crime—and Reporting It" (2005) 105:10 American J Nursing 66 at 66) in which 284 cases of reported elder sexual abuse were reviewed, and found that 62% of older people without dementia reported the abuse either to police or adult protective services. Only 12.8% with dementia self-reported, however. The number of unreported offences against those living in care facilities was expected to be higher, particularly among non-verbal women, or where the perpetrator was a person living with dementia. It was thought that these instances, even when witnessed, "… may be confused with consenting activity among residents or with a spouse, or assumed to cause no harm to a resident with cognitive impairments": Grant at 57. It is thought that many of these instances are then dealt with internally and without police involvement for a number of reasons. "Accordingly, reported cases represent merely 'the tip of the iceberg'": Grant at 57.

the next big hurdles are referral by police to Crown counsel and charge approval. Our consultation with informants indicated that the charge approval stage presents challenges due to the lack of training in assessing and documenting capacity. If charges are approved, the vulnerable adult must then undergo the trial process.

We learned that testimonial aids are inconsistently used to support vulnerable adults and applications for their use is often met with resistance. For some witnesses and victims regardless of ability, the prospect of having to testify can be a deterrent to reporting, making the need for consistent use of testimonial aids an important tool for supporting vulnerable adults. Bias, conscious or not, against older witnesses and witnesses with a disability remains an additional barrier.[4]

Approaching this topic required a level of understanding of the needs of all criminal justice system participants throughout the process of reporting a crime, investigating the report, approving charges, proceeding to trial, and conducting the trial. A number of rights are engaged throughout this process and in our analysis, we identified areas where consideration of the rights of witnesses and victims were tempered with the rights of an accused person. We do not propose lessening the rights of the accused but do propose best practices to allow the rights of a witness or victim to be further supported.

Throughout this paper, we discuss the differences between competence to testify and the concept of capacity. This distinction arises particularly where considerations of capacity may impact the perceived ability of a witness to testify. This perception can impact whether professionals working with vulnerable adult witnesses move a file along the path to prosecution or not as the perceived incapacity may impact the weight given to the vulnerable adult's testimony. The focus is on increasing understanding of these distinct considerations so that witnesses who are competent but vulnerable, including by reason of diminished capacity, can be better supported in participating in the justice system.

The best practices we suggest in this paper are based on informant feedback, identified gaps in knowledge surrounding capacity, and research aimed at supporting vulnerable witnesses. Much of our research indicated that vulnerable witnesses and victims face barriers that inhibit reporting. It is with the goal of improving trust in the criminal justice system and increased reporting that drives the best practices we suggest from jurisdictions outside of British Columbia.

[4] Jonas-Sébastien Beaudry, "The Intellectually Disabled Witness and the Requirement to Promise to Tell the Truth" (2017) 40:1 Dal LJ 239 at 275 (**"Beaudry"**).

We acknowledge that some of the suggested best practices have implications for current criminal procedure and evidentiary rules. We also acknowledge that further research is needed to determine how effective implementation could occur while maintaining the integrity of the criminal justice system and the right to a fair trial.

Implementation of the suggested best practices, particularly those that require interagency or legislative support, will be met with challenges and we hope that highlighting the need for change will foster collaboration amongst all participants. Such collaboration will increase support for vulnerable adults in the criminal justice system, encourage further training for those working with vulnerable adults, and improve court processes, all of which will further increase confidence in the criminal justice system.

## List of Abbreviations & Terms

**Crown counsel:** Also referred to as "prosecutors", Crown counsel are independent officers of the court tasked with ensuring that criminal prosecutions are conducted fairly, evidence is presented accurately, and the integrity of the justice process is maintained.[5] There are provincial Crown counsel and federal Crown counsel, with the federal Crown counsel prosecuting certain federal offences, such as drug matters.[6] The territories do not have independent Crown counsel. Thus, the Public Prosecution Service of Canada ("**PPSC**") prosecutes *Criminal Code* and federal law offences in the territories.[7]

**Capacity:** In the legal context, capacity refers to the ability of a person to enter into a legal relationship in an informed manner, meaning they are able to understand the nature of the decision and appreciate the consequences of the decision to enter into the legal relationship.[8] Different legal decisions or relationships, including testifying in court, require different tests to satisfy that the person in question has capacity.

**Competency to Testify:** This refers to whether someone is unable to testify. As a general legal principle every person is presumed competent to testify in court unless they are disqualified by reason of a legal rule. This includes if a person is incapable of interpreting observed events and/or of communicating them when asked, in which case the person is incompetent to testify.

[5] Government of British Columbia, "Crown Counsel", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/key-parts/crown-counsel ("**Crown counsel**").
[6] *Ibid*, Crown Counsel.
[7] Public Prosecution Service of Canada, "About the PPSC", online: https://www.ppsc-sppc.gc.ca/eng/bas/index.html ("**PPSC**").
[8] British Columbia Law Institute, "Report on Common-Law Tests of Capacity" (2013) at 11, online: https://www.bcli.org/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf.

**Disability:** This term refers to a condition or illness that impacts a person's senses or ability to participate in activities, such as vision or hearing loss, learning disabilities, brain injury, or a mental health illness.[9]

**Prosecutorial Discretion:** "Prosecutorial discretion is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence."[10]

**Rule of Law:** Any law proclaimed in Canada must be clear, understandable, rational, objective, and reasonably fit to the purpose of the legislation.[11] Further, any law must be applied equally to all citizens regardless of their position in society.[12]

**Victim:** The term victim is used for consistency when referencing legislation or policy that uses the word 'victim'. This word is used by the *Criminal Code*, and in British Columbia's *Victims of Crime Act*. It is also used in the *Canadian Victims Bill of Rights* to mean "an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence."[13]

**Vulnerable Adult:** This term is used throughout to identify an adult that, due to age, disability, socio-economic background, cultural or ethnic identity, Indigenous identity, position of dependence, communication barriers, substance use, or exposure to abuse or inter-generational trauma is considered vulnerable and is either a victim or witness in a criminal proceeding.[14]

**Weight:** Used to describe the amount of importance or value certain evidence will carry. If evidence, such as testimony, is admissible during a trial, a judge will determine how much importance they or a jury should give to that evidence. In some cases, a judge will instruct a jury to focus less on a certain piece of evidence, or give it less weight, because there is a reason to consider it less believable or less strong.[15]

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[9]Shelley Hourston, "Disclosing Your Disability: A Legal Guide for People with Disabilities in BC" (Vancouver: Disability Alliance BC, 2016), online: https://disabilityalliancebc.org/wp-content/uploads/2017/06/DisclosureGuide.pdf.
[10]*Krieger v Law Society of Alberta*, 2002 SCC 65 at para 43 ("**Krieger**").
[11] Jack Watson, "You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada — Part II" (2015) 52:4 Alta L Rev 949 at 955 ("**Watson**").
[12]Ibid, Watson, at 955.
[13]*Canadian Victims Bill of Rights*, SC 2015, c 13 , s 2 ("**CVBR**").
[14]BC Prosecution Services, Crown Counsel Policy Manual, "Vulnerable Victims and Witnesses"(15 January 2021), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vul-1.pdf ("**VUL 1**").
[15]David M Paciocco, Palma Paciocco & Lee Stuesser, **The Law of Evidence**, 8th ed (Toronto: Irwin Law, 2020) at 44 ("**Paciocco**").

# Chapter 1. Background

## 1.1 Introduction

The Canadian Parliament introduced changes to the *Criminal Code*[16] in 2005 for the purpose of encouraging "the participation of witnesses in the criminal justice system through the use of protective measures that seek to facilitate the participation of children and other vulnerable witnesses while ensuring that the rights of accused persons are respected". [17] The vulnerabilities of children and the correlated need to facilitate their participation when required as witnesses in criminal proceedings has received much attention.

Similarly, vulnerable adults also require the attention of the criminal justice system to facilitate their participation. This study paper explores some of the reasons vulnerable adults are often dismissed as non-credible witnesses well before a trial, the ways in which they can be better supported as witnesses with the use of testimonial aids and supportive prosecutorial policies, and practices adopted in other common law jurisdictions to support vulnerable adult witnesses.

Understanding that those working within the criminal justice system are confined to those tools, policies, and laws available to them, we are not addressing substantive changes in these beyond where they arise as a limitation. Jury instructions, *Criminal Code* amendments, and judiciary and police training are raised as potential best practices moving forward, but more fulsome research is clearly anticipated and outside the scope of this paper. We acknowledge that some of the best practices create implications for current criminal procedure and evidentiary rules. Further research is needed for the manner of implementation of the suggested best practices.

## 1.2 Reasons for this Study Paper

As the Canadian population ages, there is a correlated increase in the rate of victimization of seniors. Certain physical and neurological changes that naturally occur with age increase one's vulnerability to being a victim of crime. Research indicates cases involving elder abuse are under-prosecuted. In addition, there are few reported cases in which testimonial aids have been employed to support vulnerable adult victims in participating in the criminal justice system, suggesting they are seldom employed in practice.

This paper focuses on the policies and legislation currently available for guiding the prosecution of cases involving vulnerable adult witnesses in BC and explores some models that have been employed outside of BC and Canada. Our research highlights the importance of interagency collaboration and education in addressing elder abuse. Prosecution is not always the most appropriate response to elder abuse, but when it is, strong policies can support the employment of testimonial accommodations, inter-agency cooperation, and effective communication and trauma-informed strategies to support the full participation of vulnerable witnesses.

[16] *Criminal Code*, RSC 1985, c C-46 ("**Criminal Code**").
[17] *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32.

### 1.2.1 An Aging Population

The proportion of the Canadian population that is 65 years and older is increasing in Canada. For the first time in history, the senior population in Canada is beginning to outnumber the population of people aged 14 years and under. Between 2016 and 2021, the percentage of the population aged 65 and over expanded from 16.9% to 19%.[18] Over this same period, an increase in the rate of victimization of seniors occurred in every province and territory across Canada.[19]

Certain physical and neurological changes that occur naturally with age can increase the likelihood of victimization. According to a study cited by the World Health Organization, factors which are associated with victimization include functional dependence, having a disability, poor physical health, cognitive impairment, poor mental health, and low income.[20]

As people age, they are more likely to have a disability. In Canada, the disability rate is 23 percent among adults aged 55 to 64. That increases to 43% of the population among individuals aged 65 and older. Among individuals aged 85 and older, the disability rate is 73%. Proportionally, the rate of disability is higher for senior women than senior men and it is higher amongst Indigenous seniors in than non-Indigenous seniors. The population of seniors in Canada living with a disability is expected to grow at a much faster rate than the overall population of people with disabilities and is estimated to increase to somewhere between 4.6 million and 5.1 million people in 2036, in comparison to 1.8 million in 2006.[21]

### 1.2.2 Risk of Harm

Seniors who identify as having a disability experience a significantly higher rate of violent victimization than seniors who do not live with a disability.[22] When other factors correlated with an increased risk of victimization are considered, the rate of victimization further increases. For example, amongst seniors with a disability, the rate of victimization is higher for women than men.[23] It is also well documented that Indigenous women are more likely than any other group of women in Canada to be victims of crime, particularly victims of murder, severe physical assault, sexual assault, and robbery. Members of the 2SLGBTQQIA+ community also experience higher rates of violence.[24]

[18]Statistics Canada, "Census Profile, 2021 Census of Population", online: https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&DGUIDList=2021A000011124&GENDERList=1,2,3&STATISTICList=1&HEADERList=0&SearchText=Canada; Statistics Canada, "Census Profile, 2016 Census", online: https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Geo2=&Code2=&SearchText=Canada&SearchType=Begins&SearchPR=01&B1=All&TABID=1&type=0.
[19]Supra, note 2, Conroy.
[20]Karl Pillemer et al, "Elder Abuse: Global Situation, Risk Factors, and Prevention Strategies" (2016) 56:2 Gerontologist S194 at S198 ("**Pillemer**").
[21]Government of Canada, "2011 Federal Disability Report: Seniors with Disabilities in Canada" (Gatineau: Human Resources and Skills Development Canada, 2011), online: https://www.canada.ca/en/employment-social-development/programs/disability/arc/federal-report2011/section1.html#.
[22]*Supra*, note 2, Conroy.
[23]*Supra*, note 2, Conroy.
[24]National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol 1a* (2019) at 451, online: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

In terms of police-reported incidents of violence against seniors, the majority (76%) consists of physical assaults. However, for older women living with dementia, the risk of sexual violence is greater than the risk of non-sexual physical violence.[25] This is consistent with statistical data showing that the rate of violent victimization is three times higher for women living with a disability in comparison to those without a disability and in particular, the rate of sexual assault is much higher among women with a disability.[26]

Concern noted in much of the academic literature surveyed indicated that, 1) as our population ages, the rate of assaults will increase,[27] and 2) there is a lack of reporting of elder abuse cases and so the actual number of instances of abuse is likely higher than we are aware of.[28] Based on recent numbers from Statistics Canada, police reported rates of senior violent victimization increased 22% between 2010 and 2020, and rate increases were observed for both women (+18%) and men (+25%).[29]

### 1.2.3 Difficulty in Justice System Participation

The victimization of seniors in Canada presents challenges for the criminal justice system. These challenges arise out of the interplay between the rules around testimonial capacity, prosecutorial considerations of Crown counsel, and the physical and cognitive changes that become more prevalent with age. However, these challenges are neither new nor insurmountable. Criminal justice system participants dealt with similar challenges in the context of the victimization of children and intimate partner violence. Efforts were made in these areas to support the participation of victims in the criminal justice system, such as the development of policies on intimate partner violence.[30] Similar support for vulnerable adult witnesses would increase reporting of offences and demonstrate that it is possible to support all witnesses while still protecting the rights of accused persons.

Historically, those who could not satisfy others that they had "testimonial competency", meaning the ability to understand the nature of swearing an oath or solemn affirmation, were not permitted to testify.[31] Children and persons living with a disability were considered to lack the requisite capacity as they were not able to satisfy the court that they understood the nature of the oath or solemn affirmation based on abstract questions that did not accommodate their abilities.[32] A vulnerable witness or victim lacking testimonial capacity was unable to testify and the perpetrator was not held accountable.[33]

[25] *Supra*, note 3, Grant, at 59.
[26] Adam Cotter, "Criminal victimization in Canada, 2019", Canadian Centre for Justice and Community Safety Statistics (25 August 2021), online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00014-eng.htm ("**Cotter**").
[27] *Supra*, note 20, Pillemer, at S197.
[28] *Ibid*, Pillemer, at S197; *Supra*, note 2, Conroy.
[29] *Supra*, note 2, Conroy.
[30] Community Coordination for Women's Safety and Ending Violence Association of BC, "CCWS Backgrounder: Crown Intimate Partner Violence Policy (IPV 1)" (2019), online: https://endingviolence.org/wp-content/uploads/2022/07/CCWS-Backgrounder-Crown-IPV-Policy_vF_31032019.pdf.
[31] Benjamin Perrin, Victim Law: The Law of Victims of Crime in Canada (Toronto: Thompson Reuters Canada, 2017) at 98 ("**Perrin**").
[32] *Ibid*, Perrin, at 98.
[33] *Ibid*, Perrin, at 98.

Victims with dementia or other age-related cognitive impairments may be non-verbal, making testimony difficult at best.[34] A victim who lives with dementia and is non-verbal may be able to give behavioural indications of distress but is unlikely to be able to testify, making prosecution likely fruitless unless there is a third-party witness to the actual abuse.[35] In these scenarios, perpetrators of sexual assaults can avoid criminal prosecution if they are able to avoid any witnesses to the abuse.[36]

Research indicates that accommodations for vulnerable adults to testify in a manner that adjusts to their abilities are not readily made. In particular, judges do not intervene to assist a witness with a disability in situations where they might have been expected to, such as to ensure that a witness with an intellectual disability understood a question or how they were able to respond to a question.[37] Further, judges in some scenarios could have intervened by asking counsel to use simpler language or call for breaks when a witness with a disability appeared in need.[38]

Lawyers' questioning of witnesses with disabilities in a similar, if not the same, manner to those witnesses without a disability displays a similar lack of accommodation.[39] Our criminal trial process calls for an adversarial approach, but lawyers conducting both direct and cross-examinations without taking the time or making an effort to understand the needs of a witness or victim with a disability may create confusion and lead to an unfair and inefficient process.[40]

### 1.3 Outline of this Study Paper

In Chapter 2, we provide an overview of the Canadian legal landscape, including the relevant legislative elements of the criminal justice system. We also assess relevant pieces of human rights legislation, including the implications of international human rights instruments in upholding the rights of vulnerable adults as participants in the criminal justice system. From this background, we introduce the different justice system participants with whom vulnerable adults have contact throughout the flow of a criminal matter.

In Chapter 3, we examine the policies and legislation that guide how justice system participants interact with and manage a file that includes a vulnerable witness. For the purposes of this paper, we focus on the police, Crown counsel, and victim services. These are the three professions that have the greatest interactions with vulnerable adults as witnesses or victims. We do, however, understand that defence counsel and the judiciary have important roles in the trial process and address these roles in Chapter 6: Model Policy Language.

In Chapter 4, we provide an overview of systems in place in the United Kingdom (UK), chosen on the basis that its criminal justice system is similar to Canada's. The UK employs certain practices that we see as a potential

[34] *Supra*, note 3, Grant, at 62.
[35] *Ibid*, Grant, at 62.
[36] *Ibid*, Grant, at 62.
[37] Janine Benedet & Isabel Grant, "Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases" (2012) 50 Osgoode Hall LJ 1 at para 32 -33 ("**Benedet**").
[38] *Ibid*, Benedet, at para 32 -33.
[39] *Ibid*, Benedet, at para 32 -33.
[40] *Ibid*, Benedet, at para 32 -33.

framework to further support vulnerable adults navigating the criminal justice system in BC. Further, the UK's internal policies demonstrate strong protections for the human rights for those with disabilities that may be adaptable to future iterations of Crown Counsel Policy Manuals in BC.

In Chapter 5, we provide our assessment of the barriers facing vulnerable adults and key players in BC based on our conversations with informants. After outlining these barriers, in Chapter 6 we outline best practices from other jurisdictions, assessing where they fit within the trial process and how they address the barriers and issues that impede professionals and affect vulnerable adults. From this, we suggest best practices for Crown Counsel and other stakeholders generally and highlight the need for further reflection on policy and legislative amendments. We conclude that such changes will not only further the goals of upholding the rights of vulnerable adults but may further serve to increase trust in the criminal justice system and improve timely reporting of incidents of crime against, or witnessed by, vulnerable adults.

# Chapter 2. Canadian Legal Landscape

## 2.1 Criminal Law

### 2.1.1 Basics

Within Canada, there are certain areas of law over which the federal government has authority and areas in which provinces and territories have authority. This division of powers is set out in Canada's Constitution.[41] Under the Constitution, the federal government has jurisdiction over criminal law and provinces and territories have jurisdiction over the administration of justice.[42] The practical effect of this division of power is that both levels of government are involved in the criminal justice process. This can be a source of confusion for victims and witnesses trying to find support and information, as it can be scattered across many different government offices.

For example, some areas of overlap include:

- VICTIM'S RIGHTS - The Federal government has the Canadian Victims Bill of Rights.[43] The provinces also have victim's rights legislation. For example, BC has the Victims of Crime Act.[44]
- POLICING - The Federal government has the Royal Canadian Mounted Police (RCMP), which has its own governing federal law. The provincial governments have laws about provincial police forces. However, provinces often contract the federal RCMP to do provincial police work. This means that both federal and provincial police forces are active in many provinces, and they are governed by different or overlapping laws, policies, and procedures.
- PROSECUTION - There are federal and provincial courts, as well as federal and provincial Crown counsel, that deal with criminal matters within their jurisdiction. For example, the provincial court cannot hold a murder trial.

### 2.1.2 Key Players

Criminal law and victim support roles are fulfilled by different professionals, such as police, Crown counsel, and victim services. These players have different obligations under the laws discussed in this Chapter.[45] We provide a more fulsome examination of each of these key players in Chapter 3.

#### Police

There are three kinds of police forces in British Columbia. The first is the Royal Canadian Mounted Police ("RCMP"). The RCMP is a federal organization, not a provincial organization. However, BC has an agreement with the RCMP to provide policing services in most of the province.[46]

Certain cities have their own police forces, called municipal forces. These are based in a particular community, rather than at the provincial or federal level, and are not part of the RCMP. Some examples include Vancouver, Nelson, and

[41]Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 ("Constitution Act").
[42]Ibid, Constitution Act, ss 91(27), 92(13) and (14).
[43]Supra, note 13, CVBR, s 2.
[44]Victims of Crime Act, RSBC 1996, c 478 ("VCA").
[45]Supra, note 31, Perrin, at 497.
[46]British Columbia, Schedule A Province of British Columbia Provincial Police Service Agreement (1 April 2012).

Abbotsford.[47] These municipal police forces appear to have their own policies regarding elder abuse and abuse of vulnerable adults.

First Nations can also have police forces. In BC, there is one First Nations force, which is the Stl'atl'imx (Stat-la-mic) Tribal Police Service. [48]

As in BC, other provinces and territories have a mix of police forces, including municipal police forces, provincial police forces in Ontario and Quebec, Indigenous police forces, and RCMP operating within select jurisdictions.

### Objectives & Scope

The police in British Columbia have three components to their role:[49]

- maintain law and order;
- enforce the law; and
- prevent crime.

The British Columbia Police Code of Ethics neatly outlines the goals of police in the province. Namely, "to protect lives and property, preserve peace and good order, prevent crime, detect and apprehend offenders and enforce the law, while at the same time protecting the rights and freedoms of all persons as guaranteed in our Charter of Rights and Freedoms." [50]

### Training Requirements

Both the RCMP and municipal policing forces require that applicants have completed high school and have a valid driver's license.[51] Beyond this, training appears to be managed by the force. For example, the RCMP has a training program based in Regina, Saskatchewan.[52] Further requirements are set out in the BC Provincial Policing Standards. [53]

The Provincial Policing Standards include training requirements on vulnerable populations; however, this is limited to Indigenous perspectives, trauma

[47]Province of British Columbia, "BC Police Forces", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/bc-police-forces.
[48]Province of British Columbia, "First Nations Policing", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/the-structure-of-police-services-in-bc/first-nations.
[49]British Columbia, Ministry of Justice, BC Police Board Handbook: Resource Document on Roles and Responsibilities Under the Police Act (2015), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/boards/bc-police-board-handbook.pdf.
[50]Justice Institute of British Columbia, "BC Police Code of Ethics", online: https://www.jibc.ca/sites/default/files/2020-04/BC_POLICE_CODE_OF_ETHICS.pdf.
[51]Vancouver Police Department, "Become a Vancouver Police Officer", online: https://vpd.ca/join-us/recruiting/become-a-vancouver-police-officer/; Royal Canadian Mounted Police, "Qualifications and Standards to Become an RCMP Officer", online: https://www.rcmp-grc.gc.ca/en/qualifications-and-requirements.
[52]Royal Canadian Mounted Police, "Cadet Training Program Brief Overview", online: https://www.rcmp-grc.gc.ca/depot/ctp-pfc/index-eng.htm.
[53]Province of British Columbia, "Provincial Policing Standards", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/policing-standards.

informed practice, and violence in relationships.[54] Human rights are mentioned as a key consideration in the guiding principles associated with these policies. However, they do not mention other vulnerable populations, e.g., adults living with disabilities or diminished capacity, or older adults subjected to violence or neglect.[55]

As in other provinces, the police provide their own specialized training for candidates. The Ontario Provincial Police provide 20 weeks of police training at their specialized academy. [56] Informants in the Ontario police force stated that there is no specialized training for police officers on capacity or vulnerable victims.

## Crown Counsel

### Objectives & Scope

Crown counsel has a unique role as a prosecutor of crime. Most lawyers have an identifiable client. Thus, it may be natural to think of the victim of a crime as the client. However, Crown counsel represent the wider community rather than a specific victim.[57]

The Constitution[58] grants authority and duty to prosecute crimes to the Crown (also known as the "Sovereign").[59] The Sovereign has delegated this authority and duty to the Attorney General, ("AG") who in turn employ lawyers called Crown counsel, who "exercise the prosecution function on the AG's behalf as their lawful agents." [60]

### Federal Versus Provincial Crown Counsel

Crown counsel can be either federal or provincial. The Public Prosecution Service of Canada ("PPSC") is the federal contingent.[61] The PPSC is responsible for prosecuting cases under federal laws. A primary example is the prosecution of drug offences under the Controlled Drugs and Substances Act.[62]

The provinces also have independent Crown counsel. These are the focus of this paper. The provincial Crown counsel prosecute crimes under the *Criminal Code* in their respective provinces.

[54]Province of British Columbia, "Training to Enhance Service Delivery to Vulnerable Communities", online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/3-2-6-train-service-vulnerable.pdf. Effective 2022 and 2024.
[55]Province of British Columbia, "Guiding Principles Related to Provincial Policing Standards", online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/6-1-principles.pdf.
[56]Ontario Provincial Police, "What Happens After You're Sworn-in", online: https://www.opp.ca/index.php?id=115&entryid=6170402b2c140b41d8710fb3.
[57]BC Prosecution Service, "Role of Crown Counsel", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/about.
[58]*Supra*, note 10, Krieger, at para 26, referring to sections 135 and 63.
[59]BC Prosecution Service, "Crown Counsel Policy Manual: Guiding Principles" (20 May 2022) at 1, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/gui-1.pdf ("Guiding Principles").
[60]*Ibid*, Guiding Principles, at 1.
[61]*Supra*, note 7, PPSC.
[62]*Ibid*, PPSC.

### Training Requirements

Crown counsel are lawyers qualified to practice law in the province they work in. To become a lawyer in most Canadian provinces, a person must:

- obtain a four-year undergraduate degree in a topic of their choice;
- complete three years of law school;
- article (i.e., work under supervision) for one year; and
- pass the provincial competency program, which may include courses or exams.

Crown counsel job application postings across Canada do not require other specialized training.[63]

Once a person has passed these steps, they must become a member of the provincial or territorial law society, which oversees and regulates lawyers.[64] If anyone makes a complaint about a lawyer, it is the role of the law society to discipline the lawyer (if appropriate). Crown counsel must be 'in good standing' with their local law society. This means they are not suspended from practicing law.[65]

## Victim Services

In the criminal law system, the victim is not a party to the case. This means that victims cannot directly enforce their rights or decisions, which raises the need for victim services.[66] The federal, territorial, and provincial governments all have legislation concerning services to victims.

Victim service workers usually assist with the delivery of rights and entitlements to victims under these laws. For example, victim service workers provide required information to victims and assist with victim impact statements.

### History

There are several kinds of victim service programs across Canada. The first type is police-based. This means that the victim service workers are part of police services. Victim service workers may share an office with police in this type of program.[67]

The second type is community-based. In this situation, victim service workers

[63]See for example this Crown Counsel posting from Ontario: https://www.gojobs.gov.on.ca/Preview.aspx?Language=English&JobID=181079.
[64]See: Law Society of British Columbia, "About Us", online: https://www.lawsociety.bc.ca/about-us/.
[65]See: Law Society of British Columbia, "Part 2- Membership and Authority to Practice Law", online: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/part-2-%E2%80%93-membership-and-authority-to-practise-law/.
[66]*Supra*, note 31, Perrin, at 497.
[67]Ministry of Public Safety and Solicitor General, "Victims of Crime: Victim Service Worker Handbook" (2009) at 5, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/victim-service-worker-victims-of-crime.pdf ("VSW Handbook].

are part of a community agency, usually with a specific focus. For example, a charity that works with vulnerable adults may have a victim services program. These programs are not integrated with police, but police may refer individuals to them.

The third type is court-based victim services. These services are usually located within a courthouse. Ontario's Victim/Witness Assistance Program, offered by the Ministry of the Attorney General, is an example of court-based victim services.[68]

### Objectives & Scope

The Police Based Victim Services of BC state their objective as ensuring "[a]ll victims of crime and trauma across BC receive compassionate, professional, and consistent services."[69]

The scope of services provided by victim services will depend on the structure of the program (e.g., police-based or community-based). However, some of the tasks of victim service workers include:[70]

- critical incidence response (e.g., responding to call outs from police and the public);
- providing information about the criminal justice system (e.g., explaining victim's rights, supporting people through the court system, accompanying a victim to court, helping a victim with their impact statement);
- referring victims to other organizations that meet their needs (e.g., housing, transport); or
- emotional support (e.g., active listening, trauma informed support).

### Training Requirements

Requirements for victim services workers vary across jurisdictions and across organization type. However, in BC victim service workers are generally required to have an undergraduate degree in social work or a related field.[71]

In BC, specific training is offered to newly hired victim service workers through Justice System E-learning.[72] This programming is available to both police-based and community-based victim services workers.

The government of British Columbia has training resources on its website.[73]

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[68]Government of Ontario, "Victim/Witness Assistance Program", online: https://www.ontario.ca/page/victimwitness-assistance-program.
[69]Ian Batey & Anita Eilander, "Presentations on Police Act: Police Victim Services of BC" in British Columbia, Legislative Assembly, Special Committee on Reforming the Police Act, *Report of Proceedings (Hansard)*, 42nd Parl, 1st Sess (12 March 2021), online: https://www.leg.bc.ca/content/HansardCommittee/42nd1st/rpa/20210312am-PoliceActReform-Virtual-n14.pdf ("**Batey**").
[70]*Ibid*, Batey.
[71]Job postings for both police-based and community-based victim service workers have this requirement.
[72]Government of British Columbia,"Victim Services Service Providers Training", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/service-providers/training#victim-handbook ("**BC Victim Services Training**").
[73]*Ibid*, BC Victim Services Training.

When asked about policies or guiding principles, informants often referred to trauma informed practice training. Unfortunately, this online training is not publicly available, so other professionals cannot view it.

### 2.1.3 Relevant Elements of Criminal Law

There are several elements of criminal law which create challenges for vulnerable adult victims and witnesses.

**Competence to Testify**

The law can place restrictions on who is competent to give evidence in court. Due to the historical categorization of certain groups of people as not having testimonial competence, such as children and people with disabilities, their susceptibility to being victims of crime was amplified.[74] Over time, the categories of people considered incompetent to give evidence in court have changed.[75] However, stereotypes persist such that certain groups of people continue to be viewed as less worthy of belief. Further, the abilities of a person may influence how a criminal justice system professional perceives both their mental capacity and in turn their competence to testify.

In criminal cases, the test for whether someone is competent to testify is currently governed by the *Canada Evidence Act*.[76] Under the *Canada Evidence Act*, all persons are presumed to be competent to testify. It is only if a party to the case challenges a witness's ability to testify that the court will make an inquiry as to their competency. If this happens, the party who challenges the witness's capacity bears the burden of demonstrating to the court that there is an issue with the proposed witness's ability to testify.[77]

When the competency of an adult witness is challenged, the court must inquire as to whether the witness understands the nature of an oath or solemn affirmation and is able to communicate the evidence.[78] If the witness is able to communicate the evidence but does not understand the nature of an oath or solemn affirmation, they can still testify on a promise to tell the truth.[79] It is only where a person neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence that they will not be permitted to testify.[80]

The ability to communicate the evidence means the person has the ability to perceive, remember, and recount the events to the court. This assessment is best made at trial; therefore, the procedure often followed is to allow a witness who appears to have competency to testify to do so and to allow any deficiencies in their perception or recollection to be explored while they testify.[81]

[74] *Supra*, note 31, Perrin, at 98.
[75] *Supra*, note 15, Paciocco, at 520-521.
[76] *Canada Evidence Act*, RSC 1985, c C-5 ("**CEA**"). Section 16 applies to witnesses fourteen years of age and older and section 16.1 applies to witnesses under the age of fourteen years.
[77] *Ibid*, CEA, s 16(5).
[78] *Ibid*, CEA, s 16(1).
[79] *Ibid*, CEA, s 16(3).
[80] *Ibid*, CEA, s 16(4).
[81] *R v Marquard*, [1993] SCJ No 119 at para 12 ("**Marquard**").

If communication is difficult for a witness due to a physical or mental disability, they may nonetheless testify "by any means that enables the evidence to be intelligible".[82] This has been applied to include sign language interpretation.[83]

**Credibility, Reliability, and the Criminal Law Standard of Proof**

Although each witness must swear an oath or promise to tell the truth, there is no presumption that everything a witness says is truthful. In criminal law, the standard of proof is beyond a reasonable doubt. This means that the factfinder, meaning the judge or jury depending on the mode of trial, must consider all the evidence. If after doing so, the factfinder has a reasonable doubt as to whether the accused committed the offence, they must find the accused not guilty.[84] As it relates to each individual witness, the judge or jurors may decide to accept all, some, or none of what each witness says. Ultimately, the factfinder needs to assess the evidence as a whole when deciding whether the Crown has met its burden.

The phrase "beyond a reasonable doubt" can be challenging to define. However, these are considered some key elements of what this standard of proof means:

- reasonable doubt is one based on reason and common sense, logically derived from evidence or absence of evidence;
- a belief that the accused is probably guilty is insufficient;
- the Crown does not have to prove the accused is guilty with absolute certainty; and
- the standard of proof required is much closer to absolute certainty than to probable guilt.[85]

The requirement to prove all elements of an offence beyond a reasonable doubt is a high standard.

Several informants indicated this high standard as a barrier to cases involving vulnerable victims. The outcome of a case will turn on how credible and reliable the evidence is. Credibility refers to how worthy of belief a witness is. Reliability has to do with a witness's ability to observe, recall and recount the incident they are testifying to.

If a witness requires accommodations or cannot be cross-examined, their evidence may be given less weight, making it less likely the high standard will be met.[86] Prior to the approval of charges, the police and Crown counsel will also consider how credible and reliable they consider each witness to be. If the primary witness is seen as having capacity issues that may make it difficult to meet the high standard of proof in a criminal case, the case may not be referred to Crown counsel by the police or approved for charges by Crown counsel in the first place.

[82] *Supra*, note 76, *CEA*, s 6.
[83] *R. v Carlick*, [1999] BCJ No 1144 (BCSC) at para 45 ("**Carlick**").
[84] *R v Lifchus*, [1997] 3 SCR 320 at 335; John A Yogis et al, Barron's Canadian Law Dictionary, 6th ed (Hauppauge NY: Barron's Educational Series, 2009) ("**Yogis**").
[85] Halsbury's Laws of Canada (online), *Evidence* "The Burden of Proof and Related Issues: Burden and Quantum of Proof: Criminal and Other Penal Proceedings" (III.1(3)) at HEV-68 "Quantum of Proof at Trial" ("**Halsbury**").
[86] *Supra*, note 4, Beaudry, at 275.

## Questioning of Witnesses

In a criminal trial, a witness may give evidence for either the Crown or the defence (the accused). When the lawyer is asking their own witness questions, this is direct examination. When the lawyer is asking the other side's witness questions, this is cross-examination.
Several informants indicated that the style and method of questioning in criminal court is problematic for vulnerable adults.

For example, some general concerns with questioning include:[87]

- too much information or irrelevant information can cause confusion;
- phrasing can be confusing;
- trick questions can make the person unsure how to respond;
- repeated questions can make a vulnerable adult more likely to engage in confabulation or provide inaccurate information; and
- if questions are very rapid, it can be overwhelming.

In addition, vulnerable adults are more likely to struggle with: [88]

- memory;
- the ability to understand difficult concepts;
- the ability to clearly share information;
- suggestibility and desire to please; and/or
- difficulties in picking up on social cues.

Cross-examination can be especially challenging for vulnerable adults because the questions can be very confusing, rapid, and aggressive. However, "cross-examination is seen as a fundamental part of our common law adversarial system."[89] Cross-examination is a necessary part of a fair trial. The difficult style of questioning is also viewed as a truth-seeking method because the questions "cast doubt upon the accuracy of the evidence given in chief by the witness."[90]

Unfortunately, this does not take into account vulnerable adult witnesses. There is an important difference between a confused or overwhelmed witness and one who is lying.[91]

When a witness struggles with or is unable to undergo cross-examination, it can have serious consequences for the trial. For example, in the case of R v. Wyatt the witness could not be cross-examined without emotional breakdown.

In ruling that the case could not go forward, the trial judge noted:[92]

[87]Joanne Morrison, Jill Bradshaw & Glynis Murphy, "Reported Communication Challenges for Adult Witnesses with Intellectual Disabilities Giving Evidence in Court" (2021) 25:4 Int'l J Evidence & Proof 243 at 248 ("**Morrison**").
[88]*Ibid*, Morrison, at 248, 250.
[89]*Supra*, note 37, Benedet, at para 15.
[90]*Ibid*, Benedet.
[91]*Ibid*, Benedet, at 16.
[92]*R v Wyatt*, 1997 BCJ No 781, at para 32 ("***Wyatt***") [emphasis removed].

*"I find the results very disturbing. I find them disturbing not because I am judging this accused guilty or even possibly guilty or likely guilty or none of the above. What I find enormously disturbing about the present circumstance is that we have a young woman who has a complaint, rightly or wrongly, who by her condition and disabilities and because of the nature of the process of this court will be denied an opportunity to have a full and fair hearing on that complaint. Effectively she will be denied access to the courts because of her inability to participate in the process."*

### 2.1.4 Relevant Criminal Code Provisions

The Criminal Code contains several provisions which support vulnerable adults in their capacity by allowing for accommodations like a support person or a separate space to testify outside of the courtroom. These are known as testimonial aids and every victim has a right to request them.[93] These sections are often mandatory where an individual has a mental or physical disability.

Despite this, according to informants, testimonial aids are inconsistently used for vulnerable adult witnesses. Informants noted an unwillingness on the part of some Crown counsel to support applications for the use of testimonial aids for adult witnesses regardless of their vulnerabilities or barriers and an insistence on in-person attendance rather than requesting an accommodation to allow testimony by CCTV. The only context in which informants reported some willingness on the part of some Crown counsel to support applications for testimonial aids was in cases involving sexual assault.

This is supported by academic research on the use of testimonial aids to support seniors in testifying. A review of reported Canadian case law involving the use of accommodations in both civil and criminal cases found that testimonial accommodations are rarely used to support senior witnesses in comparison to witnesses of other age groups. The use of accommodations to support seniors was even less frequent in criminal cases than civil cases reviewed. The one exception to this was the use of the principled exception to hearsay, which appears from case law to be used more regularly to admit statements from seniors made out of court.[94]

The lack of use of accommodations to support elderly witnesses may be because of negative perceptions connected with the use of testimonial aids. For example, judges may perceive the evidence of a witness who uses testimonial aids as less rigorous than other evidence.[95]

[93] *Supra*, note 13, *CVBR*, s 2.
[94] Helene Love, "Seniors on the Stand: Accommodating Older Witnesses in Adversarial Trials" (2019) 97:2 Can Bar Rev 240 at 266-270 ("**Love 2019**"). The rule against hearsay provides that any out of court statement, which is given in evidence for the truth of the statement, is presumptively inadmissible at trial. The principled exception to this rule provides that where an individual is unable to testify, due to death or a loss of competence, their out of court statement can be admitted at trial for its truth if the statement is sufficiently necessary and reliable: *R v Khelawon*, 2006 SCC 57.
[95] *Supra*, note 4, Beaudry, at 275.

In addition, applications for testimonial aids require time and resources from Crown counsel. The provisions require Crown counsel to gather evidence and make an application. The process for this application can vary across Canada.[96]

Some accommodations are not possible in smaller towns. For example, the technology or space may simply not be available to allow a witness to use an aid like closed circuit television.[97]

### Section 486 Exclusion Of Public

In general, court proceedings must be open to the public. However, there are exceptions to this rule. A judge may exclude the public from court proceedings, or order that a witness testify behind a screen or similar device.
A judge making such an order must consider, for example:

- encouragement of reporting, and the participation of witnesses;
- the impact on a witness's ability to testify if the order is not made;
- whether protection of the witness requires the order (e.g., to guard against retaliation); and
- if there are other options that could achieve the same effect.

All orders must consider the Canadian Charter of Rights and Freedoms and must be as limited as possible.[98] Exclusion orders have been granted in cases involving allegations of sexual assault on the basis that the order was necessary to the administration of justice. In one case, an exclusion order was granted where a judge found the victim would have been too nervous to testify without the order in place.[99]

### Section 486.1 Support Person Witnesses Under 18 Or Who Have A Disability

Vulnerable victims often turn to prosecutors for support and advocacy.

As prosecutors do not represent individual victims, it is usually more helpful to connect a victim with a support person who is better equipped to provide the victim with the support and security they require.[100] This could be a victim support worker who is equipped to support the witness throughout the trial process. It could also be a person who, with permission from the court, accompanies the witness while they testify to provide emotional and moral support.

Section 486.1 of the Criminal Code allows for a support person to sit near a witness during their testimony. If the witness has a mental or physical disability,

[96]Canada, Department of Justice, *Vulnerable Adult Witnesses: The Perceptions and Experiences of Crown Prosecutors and Victim Services Providers in the Use of Testimonial Support Provisions* (Ottawa: Minister of Justice and Attorney General of Canada, 2013) at 3-4 ("**DOJ Vulnerable Adult Witnesses**").
[97]*Ibid*, DOJ Vulnerable Adult Witnesses.
[98]Marie Henein, The Honorable Justice Marc Rosenberg & Edward L Greenspan, QC, *Martin's Annual Criminal Code 2022* (Toronto: Thomson Reuters Canada Limited, 2021) at 912 ("**Martin's**").
[99]*Ibid*, Martin's, at 913.
[100]Nisha Sikka and Myrna McCallum, "Trauma-Informed Practice in the Courtroom" in *Trauma-Informed Legal Practice Toolkit* (Vancouver: Golden Eagle Rising Society, 2020) 44 at 49-50 ("**Sikka**").

the judge must make the order unless it would interfere with the administration of justice. [101]

There are some limitations. For example, a support person may not also be a witness (unless the judge believes it is necessary for the administration of justice).[102] Such accommodation may create problems. Often, a vulnerable adult will want a close friend or family member to act as their support person; however, the close friend or family member may also have witnessed the crime. This is especially likely in cases of abuse. If the chosen support person is a witness, there remains a possibility that they may be permitted to accompany the vulnerable witness during their testimony if the support person completes their testimony and cross-examination first.[103] Where possible, selecting a support person who is not also a witness would likely present fewer challenges.

### Section 486.2 Testimony Outside Court Room Witnesses Under 18 Or Who Have A Disability

A vulnerable victim or witness may request to testify from outside of the court room.

Like the previous provision, a judge must make this type of order where a witness can communicate, but "may have difficulty doing so by reason of a mental or physical disability."[104] In other situations, a judge may still make an order for testimony outside the courtroom if satisfied that doing so would facilitate the witness in giving a full and candid account of their evidence.[105] This accommodation may help a witness in providing evidence if they have mobility issues or face other challenges in attending court in person. The accused person must still be able to view the witness testifying by closed-circuit television or by other means with their lawyer present.[106]

Several informants working with vulnerable and older adults noted that it would be helpful to allow vulnerable witnesses to testify from home. For example, one informant indicated that the travel time, unfamiliar surroundings, difficulties accessing the courthouse due to physical disabilities, and disruption of routine all could potentially impact a vulnerable adult's capacity to testify.

### Section 715 Evidence At Preliminary Inquiry May Be Read At Trial In Certain Cases

Lengthy timelines associated with criminal trials can cause serious concerns for individuals with mental and physical illnesses. Degenerative and progressive illnesses like dementia are of particular concern.

There are ways to preserve a vulnerable adult's evidence. For example, evidence may be preserved from a previous trial, investigation, or a preliminary inquiry.[107]

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[101] *Supra*, note 16, Criminal Code, s 486.1(1).
[102] *Ibid*, *Criminal Code*, s 486.1(4).
[103] See for example: *R v C* (D), 2008 NSCA 105.
[104] *Supra*, note 16, *Criminal Code*, s 486.2(1). See also: *R v Alam*, 2006 ONCJ 593, in which the Judge deals with this provision directly. For example, use of the word 'may' indicates that no evidence is required that the vulnerable adult will actually struggle to testify.
[105] *Ibid*, *Criminal Code*, s 486.2(2).
[106] *Ibid*, *Criminal Code*, s 486.2(5).
[107] *Ibid*, *Criminal Code*, ss. 715(1) and 715.2(1). A preliminary inquiry is a hearing held in some serious cases to determine whether there is enough evidence to proceed to trial. Not all trials involve a preliminary inquiry.

Evidence can also be taken in advance of a trial by a commissioner if a witness is unlikely to be able to testify at the time of the trial due to a physical disability arising out of illness or another good and sufficient cause, such as where a witness dies, loses capacity, or is too ill to travel or testify.[108] Where evidence is given in one of these scenarios, it may be used later in some circumstances. If the accused was present and able to cross-examine on the evidence, it can be admitted without further proof.

### Section 715.2(1) Evidence Of Victim Or Witness Who Has A Disability

Section 715.2 allows for a video recording of a witness's account to be subsequently adopted by the witness as their evidence while testifying at trial. This particular accommodation applies to witnesses who can communicate their evidence but may have difficulty doing so due to a physical or mental disability.

The video must meet certain requirements. For example, the victim must:

- describe what happened (i.e., the alleged crime);
- adopt the video in their testimony at trial;[109] and
- have recorded the video within a reasonable time after the offense was committed.

Adoption of the video requires that a victim or witness confirm:[110]

- they made the statement;
- they were trying to tell the truth at the time; and
- they still believe the contents of the statement are true.

## Protective Provisions

The *Criminal Code* contains several sections that are designed to protect vulnerable witnesses outside of the court setting. There are two main types of protective provisions. First, those that protect the witness from the accused. Second, those that protect the identity of the witness in some way. These sections are helpful to vulnerable adults experiencing or witnessing abuse, as they are meant to both account for a person's needs and risk.

### Accused Not To Cross-Examine Complainant – Certain Offences

In the trial of certain offences, an accused person who is self-representing may not be permitted to conduct the cross-examination of the complainant personally. Those offences include harassment, sexual assault,[111] sexual assault with a weapon, or aggravated sexual assault. The witness or Crown counsel makes this application. If the offence is not in the listed offences, it is still possible for such an application to be made on behalf of the witness; a judge then determines if the order upholds the proper administration of justice, including whether it aids the witness in giving full and candid testimony.[112]

[108] *Ibid*, *Criminal Code*, s 709.
[109] The witness does not have to confirm the truth of the recording at trial. See: *R v Osborne*, (2017) 346 CCC (3d) 77 (Ont CA).
[110] *Supra*, note 31, Perrin, at 123.
[111] *Supra*, note 16, *Criminal Code*, s 486.3(2).
[112] *Ibid*, *Criminal Code*, s 486.3(3).

In making an order, a judge will consider:

- the age of the witness;
- the mental or physical disabilities of the witness, if any;
- the nature of the offence;
- the witness's need for security or protection from intimidation or retaliation;
- the nature of the relationship between the accused and witness;
- the interest of society in pursuing justice, including the reporting of offences and participation of the witness; and
- any other factors the judge considers relevant.[113]

For a vulnerable witness or victim, not having the accused conduct the cross-examination decreases the risk of intimidation. This is particularly true in the case of a victim testifying, as the accused conducting the cross-examination increases re-traumatization of the victim.

### Direct Indictment

One option for protecting vulnerable witnesses and victims is for Crown counsel to proceed on a charge by way of direct indictment.[114] Proceeding by direct indictment allows Crown counsel to take a matter directly to trial without a preliminary inquiry. Without a preliminary inquiry a vulnerable witness or victim does not have to testify twice, and the proceedings move quicker to trial.

Considerations for proceeding by direct indictment include a witness's physical or mental condition, risk of harm or intimidation, or if participation in multiple proceedings would impact the witness.[115]

### Non-Disclosure Of Victim Or Witness Identity

For a victim or witness of an offence of a sexual nature, a judge can make an order restricting any publication, broadcast, or transmission that may contain information that may identify the victim or witness.[116] If an offence is not of a sexual nature, Crown counsel or a witness can make an application that their identity not be disclosed during the proceedings if such an order is in the interests of the proper administration of justice.[117] Alternatively, Crown counsel, a witness, or victim can seek a publication ban order such that the order restricts the publication, broadcast, or transmission that may contain information as to the identity of the victim or witness.[118]

For a non-disclosure or publication ban order, a judge considers several factors, namely:

- the right to a fair and public hearing;
- whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
- whether the victim, witness or justice system participant needs the order for

[113] *Ibid*, *Criminal Code*, s 486.3(4).
[114] *Ibid*, *Criminal Code*, s 577.
[115] BC Prosecution Services, Crown Counsel Policy Manual, "Direct Indictment" at 2, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/dir-1.pdf.
[116] *Supra*, note 16, *Criminal Code*, s 486.4.
[117] *Ibid*, *Criminal Code*, s 486.31.
[118] *Ibid*, *Criminal Code*, s 486.5.

their security or to protect them from intimidation or retaliation;

- society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
- whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
- the salutary and deleterious effects of the proposed order;
- the impact of the proposed order on the freedom of expression of those affected by it; and
- any other factor that the judge or justice considers relevant.[119]

## 2.2 Human Rights

Between 2009 and 2013, forty-nine percent of all human rights complaints in Canada were disability related.[120] This prevalence of disability-related claims on the dockets of human rights tribunals points to a problem of accommodation in society, from which the justice system is not an exception. People with disabilities have the right to take part in the justice system. This includes going to court, taking others to court, and working with the police and court systems.[121]

Despite the testimonial aids discussed above, several informants indicated that accommodation is still a serious problem. Informants shared that many cases do not go forward at an investigational or prosecutorial level because there is not enough other evidence, or there are serious concerns that the witness will not be able to undergo the trial process and provide their evidence.

This means that vulnerable adults are being denied the ability and the right to actively seek justice because they struggle as much with the court process itself as being an active participant worthy of being believed, much like in the case of R v Wyatt.

### 2.2.1 Human rights In Canada

In Canada, certain federal and provincial laws protect people from differential or discriminatory treatment based on certain characteristics (also known as protected grounds). Some examples of protected grounds include age, mental or physical disability, family status, race, colour, or place of origin.[122] These human rights laws allow all people, including persons with disabilities, to "bring a claim

[119] *Ibid*, *Criminal Code*, ss 486.31(3) and 486.5.
[120] Canadian Human Rights Commission, "The Rights of Persons with Disabilities to Equality and Non-Discrimination: Monitoring the Implementation of the UN Convention of the Rights of Persons with Disabilities in Canada" (2015) at 7, online: https://www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/chrc_un_crpd_report_eng.pdf ("**CHRC Report**").
[121] Office of the United Nations High Commissioner for Human Rights, *Right to Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights*, UNGAOR, 37th Sess, UN Doc A/HRC/37/25 (2017), online: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/37/25&Lang=E.
[122] Russel W Zinn, *Law of Human Rights in Canada* (Toronto: Canada Law Book, 1998) (loose-leaf updated May 2015) ("**Zinn**").

before federal, territorial and provincial independent administrative tribunals, human rights commissions and tribunals or courts to enforce their rights."[123]

Canadian human rights law, while having some variations depending on jurisdiction and manner of implementation, is based on both national and international frameworks. Different laws may have different protected grounds (e.g., some laws protect against discrimination on criminal records, while some do not), may apply to different entities (e.g., some laws apply only to the government, while others apply to private businesses), or may apply to different situations (e.g., employment, housing). This section will outline these frameworks and their impact on the protection of rights of vulnerable victims and witnesses.

### Charter of Rights and Freedoms

Section 15 of the Canadian Charter of Rights and Freedoms states that every individual in Canada is equal, regardless of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[124] The Charter only applies to laws and programs of the government, including the judicial system. Section 15(2) allows the government to create laws and programs to support disadvantaged groups, such as the testimonial aids discussed above.

### The Canadian Human Rights Act

Section 3 of the Canadian Human Rights Act prohibits discrimination based on "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."[125]

Disability is defined to include a physical or mental disability.[126]

The *Canadian Human Rights Act* applies only to the federal government, First Nations governments and some other First Nations organizations, and companies that are federally regulated (e.g., banks).

It only applies to certain areas. Some examples include:

- if a person is employed by the federal government, a First Nation, or a company that is federally regulated; or
- if a person is discriminated against by the federal government, including federal Crown counsel, a First Nation, or a company that is federally regulated when that person is seeking to:
  - obtain goods, services, access to facilities or accommodations; or[127]
  - access commercial buildings or residential accommodation.

[123] *Supra*, note 120, CHRC Report, at 2.
[124] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 ("***Charter***").
[125] *Canadian Human Rights Act*, RSC 1985, c H-6 ("***CHRA***").
[126] *Ibid*, *CHRA*, s 5.
[127] *Ibid*, *CHRA*, s 5.

### Other Applicable Federal Legislation

As discussed previously, the government of Canada states that both the Criminal Code and Canada Evidence Act provide rights to people with disabilities, including the right to participate in court proceedings.[128]

### Provincial Human Rights Legislation

Each province and territory have their own human rights legislation. In BC, this legislation is called the Human Rights Code.[129]

Protection under this legislation is limited to certain areas.[130] For example, "[e]mployers, landlords, and people who provide a service to the public must try hard to accommodate the needs of disabled people."[131] The term "services" is quite broad and includes police services and access to healthcare.[132]

In addition, BC recently introduced the Accessible British Columbia Act[133] which will require that government and prescribed organizations develop and maintain an accessibility committee, accessibility plan, and a manner in which to receive public feedback.[134] In BC, each courthouse has an accessibility coordinator that can be contacted to access certain accommodations.[135] The provincial government has established the Provincial Accessibility Committee and Technical Committees for standards development.[136]

### Types of discrimination faced by Vulnerable Adults

Human rights law protects individuals with mental disabilities or advanced age from discrimination. Discrimination can take many different forms:

- Direct discrimination occurs when a rule or practice clearly discriminates against someone on a protected ground (e.g., if a rule stated that a person with dementia could not testify);[137]
- Adverse effect discrimination occurs when a rule or practice of general application has discriminatory consequences for individuals falling within a protected ground (e.g., if a rule states that to testify a person must be capable of making and understanding a solemn oath, then this effectively removes some children and individuals with disabilities);[138]

[128]Government of Canada, "Rights of People with Disabilities", online: https://www.canada.ca/en/canadian-heritage/services/rights-people-disabilities.html#a1c4; *Supra*, note 77, *CEA*, s 6; *Supra*, note 16, *Criminal Code*, ss 486, 709, and 715.2.
[129]Human Rights Code, RSBC 1996, c 210 ("*BC HRC*").
[130]Supra, note 122, Zinn, at 5-2.
[131]Government of British Columbia, "Human Rights in British Columbia: Discrimination Against People with Physical or Mental Disabilities" (2016) at 2, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/human-rights/human-rights-protection/disability.pdf.
[132]*Supra*, note 122, Zinn, at 2-21 to 2-22.
[133]*Accessible British Columbia Act*, SBC 2021, c 19 ("***ABCA***").
[134]*Ibid*, *ABCA*, ss 8, 9, 11, and 12.
[135]The Courts of British Columbia, "Court Locations & Contacts", online: https://www.bccourts.ca/supreme_court/court_locations_and_contacts.aspx.
[136]Government of British Columbia, "Accessibility Committees", online: https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/accessibility/committees/provincial-accessibility-committee#pac.
[137]*Supra*, note 122, Zinn, at 1-5.
[138]*Ibid*, Zinn, at 1-6.2.

- Systemic discrimination is often tied to stereotypes and longstanding beliefs. "Such discrimination has its roots, not in any deliberate desire to exclude from favor but in attitudes, prejudices, mindsets and habits which may have been acquired over generations."[139]

Informants have indicated that both adverse effect discrimination and systemic discrimination are impacting vulnerable adult victims and witnesses of crime. Some examples of discrimination against vulnerable adult victims and witnesses include:

- ***Judges and juries may give less weight to evidence from individuals using testimonial aids and other supports.*** Testimonial aids or supports may flag for a judge or jury that a person is vulnerable. This can activate stereotypes about the witness and trigger bias and assumptions about their capacity.[140] As a consequence, Crown counsel may fail to request testimonial aids to avoid the perception of incapacity. Thus, a vulnerable adult does not get the supports they need to testify.

  Several informants shared that requests for testimonial aids were never made. In 2011, there was a study on Canadian judges' experiences with use of testimonial aids. Two thirds of the judges stated that they have never received applications to use closed circuit TV.[141] The judges in the study did not receive any applications to use video-taped evidence over a five-year period.[142] A review of this area is warranted to determine if there have been any changes since this study.
- ***Individuals without the training in understanding capacity are in a gatekeeping role.*** Regardless of profession, most informants said they did not have training in understanding or assessing capacity. They also felt they lacked an understanding of conditions like dementia, brain injury, or fetal alcohol syndrome. Despite this, professionals must still make decisions about cases and whether files move forward. This means individuals without an understanding of disability are making decisions which directly impact the ability of vulnerable adults to participate in the criminal justice system.
- ***System constraints mean professionals do not have resources to service vulnerable adults.*** The criminal justice system is overtaxed. For example, the BC RCMP have outlined the barriers facing police in serving communities.[143] This includes issues like the remoteness of some communities, complexity of police work, lack of community supports, and increase in legal requirements which add paperwork and time to police investigations.[144] Crown counsel

[139] *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* (1985), 20 DLR (4th) 668 at 673.
[140] *Supra*, note 4, Beaudry, at 275.
[141] Canada, Canadian Research Institute for Law and the Family, *Department of Justice, Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary* at 53 ("Testimonial Support Provisions").
[142] *Ibid*, Testimonial Support Provisions, at 57.
[143] BC RCMP, "Written Submission to the Special Committee on Reforming the BC Police Act" (30 April 2021) at 16, online: https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/2nd-session/rpa/2021_07_29/BC-RCMP_Submission.pdf ("**BC RCMP Submission**").
[144] *Ibid*, BC RCMP Submission.

also have very heavy workloads. The court has long wait times for trials.[145] Informants said that cases involving vulnerable adults require considerably more time and resources. Some informants acknowledged that professionals may avoid cases with vulnerable adults because they simply do not have the time. Alternatively, professionals may only give the same time and attention as they do to other cases, which is not enough to support the capacity or accessibility of the vulnerable adult.

**Victims' Rights**

In both Canada and BC, victims of crime have specific rights outlined in the applicable legislation. As noted earlier, such an applicable statute is the federal Canadian Victims Bill of Rights.[146] *The Canadian Victims Bill of Rights* was passed in 2015 and is 'quasi-constitutional' in nature. This means that, much like human rights, it applies to other pieces of legislation.[147] The *Canadian Victims Bill of Rights* applies to the *Criminal Code and Canada Evidence Act*.[148]

The *Canadian Victims Bill of Rights* contains several key features:

- It acknowledges that victims of crime have rights guaranteed by the *Canadian Charter of Rights and Freedoms*.
- If a victim is incapable of acting, other (named) parties may exercise rights on their behalf.
- Victims have rights to:
  - **information** about the criminal justice system, available programs, investigations and proceedings, information about the accused, and how to lodge complaints;
  - **protection** from intimidation and retaliation, protection of their privacy and identity, and the right to request testimonial aids;
  - **participation** in the criminal justice process, including having their views heard on decisions in the case and in the form of a victim impact statement; and
  - **restitution**, where appropriate.[149]

*The Canadian Victims Bill of Rights* offers a great deal to victims of crime, but there are limitations to this. Under section 20, the rights listed above cannot interfere with the administration of justice. This includes causing excessive delay or interfering with either police, prosecutorial, or ministerial discretion.[150]

[145]Provincial Court of BC, "How We Are Accountable- BC Provincial Court's Time to Trial Reports" (23 August 2017), online: https://www.provincialcourt.bc.ca/enews/enews-22-08-2017.
[146]*Supra*, note 13, CVBR, s 2.
[147]*Supra*, note 31, Perrin, at 23.
[148]*Ibid*, Perrin, at 32.
[149]*Supra*, note 13, CVBR, s 2.
[150]*Ibid*, *CVBR*, s 2.

In BC, we have the Victims of Crime Act. This statute aims to meet certain goals, such as:

- developing and promoting victim services across BC;
- protecting victims against retaliation and intimidation;
- training justice system personnel to respond to the needs of victims; and
- ensuring that victims across BC have access to interpreters, cultural services, and accessibility features for physical disabilities.[151]

These goals do not mention access to justice for individuals with capacity issues.

Another limitation is that the government is only expected to promote these goals to "the extent that is practicable."[152] Thus, it is unlikely these are actual legal entitlements.[153]

Under the Victims of Crime Act, a victim has the right to receive information about:

- how the justice system works;
- how to apply for benefits under the Crime Victim Assistance Act (see below); and
- if requested,[154]
  - » the police investigation;
  - » what the accused is charged with or convicted of, and if charges are suspended, the reasoning;
  - » the date, time, and location of any court hearing that is important to the final outcome of the case;
  - » the outcome of important appearances;
  - » if the accused is sentenced, how long that sentence is for, and when it started; and
  - » other matters.

The Victims of Crime Act further states that Crown counsel must give the victim the opportunity to present evidence about the impact of an offence.[155]

### 2.2.2 UN Documents

Two international human rights instruments hold special importance for this project – *the Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* ("**Declaration**")[156] and the *Convention on the Rights of Persons*

[151] *Supra*, note 44, *VCA*, s 8.
[152] *Ibid*, *VCA*, s 8
[153] *Supra*, note 31, Perrin, at 225.
[154] *Supra*, note 44, *VCA*, s 6.
[155] *Ibid*, *VCA*, s 4.
[156] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 40th Sess, UN Doc A/RES/40/34 (1985) 213 ("***Declaration***").

*with Disabilities* ("**Convention**").[157] Both the *Declaration* and *Convention* influence the interpretation of Canadian legislation.

### Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power

The *Declaration* passed as a General Assembly resolution in 1985. The *Declaration* affirms that victims of crime:

- are provided with information about their case;[158]
- can express their views about the case;[159]
- have their privacy and safety protected;[160]
- receive supports and assistance (e.g., medical and psychological);[161] and
- be provided with options for restitution and compensation.[162]

Canadian human rights law and victim law appear to support the Declaration.[163]

### Convention on the Rights of Persons with Disabilities

The Convention came into force in 2008 and states that people with disabilities are capable and active members of society.[164] The purpose of the Convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[165] Canada is a signatory to the Convention, with a reservation to article 12.[166]

Article 12 and article 13 of the *Convention* are the most relevant to this project. In particular:

- article 12 requires that States recognize that people with disabilities:
  - » are persons before the law; and
  - » enjoy legal capacity on an equal basis with others; and
- article 13 requires that States:
  - » ensure persons with disabilities have access to accommodations to help them participate in legal proceedings (including as witnesses, and in early stages like investigation); and
  - » promote education for criminal justice professions.

[157] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ("**Convention**").
[158] *Supra*, note 156, Declaration, s 6(a).
[159] *Ibid*, *Declaration*, s 6(b).
[160] *Ibid*, *Declaration*, s 6(d).
[161] *Ibid*, *Declaration*, ss 14 and 17.
[162] *Ibid*, *Declaration*, ss 8-13.
[163] *Supra*, note 96, DOJ Vulnerable Adult Witnesses, at 8.
[164] *Supra*, note 157, Convention.
[165] *Ibid*, *Convention*, art 1.
[166] Jennifer A Chandler & Colleen M Flood, *Law and Mind: Mental Health Law and Policy in Canada*

It is through federal and provincial human rights legislation, the Criminal Code, and the Charter that the government of Canada supports the domestic incorporation of the Convention, rather than by a standalone act to do the same. [167]
To adequately implement article 12, States should take steps to provide supports to people to aid their capacity and prevent abuse regarding any measures used for legal capacity. The reservation by Canada with respect to Article 12 does not affect these obligations that fall on it as a signatory state. The reservation relates to an interpretation of Article 12 that would outlaw the concept of adult guardianship altogether.[168]

The Special Rapporteur on the Rights of Persons with Disabilities has urged the removal of this reservation and for Canada to fully implement article 12, giving particular attention to the restriction the reservation creates on a person's ability to testify.[169] While the Canada Evidence Act can restrict a person's ability to testify, scholars have pointed to the Canadian model of "promise to tell the truth" as an example of progress in permitting victims and witnesses to give evidence despite some impairment of capacity.[170]

The government of Canada points to the inclusion of testimonial aids in the Criminal Code, as well as implementation of provincial legislation on victim's rights and services, as meeting the requirements of article 13.[171]

[167] *Ibid*, Chandler, at 73.
[168] *Ibid*, Chandler, at 64.
[169] United Nations, Special Rapporteur on Rights of Persons with Disabilities, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020) at 12 ("**UN Special Rapporteur 2020**").
[170] Elinor Flynn et al, "Final Report: Access to Justice of Persons with Disabilities" (University of Galway Centre for Disability Law & Police, 2019) at 24, online: CDLP-Final-report-for-UN-Special-Rapporteur-on-Access-to-Justice-for-Persons-with-Disabilities-(21Jan).docx (live.com) ("**Flynn**").
[171] Canada, Government of Canada, *Convention on the Rights of Persons with Disabilities: First Report of Canada* (Government of Canada, 2014).

# Chapter 3. Key Players & Current Policy

Currently in Canada, there are three key players who interact with victims and witnesses in the context of criminal justice – Crown counsel, police, and victim services. Other professions and organizations interact with vulnerable adults, but to a lesser degree. This includes health care, advocates, and related organizations.

Currently, informants from the key players indicate they have a lack of information on how to recognize, respond to, and manage vulnerable adults with capacity issues. This section summarizes the existing legal and policy frameworks for these players.[172]

## 3.1 Crown Counsel

### 3.1.2 Ethical and Legal Obligations

#### INDEPENDENCE & PROSECUTORIAL DISCRETION

The AG and Crown counsel source their power from the Sovereign. This means that other branches of government cannot interfere with the AG or Crown counsel's decisions. This is fundamental to the Canadian criminal law system because it protects the rule of law (see terms). For example, if a Minister commits a criminal offence, it is important that the Minister cannot interfere with or prevent criminal prosecution.[173]

This independence extends to other organizations as well. For example, the police and the AG have different roles. These roles must operate independently. For example, Crown counsel cannot conduct criminal investigations and do not have the powers granted to police through the *Police Act or RCMP Act*.[174]

In BC, the police have conduct over the investigation of alleged criminal activity. If, after investigating alleged criminal activity, the police conclude that criminal charges should be considered, they prepare a Report to Crown Counsel ("**RTCC**"). The RTCC provides Crown counsel with the police summary of the events, information about potential witnesses, as well as any statements they provided to the police, and any other evidence such as photographs. The investigating officer may also include a recommendation about what criminal charges they believe should be laid.[175]

The decision whether to approve criminal charges is made by Crown counsel in BC. This is done in accordance with policy and upon reviewing the available evidence and applicable law.[176]

[172]The policy manual for Quebec was not included in this project.
[173]*Supra*, note 59, Guiding Principles, at 1-2.
[174]*Ibid*, Guiding Principles, at 2-3.
[175]The Davies Commission Inquiry into the Response of the Criminal Justice Branch, "Alone and Cold: Criminal Justice Branch Response" (19 May 2011) at 40-41, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/daviescommission-finalreport.pdf.
[176]BC Prosecution Service, "Crown Counsel Policy Manual: Charge Assessment Guidelines" (15 January 2021) at 1, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf ("**CHA 1**").

The exercise of this independent discretion over whether to prosecute an offence is a major feature of the independence of Crown counsel.[177] The boundary between the roles of the police and the Crown is not the same across all provinces. In some other provinces, the police decide whether to lay a charge and Crown counsel then makes an independent decision whether to prosecute on that charge.[178]

**Charge Assessment**

In coming to a decision regarding whether to approve charges, Crown counsel in BC are required to assess the available evidence against a 2-part test to determine:

1. whether there is a substantial likelihood of conviction and, if so,
2. whether the public interest requires a prosecution.[179]

The public interest is only considered if Crown counsel is satisfied that the first part of the test is met.

The standard in BC of whether the available evidence would result in a substantial likelihood of conviction is relatively high, when considered in relation to other provinces that use a reasonable "likelihood" or "prospect" of conviction.[180] It involves consideration of:

- what material evidence is likely to be admissible and available at a trial;
- the objective reliability of the admissible evidence; and
- whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction.

In summary, Crown counsel must be satisfied that there is a strong and solid case to present to the court.[181]

If the first part of the test is met, the public interest assessment includes consideration of the victim's age, which may weigh in favour or against prosecution. The relative vulnerability of the victim, including whether the case involves abuse of a vulnerable adult is considered a factor that weighs in favour of the prosecution, but age, physical health, mental health, and other personal circumstances of a victim can weigh either in favour of or against prosecution.[182]

[177] *Supra*, note 10, Krieger, at para 29.
[178] See, e.g., Newfoundland and Labrador, Attorney General, "Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador" at 5-11, online: https://www.gov.nl.ca/jps/files/public-prosecutions-guide-book.pdf ("**NFLD Policy**").
[179] *Supra*, note 176, CHA 1, at 2.
[180] Some other provinces use a 'reasonable likelihood of conviction' or 'reasonable prospect of conviction' test. This is discussed further in the Ontario section. See further: Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59:3 Alta L Rev 631 at 662. In BC, a lower charge assessment standard of 'reasonable prospect of conviction' can be applied by Crown counsel in exceptional circumstances and to maintain public confidence in the administration of justice: *Supra*, note 177, CHA 1, at 6-7.
[181] *Ibid*, CHA 1, at 2.
[182] *Ibid*, CHA 1, at 3 and 5.

Informants communicated to us that the two-part charge assessment test is an ethical foundation for determining whether a case proceeds.

The decision to prosecute, while made independently of external influence, does not happen in isolation from the broader context of the criminal justice system. The decision is made within the context of the applicable standard of proof (i.e., beyond a reasonable doubt) and within the context of applicable credibility and reliability assessments a prosecutor makes of each witness (as discussed above). These assessments can compound the obstacles faced by vulnerable adults in having their complaint move forward to the prosecution stage.

**Point of Confusion:**
Informants have identified the 'substantial likelihood of conviction' standard as a major point of contention and confusion between the professions.

Other professions do not always understand that:

- Crown counsel is often required to decide this issue first- before looking at public interest.
- Crown counsel bases this decision on the criminal law standard of 'beyond a reasonable doubt.'

### 3.1.2 Capacity and Testimonial Competency

The concept of capacity varies based on the decision or legal task at hand. We defined capacity generally at the beginning of this study paper. During every interaction with a client, lawyers are tasked with assessing the capacity of the client to both instruct them but also enter into the legal relationship or decision at hand. In the criminal context, one consideration for Crown counsel is whether the vulnerable adult has testimonial competency as required by the *Canada Evidence Act*.[183] Another consideration for Crown is whether a witness is a credible and reliable witness.

The consideration of testimonial competence has two objective components. The first is the capacity to understand the questions being asked and can communicate an answer to the question. The second is that the vulnerable adult understands they need to tell the truth, whether by oath, affirmation, or a promise.[184] The threshold for competence to testify is a low one so as to accommodate vulnerable adults and children.

[183] *Supra*, note 76, CEA, s 16(1).
[184] *R v DAI*, 2012 SCC 5 ("***DAI***"), at 71.

This table sets out distinct options for different levels of capacity:

| **Ability Level** | Understands oath or solemn affirmation and able to communicate evidence. | Does not understand oath or solemn affirmation but is able to communicate evidence. | Does not understand oath or solemn affirmation and cannot communicate evidence. |
|---|---|---|---|
| **Requirement** | The witness shall testify under oath or solemn affirmation.[185] | The witness shall testify on promise to tell the truth.[186] | The witness shall not testify.[187] |

As noted earlier, if the competence of a vulnerable adult is challenged by defense counsel, a hearing to inquire into the testimonial competence of the vulnerable adult pursuant to the *Canada Evidence Act* may be held.[188] Informants have indicated that this requirement adds additional stress to a vulnerable adult because it requires a hearing separate from the trial. The person challenging the witness's competence must prove it is an issue for the court to examine.[189] While this is an objective test, the vulnerable adult ought to be considered subjectively in how they are able to meet the test. Subjectively, however, this process can feel like a witness has to 'prove' their competence.

The Supreme Court of Canada considered testimonial competence in the case of *R v DAI*, which looked at the ability to understand a promise to tell the truth.[190] The Court determined that for people with mental disabilities, it is "unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness understands the difference between a truth and a falsity."[191]

The *Canada Evidence Act* itself supports this. Section 16(3.1) prohibits questions about a witness's understanding of a promise to tell the truth. The issue is whether the evidence can be received.[192]

Consideration of whether a witness is credible and reliable is not objective and is susceptible to being influenced by perceptions of a witness's capacity. When making this assessment, Crown counsel with limited understanding of how vulnerabilities and diminished capacity can impact communication may make a decision to not call a witness without first considering how to support an otherwise competent witness in giving evidence.

[185] *Ibid*, CEA, s 16(2).
[186] *Ibid*, CEA, s 16(3).
[187] *Ibid*, CEA, s 16(4).
[188] *Ibid*, CEA, s 16(1).
[189] *Ibid*, CEA, s 16(5).
[190] *Supra, note 184*, *DAI*.
[191] *Ibid*, *DAI*, at 64.
[192] *Supra*, note 81, *Marquard*.

Additionally, judges and juries may give less weight to the evidence of a vulnerable adult or an adult with capacity issues. If an inquiry into testimonial competence is held, it may bring to light issues related to a witness's capacity, which might not otherwise be before the court. Judges and juries may see their evidence as unreliable simply due to their disability or diminished capacity despite their competence to testify.[193] This creates more problems where it is unclear whether the person understands the difference between the truth and a lie when testifying on a promise to tell the truth rather than an oath or affirmation.[194]

In addition, there is some evidence that testimonial competency inquiries are extremely short. In a 2011 inquiry into judge's perceptions of testimonial aids and other supports, it was found that on average competence inquiries for children were only 12 minutes long.[195] Data on vulnerable adults was not included for this section, pointing to the need for further research with respect to vulnerable adults.

**Point of Confusion:**
In considering the reasonable likelihood of conviction, Crown counsel will likely consider whether:

- a witness's testimonial competence will be challenged;
- whether a witness will be able to testify after a section 16 inquiry; and
- whether a witness who is competent to testify will be believed, particularly following a section 16 inquiry.

### 3.1.3 British Columbia

#### Crown Counsel Policy Manual

In British Columbia, as with other provinces, Crown counsel have a publicly available policy manual. The Crown Counsel Policy Manual ("**Manual**") states its core purpose: "The primary purpose of policy is to assist Crown counsel in their decision-making on fundamental issues. Specific policies reflect appropriate public interest considerations and provide a framework for the exercise of discretion."[196] The Manual is comprised of distinct policies each aimed at specific topics throughout the criminal process.

Informants noted that it takes considerable time, energy, and research to build and modify the Manual. It requires consideration of legislation, case law, technology, public interest, court rules and procedures. The Manual guides Crown counsel in applying the right criteria when faced with a decision about

[193] *Supra*, note 4, Beaudry, at 272.
[194] *Ibid*, Beaudry.
[195] *Supra*, note 141, Testimonial Support Provisions, at 50.
[196] *Supra*, note 59, Guiding Principles, at 5.

a particular case. The BC Prosecution Service, by making the manual public, also provides transparency about how Crown counsel make decisions and apply discretion.

The Manual acknowledges that policy can only go so far. First, the policies are not law and cannot override law.[197] Second, policies cannot inform each decision for every unique situation.[198] Informants have indicated that the Manual is not designed to extend beyond the two goals of providing decision-making criteria and transparency.

### CHARGE ASSESSMENT GUIDELINES[199]

The Charge Assessment Guidelines policy ("**CHA 1**") reinforces that Crown counsel must independently decide whether to lay a charge. It clearly states that communication and cooperation with other parties is important, but cannot impact a Crown counsel's decision whether to lay charges.

CHA 1 articulates the two-part charge approval test discussed above, reiterating that the public interest is only considered if the substantial likelihood test is met.[200]

CHA 1 states that sometimes the public interest factor is very powerful. In such instances, not laying a charge would impact the public's confidence in the criminal justice system. When this happens, the CHA 1 allows for a lower standard – the 'reasonable prospect of conviction.'[201]

Informants have indicated that elder abuse and victimization of a vulnerable adult almost always entail sufficient public interest grounds to pursue prosecution.

This is echoed in CHA 1, stating that Crown counsel should consider, for example:

- the seriousness of the charges and the harm caused;
- whether the person was in a position of trust;
- the vulnerability of a victim;
- whether the offence was motivated by hate towards someone based on a protected ground (see definitions) including a mental disability; and
- the difference between the actual or mental ages of the accused and the victim.[202]

[196] *Supra*, note 59, Guiding Principles, at 5.
[197] *Ibid*, Guiding Principles.
[198] *Ibid*, Guiding Principles, at 6.
[199] *Supra*, note 176, CHA 1.
[200] *Ibid*, CHA 1, at 2.
[201] *Ibid*, CHA 1, at 6.
[202] *Ibid*, CHA 1, at 3-4.

## VULNERABLE VICTIMS AND WITNESSES[203]

In 2010, the provincial government established the *Missing Women Commission of Inquiry*.[204] This inquiry looked at the failure of law enforcement in investigating the disappearance of many women who went missing from the Downtown Eastside of Vancouver. One of the recommendations from the Inquiry was for the establishment of a policy for vulnerable victims and witnesses.[205]

The Criminal Justice Branch created the Vulnerable Victims and Witnesses policy ("**VUL 1**") in this context.

VUL 1 states that the criminal justice system should be accessible to all victims and witnesses who wish to take part. It recognizes that some witnesses may not be able to do this if "accommodations or supports are not made available."[206]

For example, features which increase vulnerability in a victim or witness include:

- age;
- trauma from colonialism (including residential schools and displacement);
- personal identity (including religion, ethnicity, sexual orientation, gender identity, gender expression, and culture);
- cognitive disabilities (including fetal alcohol spectrum disorder);
- mental or physical disabilities (including substance dependency);
- power imbalances between the victim or witness and the accused;
- legal issues (including immigration status, court orders);
- social issues (including poverty, homelessness, isolation, history of abuse); and
- communication barriers (including language concerns).[207]

When these factors are present, VUL 1 recommends the following steps to safeguard the victim or witness and ensure their participation by:

- establishing communication;
- working with other professions to provide support;
- working with advocates or support organizations assisting the victim or witness;
- seeking accommodations to support or protect the victim or witness; and moving the file along in a timely fashion.

Where possible, the assigned Crown counsel should receive training in relevant areas. VUL 1 also encourages maintaining the same administrative staff for the entire life of the file. VUL 1 recommends employing some of the following to accommodate vulnerable victims and witnesses:

[203] *Supra, note 14, VUL 1.*
[204] Wally T Oppal, KC, Forsaken: *The Report of the Missing Women Commission of Inquiry*, vol 1 (Victoria: 2012) at 4.
[205] British Columbia, Ministry of Justice, *A Final Status Update Report in Response to Forsaken: The Report of the Missing Women Commission of Inquiry* (2014) at 18.
[206] *Supra,* note 14, VUL 1, at 1.
[207] *Ibid,* VUL 1, at 1-2.

- If a witness has difficulty communicating due to a disability, video evidence may be an option.
- If the witness will be significantly adversely affected by the proceedings, Crown counsel should request direct indictment (see definitions).
- If charges are not laid, Crown counsel should consider providing supervision or counselling.
- If the accused is on bail, Crown counsel should consider arranging for safety planning for the victim or witness.
- Crown counsel should ask for needed accommodations for witnesses, including use of testimonial aids.
- If the accused is on probation or conditional sentence, Crown counsel should take measures to protect the victim or witness.

VUL 1 applies broadly to all vulnerable victims and witnesses. As a result, some of these suggestions are more relevant to children or to victims of domestic violence than to vulnerable adults with capacity issues.

VUL 1 recommends that Crown counsel consider various accommodations depending on the needs of the victim or witness:

| NEED OF THE VICTIM OR WITNESS | LEGAL PROVISION | ANTICIPATED OUTCOME |
|---|---|---|
| **CONFIDENTIALITY** | CC 486.4 | Publication ban |
| | CC 486.5 | |
| | CC 486.31 | |
| | CC 486.7 | Security of witness |
| **DIFFICULTY COMMUNICATING** | CC 715.2 | Video Statement |
| **PROTECTION WHERE NO CHARGE IS LAID** | 810 | |
| | 810.1 | |
| | 810.2 | |
| **IN COURT SUPPORT** | 486.1 | Support person |
| | 486.7 | Support dog |
| | 486.2 | Screen |
| | 486.3 | Cross-examination by appointed counsel for self rep accused |
| **IMPACT STATEMENT** | 722 | |
| **RESTITUTION** | 738 or 339. | |

Other sections that Crown should consider where victims and witnesses are vulnerable include:

| SITUATION | LEGAL PROVISION | ANTICIPATED OUTCOME |
|---|---|---|
| VULNERABILITY DUE TO PERSONAL CIRCUMSTANCES | CC 718.04 | Consideration of personal circumstances that make victimization more likely. |
| OFFENCE MOTIVATED BY BIAS OR PREJUDICE | 718.2(a)(i) | |

Informants noted vast inconsistencies in knowledge or use of a trauma-informed approach on the part of Crown counsel when working with vulnerable adult witnesses.

Informants who had worked in the criminal justice system reported rarely encountering cases involving adult victims and witnesses with cognitive disabilities. They reported knowledge of more cases in which charges were approved against a defendant living with dementia. In one of the rare situations involving an adult victim with cognitive disabilities, it was noted that the file was dealt with by a series of different Crown counsel over the course of the prosecution.

### ELDER ABUSE[208]

The current Elder Abuse policy ("**ELD 1**") is two pages long. This policy applies where the victim is 65 years or older.[209]
ELD 1 lists the following considerations for Crown counsel:

- the *Charge Assessment Guidelines* regarding the public interest factor in prosecuting a crime against a vulnerable adult;
- the *Vulnerable Victims and Witnesses* policy;
- the *Criminal Code* provisions regarding age as an aggravating factor in sentencing; and a recognizance if charges are not laid. If no charges are laid and there is no recognizance, Crown counsel should remind police that a designated agency, Public Guardian and Trustee, or community organization may need to be contacted by the police to help support and protect the vulnerable adult.[210]

[208] *BC Prosecution Service, "Crown Counsel Policy Manual: Elder Abuse- Offences Against Elders" (1 March 2018), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/eld-1.pdf ("**ELD 1**").*
[209] *Ibid*, ELD 1, at 1.
[210] *Ibid*, ELD 1, at 1-2.

*Criminal Code* sections referred to in the policy include:

| | LEGAL PROVISION | ANTICIPATED OUTCOME |
|---|---|---|
| SERIOUS PERSON INJURY | 752 | |
| RESTITUTION ORDER | 738 | |
| AGGRAVATING | 739 | |
| CIRCUMSTANCES | 718.2 | Sentencing submissions |
| RECOGNIZANCE | 810 | |

## INTIMATE PARTNER VIOLENCE[211]

The Intimate Partner Violence policy ("**IPV 1**") does not specifically refer to age as a factor in its application. However, some research indicates that the presence of dementia in women places them at an increased risk of sexual violence, particularly in a family context or from an acquaintance.[212] Despite social science evidence of the prevalence of sexual assault against older women perpetrated by someone known to the victim, there is a disproportionately low rate of reported cases in this area.[213]

Notably, IPV 1 is markedly more comprehensive than ELD 1. IPV 1 speaks to dealing with reluctant witnesses as well as navigating allegations of mutual violence. It encourages early consideration of testimonial aids, as well as coordination with victim services, police, cultural organizations, and other support services. It is a policy that touches on many aspects of vulnerability and ways to address them in the criminal justice system.[214]

Considering the challenges involved in prosecuting cases of sexual violence involving elderly victims, which may come into play at all stages from reporting to the trial, it is unfortunate that ELD 1 and IPV 1 do not cross-reference each other.

## VICTIMS OF CRIME[215]

As mentioned above, the Manual provides guidance to Crown counsel in making decisions and exercising discretion. Crown counsel have certain legal obligations as outlined in the "Victims of Crime– Providing Assistance and Information to" policy ("**VIC 1**").[216] These legal obligations impact how Crown counsel interact with victims.

[211]British Columbia Prosecution Service, Crown Counsel Policy Manual, "Intimate Partner Violence" (20 May 2022), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/ipv-1.pdf ("**IPV 1**").
[212]*Supra*, note 3, Grant, at 60.
[213]*Ibid*, Grant, at 62, 70, and 76-77.
[214] *Supra*, note 211, IPV 1, throughout.
[215] British Columbia Prosecution Service, Crown Counsel Policy Manual, "Victims of Crime – Providing Assistance and Information to" (1 March 2018), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-1.pdf ("**VIC 1**").
[216] *Ibid*, VIC 1, at 1.

VIC 1 states that the BC law focuses on police to fill this role. However, VIC 1 also indicates that there is "standard information prepared by the Ministry of Justice" on how the criminal justice system works.[217] It is unclear if this information is in plain language or would be accessible to a vulnerable adult with a disability or cognitive impairment.

#### INFORMATION REQUESTS FROM THIRD PARTIES[218]

Standards of Conduct require Crown counsel to protect confidential information, as outlined in the Information Requests from Third Parties policy ("**INF 1**"). This includes information provided by the police.

The purpose of confidentiality is to:

- protect the public and parties to the case;
- protect privileged information; and
- avoid commenting on matters that are still in process, which could jeopardize the case.[219]

The *Victims of Crime Act and the Canadian Victims Bill of Rights* require that victims receive certain information. However, this does not extend to third parties like advocates or support persons.

### 3.1.4 Ontario

#### Crown Prosecution Manual[220]

Ontario's Crown Prosecution Manual ("**Ontario Manual**") has the same stated purpose as the Manual. Specifically, "[p]rosecution policies provide mandatory direction, advice and guidance to Prosecutors on the exercise of prosecutorial discretion."[221]

The Ontario Manual also confirms the role of Crown counsel as Ministers of Justice, who "ensure that the criminal justice system operates fairly to all: the accused, victims of crime and the public."[222] Unlike BC, the Ontario Manual does not contain sections on elder abuse or vulnerable victims and witnesses, nor does it mention mental capacity of victims and witnesses.[223]

[217] *Ibid*, VIC 1, at 2.
[218] British Columbia Prosecution Service, Crown Counsel Policy Manual, "Information Requests from Third Parties" (1 March 2018), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/inf-1.pdf ("**INF 1**").
[219] Ibid, INF 1.
[220] Ontario, Ministry of the Attorney General, Crown Prosecution Manual ( 1 November 2018), online: www.ontario.ca/document/crown-prosecution-manual ("**ON CPM**").
[221] *bid*, ON CPM, at 1.
[222] *Ibid*, ON CPM, at 2-3.
[223] *Ibid*, ON CPM.

### CHARGE SCREENING[224]

A key difference with the position in BC is Charge Screening directive ("**Directive 3**"), which outlines the criteria Crown counsel must apply in deciding whether to continue with prosecution. The test consists of two parts, namely:

- there is a reasonable prospect of conviction; and
- that charges should be in the public interest.

The first requirement is a consideration which continues throughout a case. Crown counsel must consider if there is evidence on which a jury would convict.[225] Unlike in BC, a conviction does not need to be more likely than not. This includes an assessment of:

- the available evidence and its admissibility;
- the "credibility and competence of witnesses;" and
- any evidence supporting defences.[226]

The first requirement is more important. Consideration of the public interest only happens if the Crown counsel thinks there is a reasonable likelihood of conviction.

Directive 3 also draws attention to the need to be aware of stereotypes, although neither age nor disability are listed as an example of a stereotype.[227]

### TESTIMONIAL AIDS AND ACCESSIBILITY[228]

The Testimonial Aids and Accessibility directive ("**Directive 34**") instructs Crown counsel to identify and assist victims and witnesses who may have limited ability to engage in the criminal justice process due to "language, age, or any impairment of an intellectual, emotional, physical or sensory nature."[229]

A key difference between Ontario and BC is that Directive 34 states that the Crown counsel office has an Accessibility Lead, who connects with the Court Services Division Accessibility Coordinator.[230] Ontario Crown counsel is required to coordinate with the Accessibility Lead whenever working with vulnerable adults that have accessibility needs.

The Government of Ontario website states that each courthouse also has a Court Services Division Accessibility Coordinator, who may be contacted to arrange any needed accommodations. However, accommodation is subject to availability. Examples of accommodations include:

- wheelchairs, frequent breaks, and alternative formats for various documents;[231]
- a "communication intermediary" to help with communication;[232]

[224] *Ibid*, ON CPM, at 3.
[225] *Ibid*, ON CPM, at 12.
[226] *Ibid*, ON CPM, at 12.
[227] *Ibid*, ON CPM, at 3.
[228] *Ibid*, ON CPM, at 79.
[229] *Ibid*, ON CPM, at 80.
[230] *Ibid*, ON CPM, at 79.
[231] Government of Ontario, "Going to Court: Accessibility", online: https://www.ontario.ca/page/going-court-accessibility#request ("Going to Court").
[232] *Ibid*, Going to Court.

- a support person or animal; or
- assistive technologies and devices.

The individuals working in this role must follow the Ontario Public Service accessibility policies.[233]

### 3.1.5 New Brunswick

WITNESSES[234]

The Witnesses policy ("**Policy 32**") is very high level. With respect to vulnerable adults, Policy 32 does mention that Crown Counsel has the responsibility to determine if testimonial aids might be appropriate and to "plan ahead" where a witness may have a limited ability to participate. There are no clear steps or suggestions for what a plan might look like.

Policy 32 does permit a third party to be present where Crown counsel is conducting a **pre-trial** interview with a "witness with a mental disorder."[235] Again, Policy 32 does not offer any guidance about who the support person should be, nor does it recommend accommodations of any other kind.

### 3.1.6 Nova Scotia

**Crown Attorney Manual[236]**

Investigations and Prosecution of Cases Involving Persons with Special Communications Needs[237]

The Investigations and Prosecution of Cases Involving Persons with Special Communications Needs Directive ("**IPCIPSCN Directive**") applies specifically to vulnerable adults. The IPCIPSCN Directive is also quite old. It was first created in 1991 and last edited in 2002.

If a charge is laid, Crown counsel is directed to meet with the victim or witness as soon as possible to determine their needs. That same Crown counsel is encouraged to stay with the case for its entire duration and make any needed requests for testimonial aids available under the *Criminal Code*.

The IPCIPSCN Directive also encourages Crown counsel to engage with the victim or witness prior to giving testimony. This includes meeting one week prior to the hearing to:

- give the victim or witness a tour of the court,

[233] *Ibid*, Going to Court.
[234] New Brunswick, Office of the Attorney General, "Public Prosecutions Operational Manual: Witnesses" (1 September 2015), online: https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/Witnesses.pdf ("**NB PPOM Witnesses**").
[235] *Ibid*, NB PPOM Witnesses, at 4.
[236] Nova Scotia, Public Prosecution Service, "Public Prosecutions Operational Manual" (1 February 2011), online: https://novascotia.ca/pps/crown_manual.asp ("**NS PPOM**").
[237] Nova Scotia, Public Prosecution Service, "Public Prosecutions Operational Manual: Protocol for Investigation and Prosecution of Cases Involving Persons with Special Communications Needs" (3 September 2002) at 1, online: https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/SpecCommNeeds.pdf ("**NS PPOM Special Comms**").

- discuss the court process;
- review the victim or witness's evidence, and that the truth is the right answer;
- reassess the victim or witness's ability to communicate and understand an oath or promise to tell the truth; and
- prepare the victim or witness for cross-examination.[238]

On the date of the hearing, Crown counsel is directed to ensure the victim or witness is comfortable beforehand.

The IPCIPSCN Directive not only provides direction to Crown counsel, but also police. It requires police to:

- videotape any interviews with the victim or witness;
- include a support person where appropriate; and
- arrange for assistance or special equipment.[239]

### 3.1.7 Interaction with Other Professions

Informants routinely recommended increased cooperation and interaction between professions. Crown counsel policy manuals across Canada often include sections about providing legal advice to, or otherwise interacting with, police. Some manuals also speak to victim service programs. This section provides a few examples of the language used by various manuals. Some policies are very restrictive about collaboration. Others allow for more engagement between the professions.

#### Police

BRITISH COLUMBIA: POLICY ON LEGAL ADVICE TO THE POLICE[240]

The police may seek guidance from Crown counsel on how to proceed with an investigation. The Legal Advice to the Police policy ("**LEG 1**") helps Crown counsel in deciding what kind of information and advice to provide.

As in other provinces, LEG 1 makes it very clear that police and Crown counsel should work together- but that they must remain independent. This is essential to prosecutorial discretion.

Informants in various police forces expressed a desire to understand whether a case would meet charge assessment guidelines. This was especially true in cases where a major witness was also a vulnerable adult. LEG 1 instructs Crown counsel to decline providing an opinion about charge assessment until after a full police report is done.[241]

[238] *Ibid*, NS PPOM Special Comms, at 4.
[239] *Ibid*, NS PPOM Special Comms, at 2.
[240] BC Prosecution Service, Crown Counsel Policy Manual, "Legal Advice to the Police" (20 May 2022), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/leg-1.pdf ("**LEG 1**").
[241] *Ibid*, LEG 1, at 2.

Other informants expressed a desire for coordination or team work on files involving vulnerable adults. LEG 1 warns against a Crown counsel becoming too involved with investigations because it could result in a loss of objectivity.[242]

### NEW BRUNSWICK: POLICY ON LEGAL ADVICE TO POLICE[243]

The New Brunswick policy clearly draws a line between police and Crown counsel in their Policy on Legal Advice to Police ("**Policy 7**"). Like BC, Policy 7 discourages Crown counsel from prematurely indicating whether a case would meet charge assessment guidelines.[244]

It does, however, allow Crown counsel to provide specific advice on:

- weaknesses in the case;
- potential difficulties in prosecuting the case; or
- how to strengthen the case.[245]

This information may be especially helpful in cases involving vulnerable adult victims and witnesses.

## Victim Service Programs

### BRITISH COLUMBIA: POLICY ON VICTIM SERVICE PROGRAMS[246]

Victim Service programs help victims of crime. Refer to the heading Victim Services below for a greater description of types of programs and their content.

The Policy on Victim Service Programs ("**VIC 2**") encourages Crown counsel to work with victim service personnel. However, this is dependent on the victim's consent.[247] Another limitation is confidentiality. VIC 2 clearly restricts information sharing (other than the victim's statement) with victim service programs without an approved application to BC Prosecution Service.[248]

Many informants said that interagency confidentiality is one of the greatest barriers to supporting vulnerable victims and witnesses.

[242] *Ibid*, LEG 1, at 3.
[243] New Brunswick, Office of the Attorney General, "Public Prosecutions Operational Manual: Legal Advice to Police" (1 September 2015), online: https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/LegalAdvicetoPolice.pdf ("**NB PPOM Advice to Police**").
[244] *Ibid*, NB PPOM Advice to Police, at 2.
[245] *Ibid*, NB PPOM Advice to Police, at 2.
[246] British Columbia Prosecution Service, "Crown Counsel Policy Manual: Victim Service Programs – Providing Information to" (1 March 2018), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-2.pdf ("**VIC 2**").
[247] *Ibid*, VIC 2, at 1.
[248] *Ibid*, VIC 2, at 1.

## 3.2 Victim Services

### 3.2.1 Legal Basis

There are two pieces of legislation that impact victim services delivery in the province.

**Victims of Crime Act**

The VCA sets out the entitlements and rights of victims and guides the work of victim services workers.[249] The VCA applies to various kinds of constables under the *Police Act*, and to certain people working for the Attorney General (as discussed above under Section 3.1: Crown Counsel). These people are 'Justice System Personnel.'

The VCA requires that Justice System Personnel give certain information to victims including information regarding victim services.[250] Informants working for police-based victim services often stated that a large piece of their role was information sharing. The examples provided by the informants are the same as in the VCA, such as information about the investigation and conduct of the file.

Victim impact statements were another commonly mentioned job description by informants. Based on informant interviews, victim services work with victims to draft these statements.

#### CRIME VICTIM ASSISTANCE ACT[251]

The *Crime Victim Assistance Act* ("**CVAA**") focuses on payment and financial support for victims. The CVAA sets out:

- who can apply for benefits;[252]
- what kinds of benefits the program covers;[253]
- how victims receive payment from the program; and
- other details regarding the program like requests for reconsideration where a victim's application is denied by the program.[254]

Victim service workers do not oversee this program. However, they often help victims and witnesses apply for benefits.

[249] *Supra*, note 44, VCA.
[250] *Ibid*, VCA, s 5.
[251] *Crime Victim Assistance Act*, SBC 2001, c 38 ("**CVAA**").
[252] *Ibid*, CVAA, ss 2, 3.
[253] *Ibid*, CVAA, ss 4, 5.
[254] *Ibid*, CVAA, ss 13, 14.

### 3.2.2 Relevant Policies

#### Victim Service Worker Handbook

The Government of British Columbia website has several different *Victim Service Worker Handbooks* ("**Handbooks**"). The Handbooks provide guidance to victim service workers. For example, the handbook on Victims of Crime addresses issues like:

- how different populations may respond differently to crime;
- relevant policy and legislation;
- how the justice system works;
- skills needed by a victim service worker; and
- how to support a victim through the criminal justice process.[255]

According to informants, there are no specific policies or guides that they refer to in their work. Informants indicated the Handbooks were originally used for training. As training materials are now online, the Handbooks are no longer used.

## 3.3 Police

### 3.3.1 Legal Basis

There are two major pieces of legislation that govern police in BC. The provincial *Police Act*,[256] and the federal *Royal Canadian Mounted Police Act* ("**RCMPA"**).[257]

#### POLICE ACT

The Police Act oversees the administrative and structural aspects of policing in BC. For example, it governs:

- the powers and responsibilities of the government;
- oversight boards for municipal police services;
- the complaints process;
- disciplinary proceedings;
- cost recovery; and
- alleged misconduct.

The Police Act does not deal with day-to-day policing practices involving vulnerable adults, whether as a victim or witness.

A Special Committee of the BC Legislative Assembly recently released eleven recommendations for the Police Act ("**Report**").[258] These are primarily focused on mental health and police interaction with Indigenous people and communities.

[255] *Supra*, note 68, VSW Handbook.
[256] *Police Act*, RSBC 1996, c 367.
[257] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 ("**RCMPA**").
[258] Legislative Assembly of British Columbia, *Special Committee on Reforming the Police Act* (2022) (Chair: Doug Routley ("**Special Committee**").

The Report does not mention dementia, elder abuse, or other capacity related issues. InclusionBC raised these issues with the Committee, stating that "police do not currently have the training to interact with or support people who have an intellectual disability."[259]

However, these concerns do not appear to be addressed by the Report or the recommendations for reform.

There are some recommendations in the report of the special committee that could be valuable for supporting vulnerable adults. For example, Recommendation 4 urges, "[i]ncreasing coordination and integration across police, health, mental health, and social services."[260] Several informants recommended increased cooperation and information sharing across agencies to support individuals with capacity issues.

### 3.3.2 Relevant Policies

### Provincial Policing Standards[261]

#### PROMOTION OF UNBIASED POLICING

Despite the lack of required training on vulnerable adults with capacity issues, the Provincial Policing Standards do require policies regarding police interactions with:

- persons who may be vulnerable due to age (i.e., children or older adults);
- persons with disability or who may have communication barriers (e.g., language, hearing or speech)."[262]

#### VANCOUVER POLICE DEPARTMENT REGULATIONS & PROCEDURES MANUAL[263]

The Vancouver Police Department Regulations & Procedure Manual ("**VPD Manual**") applies only to the Vancouver Police Department, which is a municipal police force. It covers a broad range of topics including media, DNA evidence, and transportation of persons in custody.

Several different parts of the VPD Manual refer to victims. Some topics covered include:

- taking of video evidence;[264]
- victim services;[265] and
- information disclosure.

[259] *Ibid*, Special Committee, at 59.
[260] *Ibid*, Special Committee, at 10.
[261] Province of British Columbia, "Provincial Policing Standards", online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/policing-standards.
[262] Province of British Columbia, "Promotion of Unbiased Policing", online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/6-1-1-promote-unbiased.pdf ("**Unbiased Policing**").
[263] Vancouver Police Department, "Vancouver Police Department Regulations & Procedures Manual", online: https://vpd.ca/wp-content/uploads/2023/02/regulations-and-procedures-manual.pdf ("VPD Policing Manual").
[264] *Ibid*, VPD Policing Manual, at 318.
[265] *Ibid*, VPD Policing Manual, at 481.

However, the VPD Manual does not specifically address vulnerable victims and witnesses. For example, there is no discussion of individuals with dementia or other disabilities. The VPD Manual also does not address elder abuse apart from elder abuse in the intimate partner violence investigation section.[266] Despite these omissions, the Vancouver Police Department has dedicated Elder Abuse Units.[267]

### 3.3.3 Federal Police

#### Legal basis

##### ROYAL CANADIAN MOUNTED POLICE ACT[268]

The *Royal Canadian Mounted Police Act* is like the policing legislation discussed above. The *RCMPA* deals with matters including:

- qualifications;
- external review committees;
- civilian complaints; and
- cross border law enforcement.

The *RCMPA* does not manage the day-to-day interactions with victims or witnesses, nor does it speak to capacity issues. It sets out the responsibilities and expectations of RCMP members, including:

- respecting individual rights (although there is no reference to any human rights legislation);
- protecting the integrity of the law and administration of justice;
- avoiding conflicts of interest; and
- behaving in a way that is honourable, respectful, and courteous.[269]

##### ROYAL CANADIAN MOUNTED POLICE REGULATIONS, 2014[270]

Attached as a schedule to the *Royal Canadian Mounted Police Regulations* is the Code of Conduct ("**Code**").[271] The Code is very high level, setting out obligations like:

- respect for the law and individual rights;
- members should only use reasonable force;
- avoidance of conflicts of interest; and
- members maintain confidentiality, and only disclose information by proper channels.[272]

Language in the Code is general and does not include specific reference to any disabilities, capacity issues, or even human rights legislation.

[266] *Ibid*, VPD Policing Manual, at 133.
[267] *Ibid*, VPD Policing Manual, at 133.
[268] *Supra*, note 257, *RCMPA*.
[269] *Ibid*, RCMPA, s 37
[270] *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281.
[271] *Supra*, note 257, RCMPA, s 38.
[272] *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, Schedule Code of Conduct of the Royal Canadian Mounted Police.

# Chapter 4. Best Practices from the United Kingdom

The UK has a well-established and comprehensive framework for working with vulnerable adults that operates in a criminal procedure framework like Canada. New Zealand as well as states within the United States have incorporated certain best practices. The section below examines the framework in the UK. Additional best practices from New Zealand and the US, as well as other Canadian jurisdictions, are referenced in Chapter 6: Suggested Best Practices for British Columbia.

## 4.1. United Kingdom

### 4.1.1 Liverpool Model[273]

**Ground Rules Hearing**

In the UK (specifically in England and Wales), the Criminal Procedure Rules provide that the court must take every reasonable step to encourage and facilitate the attendance of a witness when they are needed and to facilitate the participation of any person, including the defendant.

The approach in the UK is grounded in the understanding that effective communication is essential to ensuring fairness in the justice system.[274] Criminal courts in the UK have recognized that advocates must adapt to witnesses, not the other way around, and the handling and questioning of vulnerable witnesses requires specialized skills.[275]

In every case involving a vulnerable witness or a witness or defendant who has communication needs, a Ground Rules Hearing is held prior to the trial.[276]

During the Ground Rules Hearing, the court can make directions for facilitating witness participation, which may include:

- allowing for a support person during witness testimony;
- alternate seating arrangements in court;
- directions as to the manner of questioning by counsel and the duration of questioning;
- allowing the use of aids to assist with communicating a question (by counsel) or answer (by a witness);
- relieving a party of having to ask questions in a particular way; or
- inclusion of an intermediary.

[273]This short documentary on the Liverpool Model is extremely informative on how working with vulnerable adults can be done better in a common law jurisdiction: Glenton Media & Events, "DOCUMENTARY – Witness Support, Preparation & Profiling – The Liverpool Model" (2012), online: Vimeo <https://vimeo.com/45696380>.
[274]The Advocates Gateway, "Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court: Toolkit 1" (2019) at 2, online: https://www.theadvocatesgateway.org/_files/ugd/1074f0_846f9ab1f1e94dd7bd58bcc62f76ddb8.pdf.
[275]*R v Lubemba; R v JP* [2014] EWCA Crim 2064, at para 45 ("**Lubemba**").
[276]*Ibid*, *Lubemba*, at para 42.

Examples of directions a court may give at a Ground Rules Hearing could include setting aside the requirement to put one's case to a witness or to put a prior inconsistent statement to a witness. This does not necessarily mean that the defence is not required to put forward their theory of the case. It may simply require the defence to frame their questions in a way that is easier for the witness to comprehend. Other examples include a direction that a witness who has a phobia of crowds is always to be the first to enter the courtroom or a witness who is better able to think clearly in the morning because of medication will be scheduled to testify in the morning. Directions made at an initial Ground Rules Hearing can be revisited closer to the trial in the event of changing circumstances.

### 4.1.2 Crown Counsel Policies and Guidance

Crown policies in the UK are highly detailed on working with vulnerable adults, prosecuting crimes against older adults, competence, and victim support, creating strong trust in the criminal justice system for vulnerable adults.

#### Intermediaries

Guidance for the court directions, particularly in relation to the manner of questioning and communication aids, is often provided by an intermediary. An intermediary is a registered communication specialist whose role is to assist with two-way communication between vulnerable witnesses and the police, Crown counsel, or the court. An intermediary has specialized skills for facilitating communication with vulnerable witnesses. For example, an intermediary may be a social worker or speech and language therapist.

Whenever an intermediary is involved, they must have the opportunity to make representations at the Ground Rules Hearing.[277] The use of intermediaries in the UK provides an opportunity for a vulnerable adult to both report a crime and testify, should the matter proceed to trial. Use of an intermediary for children or adults with a disability or impaired capacity is considered a "special measure" to assist these vulnerable witnesses.[278] It must be established that the "quality" of a vulnerable adult's evidence is weakened because of their disability.[279]

An assessment of the impact of the disability, physical or mental, on the "quality" requires the judge to assess whether the vulnerable adult can respond to the questions asked and if the disability impacts the "completeness, coherence, and accuracy" of the evidence given in response.[280] If an intermediary is permitted, their role is to communicate with the witness, put any questions to the witness, communicate the witness' response to the questions, and explain the questions and answers to the extent needed for either the witness or person questioning to understand them.[281] The explicit inclusion of

[277] *The Criminal Procedure Rules*, 2020 No 759 (L 19), s 3.9(7)(a).
[278] *Supra*, note 37, Benedet, at para 80-81; *Youth Justice and Criminal Evidence Act 1999* (UK), c 23, s 29(1) ("**YJCEA**").
[279] *Ibid*, Benedet, at para 80-81; *Ibid*, *YJCEA*, ss 16(1)(b) and (2).
[280] *Ibid*, *YJCEA*, s 16(5).
[281] *Ibid*, *YJCEA*, s 29(2).

an intermediary as a special measure creates trust that a person with a disability will be heard in the manner that accommodates their needs.

### POLICY GUIDANCE ON CRIMES AGAINST OLDER PEOPLE

The UK Crown Prosecution Service ("**CPS**") emphasizes an awareness that capacity of older adults can fluctuate over time and in relation to different decisions.[282] Further, CPS developed a "flagging definition" for vulnerability so that a matter where an older adult is targeted by the perpetrator due to vulnerability is closely monitored and pursued while maintaining focus on the victim and their needs.[283] This allows UK Crown counsel to flag a file and emphasize the special considerations in pursuing the matter, including any specialized supports, as well as reviewing the file as part of their "enhanced checks" conducted through their national hate crime assurance regime.[284]

### POLICY GUIDANCE ON PROSECUTING CRIMES AGAINST OLDER PEOPLE

In addition to policy guidelines on crimes against older people, the CPS has a distinct policy on prosecuting crimes against older people.[285] By separating out the understanding of what is a crime against an older person and special considerations, such as using a flagging definition, and the steps and considerations when prosecuting, CPS creates a highly detailed and technical framework for crimes against older adults. For example, the first thing addressed in the "Case-building" chapter is the distinction between competence of a witness and their mental capacity, as capacity is something that is context specific and can fluctuate.[286] Crown counsel are then reminded not to make assumptions about the "reliability, credibility, or competence" of the vulnerable adult or their ability to testify.[287] While the policy is silent regarding assessment of capacity, there is cross-reference to a separate "Competence and Compellability of Witnesses" policy that we discuss further below.[288]

Crown counsel are also encouraged to work with third parties, including the police, to ensure that the vulnerable adult is supported early on and their evidence is supported by corroborating evidence should they not be able to testify.[289] This approach also allows Crown counsel to identify any aggravating factors that may warrant further information gathering by police.[290]

The policy also notes that where Crown counsel decides not to proceed with charges but concern for the safety of the vulnerable adult remains, they should

[282]CPS Policy, "Policy Guidance on the Prosecution of Crimes Against Older People" (15 July 2019), online: https://www.cps.gov.uk/publication/policy-guidance-prosecution-crimes-against-older-people-0 ("**CPS Policy Guidance Prosecution**").
[283]*Ibid*, CPS Policy Guidance Prosecution.
[284]*Ibid*, CPS Policy Guidance Prosecution.
[285]CPS Policy, "Older People: Prosecuting Crimes Against" (30 April 2020), online: https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against ("**CPS Prosecuting Crimes Against**").
[286]*Ibid*, CPS Prosecuting Crimes Against.
[287]*Ibid*, CPS Prosecuting Crimes Against.
[288]*Ibid*, CPS Prosecuting Crimes Against.
[289]*Ibid*, CPS Prosecuting Crimes Against.
[290]*Ibid*, CPS Prosecuting Crimes Against.

assess and then correspond with third parties, such as the police or local social services, to ensure the vulnerable adult is safeguarded.[291]

Crown counsel are also directed to highlight a crime against a vulnerable adult targeted because of being vulnerable as one with a serious aggravating factor for the purposes of sentencing.[292]

### COMPETENCE AND COMPELLABILITY

Adding to the already fulsome framework is the CPS policy, "Competence and Compellability" in which Crown counsel are provided with definitions of competency and compellability, as well as guidance on determining competency.[293] This CPS policy states that all witnesses are competent to give evidence subject to an exception that a person cannot provide testimony if they cannot understand the questions put to them and cannot give answers that are understood.[294]

Competence is not to be confused with mental capacity but if the witness can understand the question and respond in a manner that can be understood, they are deemed competent to testify. Subsequent considerations are then given to how best to support an adult whose mental health may impact their ability to testify with special measures like the use of an intermediary.[295]

[291] *Ibid*, CPS Prosecuting Crimes Against.
[292] *Ibid*, CPS Prosecuting Crimes Against.
[293] CPS Policy, "Competence and Compellability" (24 July 2018), online: https://www.cps.gov.uk/legal-guidance/competence-and-compellability ("**CPS Competence and Compellability**").
[294] *Ibid*, CPS Competence and Compellability; *Supra*, note 278, *YJCEA*, s 53(3).
[295] *Ibid*, CPS Competence and Compellability; CPS Policy, "Mental Health: Victims and Witnesses" (25 April 2023), online: https://www.cps.gov.uk/legal-guidance/mental-health-victims-and-witnesses.

# Chapter 5: Considerations for Professionals and Policy-makers in British Columbia

Much of the information in this chapter is based on informant interviews. This chapter is intended to highlight pitfalls that were pointed out by informants. It is not intended to blame individuals doing the best they can working with considerable constraints. Two points must be made at the outset. First, references in this chapter to '**professionals**' include all occupational groups that interact with vulnerable adults as part of the criminal justice process. Second, the barriers, limitations, and issues discussed below have complex systemic causes.

## 5.1 Barriers to Access to Justice in the Current Canadian Model

### 5.1.1 Silos: Privacy and Lack of Information Sharing

Crown counsel, police, victim services, and other professionals are bound by various confidentiality rules. These rules result in professions failing to pass on important information regarding vulnerable victims or witnesses. Many informants reported that interagency confidentiality is one of the greatest barriers to supporting vulnerable victims and witnesses, especially those individuals with capacity issues. Open communication was identified as an important tool to successfully support this population through the criminal justice process.

Victim service workers in BC indicated that information sharing with police was a major issue, especially for community-based victim service programs. However, even police-based victim services expressed concerns. This is in part due to limitations with technology.[296]

#### LACK OF A DEDICATED ADVOCATE

Informants noted that the challenges faced by victims with capacity concerns are accentuated by the lack of a dedicated advocate within the victim's circle of confidentiality. The role of Crown counsel and police do not allow for either of these parties to act as an advocate on behalf of a victim. Victim service workers reported generally playing a more informational role in supporting victims, supplying them with information about various supports and relying on the client to self-advocate to engage those supports. Victim service workers noted that clients with capacity issues required a higher level of advocacy support to navigate the criminal justice system and access other available supports.

When working with clients with capacity concerns, victim service workers noted that they needed to do the work of connecting clients directly with support and advocating on their behalf. This was noted as challenging due to the limited time and resource support available within Victim Services to provide that level of service.

[296]See for example: Alberta, Justice and Solicitor General, *Recommendations on Victims Service: Report to Government* (2021) ("**Alberta Report**").

Informants also noted the challenges with asking a family member to support a victim with capacity issues as their advocate due to concerns around family being the source of abuse or coercion within a relationship.

Lack of training on recognizing indicia of capacity concerns and mental health decline was also noted as resulting in inconsistent approaches to identifying clients requiring greater support with advocacy and communication.

### 5.1.2 Intersections

Informants expressed intersections between capacity and other issues as a major barrier to justice for victims and witnesses with capacity issues.

#### VICTIM AND PERPETRATOR

Individuals with capacity issues often have more interactions with the criminal justice system – as victims and as perpetrators.[297] Informants indicated that individuals with fetal alcohol syndrome and traumatic brain injury are particularly prone to this. However, where a person is known primarily as a perpetrator, this may create barriers to justice when they find themselves on the other side of the coin as a victim.[298]

#### HOMELESSNESS

Individuals with capacity issues may find themselves in situations of prolonged homelessness. . Informants indicated that unhoused victims of crime are less likely to report incidents. This issue is outside the scope of this paper; however, informants indicated that the intersection between homelessness, capacity, and victimization creates a serious barrier to accessing justice.

#### SUBSTANCE USE AND BRAIN INJURY

Informants spoke about an intersection between substance use and capacity issues. For example, there are overlaps where:

- substance use has caused the brain injury; or
- someone has developed a substance use problem following a brain injury.[299]

These two factors can increase the difficulty in assisting or working with a victim or witness of crime. Both factors may result in challenges interacting with the criminal justice system, including problems with concentration and memory.[300] In addition, as outlined above, individuals with a brain injury have an increased risk of perpetrating crime.[301]

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[297]Kent Roach & Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42:1 UBC L Rev 1. ("**Roach**")
[298]Charlotte Fraser, "Victims of Crime Research Digest: Victims and Fetal Alcohol Spectrum Disorder (FASD): A Review of the Issues", online: https://canada.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p4.html.
[299]Brain Injury Canada, "Substance Use", online: https://braininjurycanada.ca/en/living-brain-injury/substance-use/#:~:text=Examples%20of%20situations%20of%20problematic%20substance%20use%20that,Lowered%20inhibition%20and%20an%20increase%20in%20risk-taking%20behaviour ("**Substance Use**").
[300]*Ibid*, Substance Use.
[301]*Supra*, note 297, Roach.

### AGE

Age is not an indication of capacity despite cognitive impairments, such as dementia related diseases, typically more prevalent in older adults. Further, stereotypes around aging noted earlier tend to leave older adults less believed or considered less reliable in their testimony. This creates a barrier for those suffering stigma related to both their age and cognitive functioning. As a result of these stigmas, older adults may face embarrassment or shame for falling victim and be less likely to report the matter.

Alternatively, age is often a factor considered at the sentencing stage for an offender, as is their moral culpability resulting from an age-related illness such as dementia.

### INDIGENEITY

As noted earlier, vulnerable adults who are Indigenous are at even greater risk of suffering harm. Further, Indigenous older adults are less likely to report a criminal matter to the police.[302]

### DOMESTIC VIOLENCE

Domestic violence also has an overlap with capacity issues. First, domestic violence often involves injuries to the face and head. This can result in traumatic brain injury, which in turn leads to capacity issues.

Further, individuals with disabilities are more likely to stay in abusive relationships, may not be aware of the abuse, may be less likely to report intimate partner violence, and may be less likely to be believed if they do report.[303] From a discussion with an informant, we know there are situations where it is also possible for a witness to come forward about abuse but the complainant, due to a disability, may be unaware or unable to confirm that the abuse occurred.

## 5.1.3 Lack of Documentation and Transparency

There are two points to note before addressing this barrier. First, Crown counsel are required to comply with evidentiary laws respecting competence to testify. Second, CHA 1 requires that Crown counsel document their reasoning on either proceeding or not proceeding with charge recommendations from police. Thus, Crown counsel are required to consider and document their determinations with respect to the capacity and competence of a vulnerable adult.

However, informants noted that informal capacity determinations are made by various professionals throughout the course of a criminal matter that impact how a case will progress. There is an absence of consistent policy and

[302] *Supra*, note 2, Conroy.
[303] Doris Rajan, "People with Mental Health and Cognitive Disabilities & Access to the Justice System: Report on a Review of the Literature" (Institute for Research and Development on Inclusion and Society,2015) at 3, online: https://inclusioncanada.ca/wp-content/uploads/sites/2/2016/05/People-with-Disabilities-Family-Violence-Access-to-Justice-FINAL-M....pdf ("**Rajan**").

training direction amongst the various professionals on understanding and determining capacity, and when a capacity assessment ought to be made and documented. Additionally, because there is no consistent policy between the various professionals, there is no consistent record of their determinations, or consistency in their handling of capacity issues.

### WHO IS MAKING ASSESSMENTS?

Only two informants indicated receiving extensive training on capacity. Both took this training independently. Despite this, all informants indicated that they were required to make determinations about whether a person had capacity issues. This often led to referrals for formal assessments. However, informants also indicated observing others in their profession making judgment calls regarding a person's capacity without formal training.

### WHAT INFORMATION IS THE DETERMINATION BASED ON?

Without specific policies and procedures, professionals often make informal determinations of a person's capacity. When speaking to a witness or victim, informants indicated that certain behaviors would trigger their concern. For example, it may become apparent that a person is providing incorrect information, or they are making contradictory statements.

Once this concern is triggered, informants said they would try to gather more information. Usually this involved reaching out to other professionals for their observations or to supporters like community organizations and family. Unfortunately, not all victims and witnesses have family or support people who can help provide information. Additionally, sometimes the only family member is the person who has committed the crime.

In these situations, professionals may choose to refer the individual for a formal assessment. Alternatively, a professional may make an independent judgement call about the trajectory of the case based on their observations and informal determinations.

### WHAT IS THE PURPOSE OF A CAPACITY ASSESSMENT?

Informants expressed concern regarding unqualified individuals assessing capacity in a blanket manner.

For example, an individual may discover that a person has been diagnosed with dementia, or they may notice a person has said or done things that indicate capacity issues. The presence of these factors combined with a lack of training in understanding capacity and the root causes of capacity issues (e.g., dementia) may result in blanket assumptions about a person's ability to engage with the criminal justice system with insufficient regard to their ability to recall information in a manner that meets expectations of testimonial competence.

This can lead to possible misjudgment of not only their testimonial competence, but also their reliability and credibility as a witness.[304]

For example, a professional may discover that a person has dementia and receives help with their finances. From this information, they may incorrectly determine that it is not worth referring the case to the Crown because the person will not have testamentary capacity.[305] The test for testamentary capacity is a different test to that of testimonial capacity; it has a higher threshold. On the basis of this type of decision, the professional may refer the individual to social supports and not Crown.

### ABSENCE OF A RECORD OF CAPACITY DETERMINATIONS

For all the reasons discussed above, professionals often make judgment calls about a person's capacity. However, these are not necessarily documented.

For example, a professional may determine that an individual has capacity issues, and their case is best addressed by providing community resources rather than proceeding with criminal charges. However, there is no documentation created to show that this judgment call was made, by whom it was made, or what criteria or observations formed its basis.

**Inconsistencies between Professions**

Informants in various professions did not understand the standards, policies, and constraints of their partners. Police, victim services, and Crown counsel all have unique roles, requirements, obligations, and relationships with the victim. A lack of understanding about the other professions resulted in frustration and a lack of coordination.

### DEFINITIONS OF CAPACITY

Informants said they did not always understand the other profession's standards and requirements for capacity.

For example, Victim Services have a very different approach to capacity than Crown counsel. Victim service workers said they did not understand what standards Crown counsel applied or how a person's capacity was determined. .

This had two impacts:

1. cases were not referred to Crown counsel because they were not seen as viable; or
2. cases were referred to Crown counsel, but differences in opinion on capacity resulted in relationship strain.

Clearer information about what level of capacity is required for each step in the criminal justice process, and how it is assessed would allow for better collaboration between professions.

[304] *Supra*, note 37, Benedet, at 44.
[305] Testamentary capacity refers to the test an individual must meet in order to execute a will. Testamentary capacity is considered to be at the highest end of capacity requirements for decision-making. See *Wolfman-Stotland v Stotland*, 2011 BCCA 175 at para 26.

### RELATIONSHIP TO VICTIM

Each profession has a different relationship to the victim or witness. Again, this was a place of confusion and hard feelings.

For example, advocates, Victim Services, and health care workers have a client centered approach.

This contrasted significantly with police and Crown counsel, who have broader obligations. While the victim is a direct client to an advocate or victim service worker, Crown counsel's obligation is to the broader community. Informants noted that this difference resulted in misunderstandings between the professions.

## 5.1.6 Lack of Training

### FOCUS ON PERPETRATORS

Most informants had not received training on either capacity or causes of diminished capacity. Where professionals did receive training on these topics, it was primarily on the topic of perpetrators rather than victims. While some informants felt this information was transferable to victims, the vast majority did not.

### COMPOUNDING FACTORS- TRAUMA, MENTAL HEALTH, AND SUBSTANCE USE

Several informants expressed confusion around the intersections between trauma, mental health, substance use, and capacity. Informants said they did not clearly understand the line between these concerns.

For example, some informants expressed concern that memory problems attributed to dementia were actually short-term impacts from trauma, affecting how a vulnerable adult's capacity was assessed. This indicates that professionals need training in relation to these compounding factors and how they may impact a victim or witness.

### LIMITATIONS OF EXISTING TRAINING

Informants noted that while information on elder abuse was accessible to them, what training they received did not extend to understanding and identifying mental health issues and capacity decline in older adults, the obligations of service providers when working with adults with diminished capacity, or strategies for communicating with clients with diminished capacity and communication challenges.

# Chapter 6: Suggested Best Practices for British Columbia

The following suggested best practices arise from conversations with informants, identified extra-jurisdictional best practices, and research. In considering these suggested best practices, we acknowledge implementation of some of the suggested best practices would have implications for current criminal procedure and evidentiary rules. The suggested best practices create inherent challenges to the way these rules currently operate, and implementation requires further research to navigate these challenges.

## 6.1 The Flow of a Criminal Matter in BC

Informants across various professions, geographic locations, and different clientele helped us to analyze how vulnerable adults navigate the criminal justice system. Below we provide a broad overview of some of the complexities vulnerable adults face at each stage of a criminal matter. It also seeks to identify which professionals could intervene to assist vulnerable adults in mitigating these issues. For each stage, we offer best practice suggestions that could be incorporated into training, policy manuals, or guidelines for the identified professionals.

### Stage 1: Reporting

**Issue 1: Lack of reporting**

Informants indicated that often vulnerable adults often will not report a crime, an observation that is supported in research.[306] This lack of reporting may occur for several reasons:

- the crime was perpetrated by a family member, and the vulnerable adult is afraid of reprisal or losing support;
- the vulnerable adult does not understand what happened was a crime;
- the vulnerable adult cannot communicate in a traditional manner;[307]
- the vulnerable adult does not think they will be believed; and/or
- the vulnerable adult may not be able to describe what happened.[308]

[306] *Supra*, note 3, Grant at 57. Grant and Benedet referred to a study by Ann Burgess and Steven Phillips (Ann Wolbert Burgess et al, "Sexual Abuse of Older Adults: Assessing for Signs of a Serious Crime—and Reporting It" (2005) 105:10 American J Nursing 66 at 66) in which 284 cases of reported elder sexual abuse were reviewed, and found that 62% of older people without dementia reported the abuse either to police or adult protective services. Only 12.8% with dementia self-reported, however. The number of unreported offences against those living in care facilities was expected to be higher, particularly among non-verbal women, or where the perpetrator was a person living with dementia. It was thought that these instances, even when witnessed, "… may be confused with consenting activity among residents or with a spouse, or assumed to cause no harm to a resident with cognitive impairments": Grant, supra note 3, at 57. It is thought that many of these instances are then dealt with internally and without police involvement for a number of reasons. "Accordingly, reported cases represent merely 'the tip of the iceberg'": *ibid.*

[307] Communication Disabilities Access Canada, "Communication Intermediaries in Justice Services: Access to Justice for Ontarians who have Communication Disabilities" (2017) at 18, online: https://www.cdacanada.com/wp-content/uploads/2018/02/Communication_Intermediaries_In_Justice_Services_DIGITAL_14-1.pdf ("**CDAC Intermediaries**").

[308] *Supra*, note 303, Rajan, at 4.

Informants indicated that they often encounter vulnerable victims long after the crime has been committed.

For example, a person may experience domestic or elder abuse and end up living in their vehicle. The person becomes ill and ends up in hospital. The hospital reports suspicions of violence or other crimes to the police. Often, months or even years have passed since the events occurred and evidence is no longer available. Police then refer the vulnerable adult to Victim Services, who provide resources to assist them. In this situation the criminal charge is never pursued.

**Professions involved:** Health care, police, victim services.

**Issue 2: Third party reporting**
Informants indicated that crimes against vulnerable adults are most often reported by third parties. This may include family, friends, support workers, health care professionals, lawyers, or any other person who notices signs of abuse or a crime.

This scenario appears to follow a predictable path. For example, a vulnerable adult goes to the hospital with injuries. Hospital staff suspect the injuries were caused by a crime. A report is made to the police and any other appropriate authority.

**Professions involved:** Health care, police, Public Guardian and Trustee, and advocacy or support agencies.

**Issue 3: Self-reporting**
Some vulnerable adults report crime directly. For example, the vulnerable adult contacts the police or tells a third party about a crime and asks for help reporting it.

**Professions involved:** Police.

**Suggested Best Practices**
**Best Practice:** One of the keys at this stage of the process is to increase confidence in the justice system, which will in turn encourage timely reporting. Best practices that support reporting involve modification of interview techniques and using communication intermediaries.

Modify interviewing techniques
Interviews should be conducted:[309]

- quickly after the event;
- in the morning;
- with consideration for sensory limitations (hearing or vision limitations); and

[309]Helene Love, "Aging Witnesses: Exploring Difference, Inspiring Change" (2015) 19:4 Int'l J Evidence & Proof 210 at 220-221 ("**Love 2015**").

- Victim Services should be brought in for collaborative interviews to ensure a victim-centred approach is taken.[310]

When using lineups for identification, police should:[311]

- use sequential lineups (i.e., one person at a time);
- tell the witness that the perpetrator might not be in the lineup; and
- provide the witness with photos of the scene or let them read a prior statement to refresh their memories of the event.

**Use of a Communication Intermediary**

**Best Practice:** Ontario has accepted the use of "communication intermediaries", akin to those used in the UK, to better facilitate the involvement of vulnerable adults with speech, language, and communication disabilities.[312] A communication intermediary is an impartial Speech-Language Pathologist who assists with facilitating communication of a person with a communication disability to give a witness statement, for example.[313] This suggested best practice is not exclusive to this stage of criminal matter, but when implemented at the earliest opportunity could increase reporting of offences against vulnerable adults as the support could raise confidence in the complaint being understood and taken seriously.

Aids are frequently available for those with visual or auditory impairments or who require an interpreter for a different language. Those who require assistance with communicating outside of our traditional understanding of communication must also be accommodated by providing a communication intermediary to assist the vulnerable adult in giving information accurately.[314] Identifying this need at the initial reporting stage can ensure that police and Victim Services gain a more fulsome understanding of the incident and the appropriate trajectory of the report and investigation, as those with communication disabilities may not be in a position to report abuse without the assistance of a communication intermediary.[315]

While having an advocate to assist a vulnerable adult in reporting is important, a communication intermediary who is an independent third party can also help in cases where the perpetrator may be a supporter or caregiver of the victim, particularly if the vulnerable adult identifies as a woman.[316] Involving a communication intermediary at this stage ensures that a fulsome initial report

[310]British Columbia, Ministry of Public Safety and Solicitor General, News Release, "New Programs, Police Standards Support Sexual Assault Survivors" (24 July 2023), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/service-providers/procurement/sas_nr_sa_standards_services-july_2023.pdf.
[311]*Supra*, note 309, Love 2015, at 221-222.
[312]*Supra*, note 307, CDAC Intermediaries, at 22.
[313]*Ibid*, CDAC Intermediaries, at 22.
[314]*Ibid*, CDAC Intermediaries, at 22.
[315]*Ibid*, CDAC Intermediaries, at 17; *Supra*, note 3, Grant, at 57.
[316]*Ibid*, CDAC Intermediaries, at 17-18.

is obtained by police and helps to ensure investigative steps undertaken are properly informed.[317]

## Stage 2: Investigation

### Issue 1: Supporting evidence

Informants indicated that other evidence was a major factor in whether a case progressed. The less evidence available, the less likely a case was to proceed. This was especially true when the vulnerable adult was the only source of evidence.

Supporting evidence has also been demonstrated to impact how a judge assesses a witness's credibility and reliability. A 2019 study showed that judges were more likely to view a witness as credible if there was other supporting evidence.[318]

**Professionals involved:** Police, victim services, and Crown counsel.

### Issue 2: Recording statements

Vulnerable adults are a diverse group. Some individuals within this population may have degenerative illnesses (e.g., Alzheimer's) which can continue to negatively affect their capacity. Other vulnerable adults may not have degenerative illnesses but may have serious reactions to being a victim of crime. For example, in one case a vulnerable adult with a cognitive disability was unable to speak about the incident.[319] She was unable to testify at trial because of this.

Informants indicated that taking recorded video statements was not an approach they saw being employed in cases involving witnesses who were advanced in age and/or people with limited capacity due to dementia or other causes.

Informants indicated that it is important to carefully record a vulnerable adult's statement in line with the case law requirements for videotaped evidence.[320] This acts as a safeguard to preserve evidence in case the adult is unable to testify or has a change in capacity between the incident and the trial.

**Professionals involved:** Police, Victim Services, and Crown counsel.

### Issue 3: Accurately identifying vulnerable victims needs and abilities

Training for understanding capacity and working with vulnerable adults with disabilities was indicated as an area for improvement. Identifying the level of ability of a vulnerable adult will assist in determining the best method for obtaining and preserving relevant evidence from that person. If police and Victim Services can provide appropriate accommodations throughout the

[317] *Ibid*, CDAC Intermediaries, at 29.
[318] Helene Love, *Age and Ageism in the Assessment of Witnesses* (Doctoral dissertation, University of Toronto, 2019) [unpublished] at 53.
[319] *R v RR*, 2002 ON No 4254.
[320] For admissibility and purpose, see *R v L (DO)*, [1993] 4 SCR 419; *R v Untinen*, 2017 BCCA 320; *R v KA*, 2023 BCCA 323.

investigative process, it is more likely that the vulnerable adult will have greater trust in the justice system.

**Professionals involved:** Police, victim services, and Crown counsel.

**Suggested Best Practices**

Police and Crown counsel informants indicated how important it is for investigators to locate as much evidence as possible in cases involving vulnerable adults as witnesses. This requires a modification of investigative techniques. We acknowledge that there is no universal way to investigate cases of elder abuse,[321] but there needs to be a shift in how police, Victim Services, and Crown counsel work to support vulnerable adults in the criminal justice system.

**Best Practice:** Development of an information sharing database between Crown, police, and Victim Services that could allow for:

- key individuals to be listed (e.g., assigned Crown counsel);
- information and document sharing (e.g., police reports, etc.); and
- information about scheduling (e.g., court dates, etc.).

**Best Practice:** In Alberta, it has been suggested that a team approach be implemented, primarily between victim serving organizations and police, but also including other stakeholder groups like the courts, the Alberta Crown Prosecution Service, shelters, and other community agencies.[322]

**Newfoundland & Labrador: Policy on the Relationship between Crown Attorneys and the Police[323]**

The Newfoundland and Labrador policy on police and Crown counsel interaction is longer and more nuanced than most other jurisdictions ("**NFLD Policy**"). The NFLD Policy actively encourages the two professions to work together on difficult cases, stating: "[c]ooperation and effective consultation between the police and Public Prosecutions are essential to the proper administration of justice."[324]

The NFLD Policy also instructs Crown counsel to work "closely" with police to identify and collect evidence. This includes videorecorded statements of key witnesses. Crown counsel is advised to review these videos for the quality and reliability of the recorded witness.[325] This would be of considerable value for vulnerable victims and witnesses. Many informants expressed that recording interviews ahead of time was especially important for this population not only to preserve evidence, but to permit different parties to understand the needs of the victim or witness (e.g., defence counsel, expert witnesses etc.).

[321] Lisa Ha & Ruth Code, *An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Section of the Ottawa Police Service* (Canada Department of Justice, 2013) at 7.
[322] See for example: *supra*, note 296, Alberta Report, at 12.
[323] *Supra*, note 178, NFLD Policy.
[324] *Ibid*, NFLD Policy, at 5-3.
[325] *Ibid*, NFLD Policy, at 5-4 to 5-5.

**Best Practice:** Video record a vulnerable adult's evidence in line with case law requirements as early as possible to ensure timely recording. This is integral if the victim or witness is an older adult who may have mild cognitive impairments at the time of reporting that may progressively impact testimonial competence while awaiting trial.

## POLICE SERVICES ACT REGULATION: ADEQUACY AND EFFECTIVENESS OF POLICE SERVICES[326]

*The Adequacy and Effectiveness of Police Services Ontario Regulation* ("**AEPSR**") requires that "every chief of police shall develop and maintain procedures on" a variety of topics ranging from child pornography to hate crime.[327] Elder abuse and vulnerable adult abuse are among the subjects listed in the AERPSR. Despite this, there is no guidance as to the content required for procedures.[328] As a result, most of the policies accessed online were very high-level and brief and did not discuss capacity.[329]

In BC, the Provincial Policing Standards include training requirements on vulnerable populations. This is limited, however, to Indigenous perspectives, trauma-informed practice, and violence in relationships.[330] Human rights are mentioned as a key consideration in the guiding principle, but the standards fail to mention vulnerable adults, people living with disabilities, capacity, and violence against elders.[331]

For better accommodation, there needs to be more fulsome training with respect to understanding and assessing capacity. This also requires police, Victim Services, and Crown counsel to learn techniques on how to identify when a vulnerable adult may have capacity but requires assistance in giving evidence at the investigative stage. This is because there often are assumptions made about persons with disabilities that give rise to confusion between a vulnerable adult's physical abilities and capacity.[332]

**Best Practice:** Discuss capacity and how to determine capacity issues and their impact on a person's ability to testify in greater detail in both policing guidelines and procedures.

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[326] *Adequacy and Effectiveness of Police Services*, O Reg 3/99 ("**AEPS Reg**").
[327] *Ibid*, AEPS Reg, s 12.
[328] *Ibid*, AEPS Reg, s 12.
[329] Niagara Police, "Bylaw No. 213-2000, A By-law Respecting Elder & Vulnerable Adult Abuse (LE-021)", online: https://www.niagarapolice.ca/en/contentresources/resources/who-we-are/Elder-and-Vulnerable-Adult-Abuse---213-2000.pdf; Toronto Police Service, "05-22 Elder and Vulnerable Adult Abuse", online: https://www.tps.ca/media/filer_public/7e/1a/7e1a0ced-ac1d-438e-a90d-e1fb96d2be93/05-22_elder_and_vulnerable_adult_abuse_20220615_ext.pdf; York Regional Police Services Board, "Adequacy Standards Older and Vulnerable Adult Abuse Policy", online: http://www.yrpsb.ca/policies-adequacy-standards-older-and-vulnerable-adult-abuse-policy#:~:text=Statutory%20Authority%20Section%2029%20of%20the%20Adequacy%20Standards,includes%20any%20reference%20to%20seniors%20or%20elderly%20adults.
[330] Province of British Columbia, "Training to Enhance Service Delivery to Vulnerable Communities", online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/3-2-6-train-service-vulnerable.pdf. Effective 2022 and 2024.
[331] Province of British Columbia, "Guiding Principles Related to Provincial Policing Standards", online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/6-1-principles.pdf.
[332] *Supra*, note 170, Flynn, at 17-18.

## Stage 3: Charge Assessment and Approval

### Issue 1: Capacity and Testimonial Competence

Informants highlighted the need for greater understanding about how to identify capacity concerns for vulnerable adults. Neither police nor Crown counsel have extensive knowledge of capacity issues or how to screen for capacity such that they are satisfied that a vulnerable adult with cognitive impairments can still adequately testify. At this stage of the criminal process, understanding a vulnerable adult's capacity can either cause a matter to move forward or bring it to an end, either because a vulnerable adult is deemed incapable of testifying or they are not found to be a credible or reliable witness, even though they satisfy the test for testimonial competence.

**Professionals involved:** Police and Crown counsel.

### Suggested Best Practices

**Best Practice:** As noted earlier, use of a communication intermediaries, such as is available in Ontario, can greatly assist Crown counsel in determining if a vulnerable adult could testify with supports in place that do not conform to traditional methods of communication. In implementing use of communication intermediaries, Crown counsel may find that vulnerable adults are competent to testify but their ability to convey evidence requires the use of symbols, gestures, or pictures.[333]

**Best Practice:** Acquiring a stronger understanding of capacity and what to screen for, as well as introducing strategies to assist a vulnerable adult with diminished capacity at the charge assessment stage may help ensure greater success through the trial process.

If the approval of a charge is dependent on whether the witness has competence to testify or is a reliable or credible witness, Crown counsel is inherently making a determination of the witness's capacity. This should be recorded in a fashion that outlines Crown counsel's considerations, factors they relied upon, and whether counsel believe the vulnerable adult can understand the nature of the oath or affirmation and can recall and communicate the evidence, or if only one or none of the elements is met, which one.

**Best Practice:** Crown counsel may need to employ a range of strategies when working with vulnerable adults. For example, some people living with dementia are prone to "sundowner's effect", meaning that their cognitive functioning decreases during the day. When working with a vulnerable adult affected by sundowner's effect, Crown counsel may need to schedule interviews in the morning and end them when they notice the vulnerable adult beginning to struggle with recalling details or responding to questions.

Some strategies for working with vulnerable adults that Crown counsel may

[333] *Supra*, note 307, CDAC Intermediaries, at 27, 36, 54, and 61.

need to employ when working with a vulnerable adult, depending on the adult's abilities, are:

1. rephrasing questions;
2. avoiding complex sentence structures and terms;
3. giving the vulnerable adult the time they need to answer questions rather than rushing;
4. coming back to a topic later; or
5. having questions and requests for information written in plain language for them to take and think about.

**Issue 2: Crown Counsel Policy Manual Cross-References**

Considering the challenges involved in prosecuting cases of sexual violence involving elderly victims, which may come into play at all stages from reporting to the trial, it is unfortunate that ELD 1, VIC 1, and IPV 1 do not cross-reference each other.[334] While ELD 1 does reference VUL 1, VUL 1 does not reference back to ELD 1. This cross-referential gap in policies highlights the need to acknowledge that intimate partner violence and sexual violence against vulnerable adults also occurs in the realm of elder abuse. This is supported by statistics indicating that older women with disabilities, particularly those residing in care facilities, are more likely to suffer sexual assault, often by a person in a supportive or trusted role.[335]

Further, VIC 1 is very high level and mostly outlines Crown counsel's obligations to victims under the different pieces of legislation. Given that VIC 1 is a high-level policy, it is not surprising that it does not include a more detailed discussion of how to support vulnerable adult victims beyond the minimum legal requirements contained in the *Canadian Victims Bill of Rights Act and Victims of Crime Act*.

**Professionals involved:** Crown counsel.

**Suggested Best Practices**

**Best Practice:** Acquire increased awareness of the interplay between the vulnerability of an adult, advanced age, and increased risk of abuse, particularly of sexual abuse. There needs to be wider acceptance that vulnerable adults in relationships are at risk of intimate partner violence, regardless of age. Cross-referencing ELD 1, VIC 1, and IPV 1 can provide a more detailed understanding of how to support vulnerable adult victims suffering forms of domestic or elder abuse, in particular older adults and victims of intimate partner violence.

**Best Practice:** A possible addition to CHA 1 for increased reporting to vulnerable adults on Crown counsel charge assessments. If Crown counsel choose not to proceed on a matter, allowing vulnerable adults or their advocates the ability to be informed of the reasons not to proceed, similar

[334] See chapter 3 for an explanation of these abbreviations for existing policies.
[335] *Supra*, note 3, Grant, at 57.

to the provisions of CHA 1 for investigating agencies[336], could create greater transparency and understanding of the criminal justice system when working with vulnerable adults.

### Stage 4: Court Process

Once an offence is reported by or on behalf of a vulnerable adult, an investigation is completed, and charges are subsequently approved, the vulnerable adult is then subjected to the court process that does not always provide a safe and accommodating environment. As discussed above, there are efforts to better accommodate vulnerable adults, but these efforts are balanced with the rights of an accused person. We must ensure that fair administration of a trial occurs, but the concept of fairness should not lie solely in the accused's perspective as a victim is also entitled to a right to a "fair trial".[337]
**Professions involved:** Crown counsel, judiciary, and defense counsel.

#### Issue 1: Testimonial Aids

Use of testimonial aids generally has been somewhat inconsistent, according to information provided by informants. In particular, testimonial aids like video-recorded statements, are not consistently used when older persons, persons with dementia, or persons at risk of cognitive decline are or would be witnesses. In line with less-than-ideal policies for assessing capacity, there is little guidance on how to conduct an assessment for need of testimonial aids and which would be most helpful to a vulnerable adult.[338]

It was frequently expressed that applications should be made at the earliest opportunity. One informant noted that while applications are made, it often happens that defence counsel take unnecessary positions as a form of advocacy for their client. This suggests that use of testimonial aids may sometimes be opposed to further an accused person's defence, rather than acknowledging the use of testimonial aids as a manner of ensuring rights to accommodation and a fair trial are upheld. The rights of the accused are integral to a fair trial, which includes opposing applications by Crown counsel deemed necessary to protect the interests of their client. However, opposition to a valid application for use of a testimonial aid does not necessarily support a fair trial and presentation of best evidence.

#### Suggested Best Practices

**Best Practice:** Make applications for use of testimonial aids as early as possible to ensure that the vulnerable adult has the required support secured well in advance of the trial.

**Best Practice:** For both defence and Crown counsel, specialized training on assessing and accommodating the need for testimonial aids for vulnerable adults, particularly older adults with dementia.

[336] *Supra*, note 176, CHA 1, at 1 – 2.
[337] *Supra*, note 307, CDAC Intermediaries, at 38, citing *R v Seaboyer*, [1991] 2 SCR 577, dissent of J L'Heureux Dube, and *R v Mills*, [1999] 3 SCR 668.
[338] *Supra*, note 14, VUL 1.

**Best Practice:** Implementation of the Ground Rules Hearing in the British Columbia criminal justice system would require discussion amongst all justice system participants at the outset of the criminal matter as to any accommodations needed for a vulnerable adult. While this may require Crown counsel to disclose any knowledge regarding a vulnerable adult's cognitive impairments, implementation of a pre-trial hearing similar to the Ground Rules Hearing serves to ensure that the best evidence is put forward for the trial by ensuring that accommodations are addressed at an early stage in the trial process. This does not, however, remove the burden of a challenging party to prove a vulnerable adult does not have testimonial competence.

### Issue 2: Trial prep

As noted in VUL 1, it is preferred that assigned Crown counsel have specialized training and remain on the file through to completion when there is a vulnerable adult involved.[339] This helps to maintain consistency for the vulnerable adult and build trust in the process. Unfortunately, staffing and resources can make this difficult to accomplish, leaving Crown counsel in a position where they are picking up a file halfway through and do not have a strong relationship with the vulnerable adult, nor are they aware of the vulnerable adult's needs or capabilities. This can lead to a gap in knowledge of the vulnerable adult's capacity, how to support them, or even to spot if capacity has subsequently fluctuated. As a result, it may be that a pre-recorded statement was needed but due to changes in the assigned Crown counsel, the opportunity was missed. Further, having support staff in place that a vulnerable adult is comfortable with and can ask questions of is important in furthering confidence that the adult's concerns or needs are being taken seriously. In addition to a lack of specialized Crown counsel, other staff and resources needed for files with vulnerable adults are not always available.

### Suggested Best Practices

**Best Practice:** Adequate training implemented to ensure staff and Crown counsel are available to assist on files involving a vulnerable adult.

**Best Practice:** Consider the abilities of the vulnerable adult and adjust trial preparation with the vulnerable adult's needs in mind. This may include:

- having victim services in meetings with the vulnerable adult;
- working with the vulnerable adult's advocate, if they have one;
- providing consistent updates for the vulnerable adult on the status of the matter;
- conducting regular interviews to assess the vulnerable adult's abilities leading up to trial to determine if testimonial competence may become an issue; and
- use of a communication intermediary throughout trial preparation sessions so that the vulnerable adult *and* Crown counsel are comfortable with the mode of communication.

[339] *Ibid*, note 14, VUL 1.

### Issue 3: At Trial

The trial can often be one of the more re-traumatizing stages of the criminal justice system process for a vulnerable adult. As discussed in the case of *R v Wyatt*, there are instances where a matter should proceed to trial, but the inability of a vulnerable adult, who is otherwise competent to testify, to withstand cross-examination brings the matter to an end. [340]

Understandably, the rights of the accused to cross-examine and meet the case against them is not in question. There are, however, steps that can be taken to better ensure that the same rights of victims and witnesses to be treated fairly are respected during the trial process.

Two key aspects of the trial process that can impact a vulnerable adult's perceived credibility, reliability, and competence to testify are cross-examination and potential bias. Addressing both issues requires a shift in the way a vulnerable adult testifies, beyond the use of testimonial aids, and how such testimony should be considered when jury instructions are given.

**Professionals involved:** Crown counsel, defense counsel, and the judiciary.

#### General Trial Procedures

From the outset, there is support in the social science research and from some informants that both the examination-in-chief and cross-examination of a vulnerable adult may need to be altered to accommodate the needs of the adult to ensure fair and accurate delivery of the evidence.
This support could be more effectively implemented, and the legal system could better accommodate vulnerable victims and witnesses by:

- creation of a specialized court (e.g., specially trained judiciary, built in supports and accommodations);
- routine application for accommodations; and
- creation of legal mechanisms to preserve evidence of the victim or witness, while meeting the rights of the accused.[341]

#### Cross-Examination

Fairness requires that an accused have the opportunity to cross-examine a witness for the Crown. The adversarial nature of the trial process encourages defence counsel to zealously advocate for their client, such that it is in the *BC Professional Code of Conduct*.[342] However, there is also a requirement that in so doing, defence counsel is to treat all witnesses fairly. The research and information gathered from informants indicates that fairness with respect to vulnerable adults is not always adequately applied. Cross-examination is often

[340] *Supra*, note 92, *Wyatt*.
[341] *Supra*, note 309, Love 2015, at 222.
[342] Law Society of British Columbia, "Chapter 2 -- Standards of the Legal Profession -- Annotated" in *Code of Professional Conduct for British Columbia*, Law Society of British Columbia (updated July 2023), c 2.1-3(d)- (f), online: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-2-%E2%80%93-standards-of-the-legal-profession/.

formulated to "trip up" a witness, capture them in a contradiction, and ultimately deconstruct their testimony-in-chief such that their reliability or credibility is called into question.

For even the most well-prepared witness, maintaining their testimony can be difficult in the face of an experienced litigator. For a vulnerable adult who may be in the early stages of dementia, have a cognitive impairment, or live with a disability that impacts their ability to recall or communicate evidence, cross-examination can be incredibly difficult and traumatizing. Tactics traditionally employed during cross-examination cannot be used with a vulnerable adult and then suggest that the process is fair.

**Suggested Best Practices:**

**Best Practice:** Typical practices reserving open-ended questions for direct examination and leading questions for cross-examination may need to be modified. The format of questions and the length of time given for a witness to respond to a question may also need to be modified.[343]

Open ended questions- Research indicates that vulnerable adults with intellectual disabilities can respond to open ended questions with a high degree of accuracy, even if they are not giving as much information in their response.[344] Employing open ended questions consistently and in plain language will likely increase the perceived reliability of the testimony from a vulnerable adult.

Avoid leading questions- It is the right of the accused to question a witness and test their evidence by way of cross-examination. However, leading questions like those typically employed during a cross-examination do not produce reliable responses from vulnerable adults with certain intellectual disabilities. Research indicates that "…this occurs because persons with certain intellectual disabilities are more suggestible and may try to please the questioner more than other witnesses. There may also be a tendency for a witness with a mental disability to answer "yes" to a question when the question is not understood."[345]

There are thought to be a number of reasons for this, such as the vulnerable adult's ability, wish to please counsel, or that they have learned that answering things affirmatively gives the impression that they understand the questions.[346] It is also possible that if a question is asked repeatedly, the vulnerable adult may change their answer because they believe that they may not have answered "correctly" the first time, leading the questioner to ask again.[347]

Intermediaries suggest the following when asking questions of vulnerable adults:

[343] *Supra*, note 169, UN Special Rapporteur 2020, at 16. According to the Special Rapporteur, "Modifications to the method of questioning in appropriate circumstances, such as allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language…" may be needed.
[344] *Supra*, note 37, Benedet, at para 22.
[345] *Ibid*, Benedet, at para 23.
[346] *Ibid*, Benedet, at para 23.
[347] *Ibid*, Benedet, at para 23.

- ask short questions;
- keep questions to one subject;
- ask questions in chronological order;
- ask questions using simple and plain language;
- ask questions slowly; and
- avoid statements, negative language, and non-literal language.[348]

Also recommended:

- "Hampel method" of roleplay to teach lawyers;
    - Hampel method has participants engage in role playing as a form of advocacy training which provides the trainee a scenario and task to be completed. Following their performance of the task, a trainer reviews their performance and provides points to be improved, how to improve, and then the role play is conducted again.[349]
- use of intermediaries to support communication; and
- consider – is it realistic that a lawyer will completely change their work style to accommodate a witness for the other side? "Not only does an advocate have to ask questions in the best interests of his/her client's case by extracting alternative evidence and casting doubt on the witness's version of events, they have to perhaps change their entire style, manner and medium of questioning for a witness with ID [intellectual disabilities]. This raises a number of issues. Is this placing very high expectations onto advocates and putting them into an unfair position and are they then best placed to cross-examine witnesses with ID?"[350]

**Best Practice:** This requires an agreed mode of best practice questioning for both defence and Crown counsel when a vulnerable adult will testify. A similar approach to the Ground Rules Hearing in the UK may assist in ensuring that any modified trial techniques respect the rights of the accused and witness, while also ensuring the integrity of the trial process remains intact.

**Issue 4: Judicial Intervention and Objections to Questioning**

Judicial interventions can be perceived as unnecessary interference in what may traditionally look like an appropriate cross-examination or even direct examination. However, there may be times when Crown counsel may need to be more proactive in their advocacy to ensure a vulnerable adult is able to provide adequate testimony while under cross-examination. While some informants noted that members of the judiciary seem reluctant to intervene, there have been times where it was clearly warranted.

Interventions by the judiciary may be prompted by counsel objecting to the

[348] *Supra*, note 88, Morrison, at 257.
[349] Stephen Lloyd, "Working Party on the Method of Teaching Advocacy" (January 2018), *The Inns Court College of Advocacy*, online: https://www.icca.ac.uk/post-qualification-training/cpd/advocacy-training/the-hampel-method/working-party-on-the-method-of-teaching-advocacy/.
[350] *Supra*, note 87, Morrison, at 259.

format of a question, purposely misleading questions, or persistent attempts to confuse and press vulnerable adults.[351] Typically, defence counsel can rely on the traditional response that the questioning is in line with speaking to their theory of the case or may simply rephrase the question in a different but similarly confusing manner. Intervention in these scenarios is warranted and permitted by case law but is not legislated.

The discretion to intervene, however, is not consistently exercised and this may be due to an unwillingness to contravene the accused's right to a fair trial. Unfortunately, this may result in situations where the evidence of a vulnerable adult is tainted because the questioning was not interrupted to address the fact that the witness has lost the ability to understand the correctness of their own testimony. For example, the Manitoba case of *R v Prince*[352] resulted in a situation where the judge admitted that he found the witness seemed to have capacity to understand the questions put to her but agreed that she was not able to understand that her responses created serious inconsistencies in her testimony.[353]

In this case, the inability to comprehend that the testimony created contradictions should raise concern over the capacity of the complainant, who did have a cognitive functioning impairment, rather than finding the complainant unreliable and a basis for the acquittal.[354] While it may be that the complainant was attempting to mislead, it is also likely that the witness was attempting to please the questioners and/or was confused by the questions, leading to an unclarified perception that the complainant was unreliable.[355]

However, in New Zealand, a trial judge can rely on section 85 of the *Evidence Act 2006*, which expressly "allows a judge to intervene where he or she considers a question "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand," with mental disability being one of the factors the judge should consider before doing so.[356] In a case of the Court of Appeal in New Zealand, the accused appealed on the basis of inappropriate judicial interference. The convictions were upheld as the Court found defence counsel used cross-examination tactics that were not appropriate for the witness at hand and created confusion for the witness, warranting judicial intervention to clarify the questions for the complainant.[357]

**Best Practice:** When looking at the UK model discussed above, it becomes apparent that matters involving vulnerable adults warrant a different approach to a judge's typical involvement during trial. Such an approach can be seen in

[351]*Supra*, note 37, Benedet, at para 53.
[352]*R v Prince*, 2008 MBQB 241 ("**Prince**").
[353]Ibid, *Prince*, , at paras 18, 55-58, 60, and 62.
[354]*Supra*, note 37, Benedet, at para 48.
[355]*Ibid*, Benedet, at para 48.
[356]*Ibid*, Benedet, at para 53.
[357]*Ibid*, Benedet, at para 54.

the UK's "Equal Treatment Bench Book" (the "**Bench Book**").[358] Considering that an effective trial process relies on the communication and participation of all parties to a proceeding, the Bench Book outlines how and when a judge may need to intervene when a vulnerable adult is on the stand.

Such interventions are considered to "safeguard" vulnerable adults (and children) and underscores the need to ensure that "best interests of the witness are the paramount consideration."[359] It may be necessary for Crown counsel to adopt a more proactive approach to advocating the best interests of the vulnerable adult to ensure that the judge is aware of the needs of the witness. In turn, the judiciary must be receptive to intervening when warranted to ensure the evidence of the vulnerable adult is given accurately, while maintaining the objective of a fair trial for all participants.

By being alerted to the needs of a vulnerable adult, the judiciary may become live to the issue of unconscious bias of either themselves or the jury relating to the credibility or reliability of the witness. Crown counsel must ensure that when giving closing submissions in a judge-alone trial there is emphasis on avoiding stereotypes regarding the credibility and reliability of vulnerable and older adults due to the need for testimonial aids or if the vulnerable adult did not meet the full threshold for testimonial capacity. This emphasis must also be raised during jury instructions, particularly in situations where the vulnerable adult testified on a promise to tell the truth, as this point is not clearly outlined in the model criminal jury instructions.[360]

## 6.2 Further Considerations

Incorporating the best practices discussed above into Crown counsel policy is somewhat restricted in that some of the best practices rely on other professionals to make internal policy or, in the case of the government, legislative changes. Those changes are ones that we acknowledge in this paper but frameworks for such change are beyond the scope of this paper. We note those as challenges to implementing the best practices and discuss them briefly below.

### 6.2.1 Common Definitions and Understandings

Best practices from both the US and the UK utilise common definitions and understandings with respect to files involving vulnerable adults. The use of common definitions ensures better consistency both in prosecution and protection of vulnerable adults. For example, Ohio has incorporated an

[358] United Kingdom Courts and Tribunals Judiciary, "Equal Treatment Bench Book", April 2023 revision, online: https://www.judiciary.uk/wp-content/uploads/2023/06/Equal-Treatment-Bench-Book-April-2023-revision.pdf ("**Equal Treatment Bench Book**").
[359] *Ibid*, Equal Treatment Bench Book, at 55.
[360] National Judicial Institute, Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions" at C11.19, online: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/.

understanding of "**perpetrator tactics**" with respect to prosecuting crimes against older adults or adults with disabilities.[361]

Often thought of in the context of domestic violence or stalking, perpetrator tactics are defined from the lens that the vulnerable adult has been "groomed" into accepting the abuse by way of trust and manipulation.[362] Such grooming may also include using these tactics against would-be vulnerable adult witnesses. By establishing a base understanding of how these tactics are utilised against vulnerable adults, prosecutors can spot instances of influence and abuse over a vulnerable adult possibly before the vulnerable adult even knows the abuse is occurring.

**Best Practice:** ELD 1 and VUL 1 should be revised to include this understanding of perpetrator tactics to better recognize patterns of behaviour in cases that may involve abuse of a vulnerable adult.
In the UK, the common definition used by CPS for an offence in which an older adult is involved was influenced from the World Health Organization's definition of an older adult, which is a person 65 years or older.[363] In addition to the adult being 65 years or older, CPS uses the following definition: "Where the victim is 65 or over, any criminal offence which is perceived by the victim or any other person, to be committed by reason of the victim's vulnerability through age or presumed vulnerability through age".[364]

CPS goes on to provide further indicators of vulnerability, such as loneliness, isolation, a recent loss or separation, literacy, or physical environment.[365]
By flagging offences that meet the definition and may include indicators of vulnerability, Crown counsel can employ evidence gathering strategies best suited to working with older adults, as well as connect them to necessary supports, at the earliest opportunity.[366]

**Best Practice:** ELD 1 should include a flagging policy based on an accepted definition of "elder abuse" to ensure that complaints meeting that definition are identified and Crown counsel can take necessary steps to initiate accommodation applications, request pre-recorded statements if needed, adjust interviewing techniques, and connect the victim to necessary supports early in the file.

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[361]Adult Advocacy Centers, "Prosecutor's Guide for Crime Involving Victims with Disabilities" ( 2020) at 12, online: https://www.adultadvocacycenters.org/assets/documents/prosecutors_guide_2020.pdf, ("**AAC Prosecutor's Guide**"). The inclusion of perpetrator tactics outlines the stages of influence, as well as a number of rationalisations prosecutors may be given for the abuse. The rationalisations are a strong indicator that elder abuse may be occurring, possibly out of fear or coercion. Adult Advocacy Centers acknowledges the Illinois Criminal Justice Information Authority, "Protocol for Prosecutors" (2016), as a source for their description of perpetrator tactics.
[362]*Ibid*, AAC Prosecutor's Guide, at 12.
[363]*Supra*, note 282, CPS Policy Guidance Prosecution; Supra, note 285, CPS Prosecuting Crimes Against.
[364]*Ibid*, CPS Policy Guidance Prosecution.
[365]*Ibid*, CPS Policy Guidance Prosecution.
[366]*Ibid*, CPS Policy Guidance Prosecution.

### 6.2.2 Training

A recurring point of informant feedback across the professions we spoke to is a need for increased training on how to work with vulnerable adults. Training on understanding and making determinations of capacity, ways to work with a vulnerable adult where capacity is at issue, and methods to better support vulnerable adults are all essential best practices arising from the research conducted, including as a recommendation from the Special Rapporteur on Rights of Persons with Disabilities.[367]

Crown counsel could take the first step in implementing "awareness-raising strategies" by the creation of a comprehensive training manual focused on:

1. defining testimonial competency;
2. how it can be assessed;
3. understanding that capacity is person specific, not always static, and may fluctuate in a particular vulnerable adult;
4. a proper manner of documenting capacity determinations; and
5. best practices that can serve to support the testimonial competence of vulnerable adults.

In creating a capacity training manual, regional offices may establish a "champion" or local Crown counsel as that office's accommodations expert. As noted earlier, staffing and resources can be an issue, but BC could use the model adopted by Ontario to ensure that there is an Accessibility Lead in each regional office that can then train members of their team and/or assist with identifying accommodations or strategies to best support the witness.[368]

**Best Practice:** Crown counsel should have the opportunity to receive specialized training on assessing capacity, working with adults with disabilities, and employ best practices aimed at supporting the ability of a vulnerable adult to give evidence. Each regional office should have at least one Crown counsel designated as Accessibility Lead to assist with implementation of suggested best practices.

## 6.3 Challenges in Implementing Best Practices

One of the biggest hurdles in implementing suggested best practices is the reliance on other professionals to also review and possibly modify their best practices when working with vulnerable adults. While there are suggested best practices for other professions in this study paper, there must be buy-in to incorporate them, or pursuit of further research with respect to best practices for police, the judiciary, and defence counsel.

For the purposes of this study paper, we have limited the challenges to those that require responses from those that set policy above Crown counsel – the judiciary and government.

[367] *Supra*, note 170, UN Special Rapporteur 2020, at 26.
[368] *Supra*, note 220, ON CPM, at 79.

### 6.3.1 Legislative Amendments

Legislated use of communication intermediaries as the UK[369] has would greatly assist in ensuring that testimony of vulnerable adults in BC is received, regardless of their manner of communicating. Such legislative change could come by way of an amendment to the *Criminal Code*, such that use of communication intermediaries are included as a testimonial aid much like that of a support person.

Ontario has adopted the use of communication intermediaries as an accommodation available through Court Services, demonstrating that such provision of this accommodation is not only possible, but helpful.[370] BC has an initial framework in their *Evidence Act* that could be used to support systematic use of communication intermediaries during the criminal process, as evidence is sought to be given in "any other manner that is intelligible."[371] Just as we accommodate language or ASL interpreters, communication intermediaries have an important role in ensuring that otherwise capable adults can testify.

**Best Practice:** The *Criminal Code and Evidence Act* should be amended to explicitly incorporate use of communication intermediaries as a matter of best practice for accommodation of vulnerable adults with communication barriers. This will both meet the recommendations of the Special Rapporteur to bring Canada's laws in line with the Convention and Declaration,[372] and conform to the relatively new *Accessible British Columbia Act*.[373]

### 6.3.2 Jury Instructions

Jury instructions regarding bias are extensive in highlighting what a bias and unconscious bias are, where biases and stereotypes arise, and how to resist bias when hearing testimony and deliberating.[374] While these are helpful, there is

[369] *Supra, note 278, YJCEA*, s 29
[370] Supra, note 231, Going to Court.
[371] *Evidence Act*, RSBC 1996, c 124, s 17.
[372] *Supra*, note 169, UN Special Rapporteur 2020, at 26.
[373] *Supra*, note 133, ABCA. This legislation is relatively recent and currently applies to governmental agencies and organizations prescribed in the *Regulation*. Ostensibly this includes the Courts of British Columbia and the provincial Crown Counsel offices.
[374] National Judicial Institute, Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions" (National Judicial Institute: Ottawa), online: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/, chapters A1.1.1, A3.1.1, A4.11, and C9.4[10], chapters A1.1.1, A3.1.1, A4.11, and C9.4[10]; Ferguson, Gerry, et al., *Canadian Criminal Jury Instructions* (Continuing Legal Education Society of British Columbia: 2022), chapters 4.2 Caution—Specific Biases and Stereotypes [§4.2], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619014, 14.II(1)(D) Jurors' Analysis of Evidence [§14.6], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619059, and 17.V Jurors Are to Weigh the Evidence Impartially [§17.5], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619110.https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/; Gerry Ferguson et al, Canadian Criminal Jury Instructions (Continuing Legal Education Society of British Columbia, 2022), chapters 4.2 Caution—Specific Biases and Stereotypes [§4.2], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619014, 14.II(1)(D) Jurors' Analysis of Evidence [§14.6], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619059, and 17.V Jurors Are to Weigh the Evidence Impartially [§17.5], online: https://pm.cle.bc.ca/clebc-pm-web/manual/42835/book/view.do#/C/1619110 ("**Ferguson**").

little recommended in the way of addressing a vulnerable adult who does not fully satisfy the test for testimonial competency and is testifying on a promise to tell the truth. Such jury instruction may be left for the trial judge to assemble in relation to the specifics of the trial. This leaves Crown counsel in the position of advocating for the testimony of a vulnerable adult to receive the weight and credibility it deserves despite the lessened capacity of the witness.

Jury instructions as currently written do not adequately address the inherent bias towards vulnerable adults, whether their vulnerability arises from age or a disability. Specific biases, such as those held against Indigenous justice system participants, participants engaged in sex work, or other visible minorities, are clearly outlined in some resources, such as the Continuing Legal Education Society of British Columbia's *Canadian Criminal Jury Instructions*.[375] In both the *Model Jury Instructions* and *Canadian Criminal Jury Instructions*, there is little said about specific biases that arise due to a cognitive impairment and/or age which, as noted throughout this study paper, can still exist in the minds of both jurors and judges.

**Best Practice:** Jury instructions should be amended to provide clear and consistent provisions with respect to vulnerable adults with reduced capacity or who meet a specific stereotype of an older person, such as suggested with the Crown Counsel Policy Manual, or a person with a disability that affects their ability to communicate evidence clearly.

**Best Practice:** The judiciary may also consider issuing practice directives on effective and fair examinations of vulnerable adults such that the process may take into account the rights of the accused, victim, and witness to a fair proceeding.

[375] *Ibid*, Ferguson.

# Chapter 7: Conclusion

Improving access and support in the criminal justice system for vulnerable adults is essential as our population ages. The best practices we suggest are ways in which we can create the improvements needed to increase vulnerable adults' participation in the criminal justice system and their trust in the system. Understanding that addressing the challenges and barriers facing vulnerable adults in their participation is not as simple as implementing best practices, we are hopeful that such implementation can start to break down those barriers and challenges.

All the key players have integral roles to play in implementing the suggested best practices and it is our hope that this paper lays a foundation to consider how they may become future amendments to policies discussed. We also hope that those justice system participants outside the scope of this paper, namely the judiciary and defence counsel, consider those best practices that touch on their role. By acknowledging the importance of increased options available for accommodation of vulnerable adults, we see that the barriers and challenges are not bars but now represent opportunities to assess what we are doing and shift to what we could do better to support the participation of vulnerable adults in the criminal justice system.

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