# GENDER EQUALITY

# in the

# JUSTICE SYSTEM

A DISCUSSION PAPER

*The Northwest Territories*
*Gender Equality Review*

April 1991

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# IN THE JUSTICE SYSTEM

-DISCUSSION PAPER-

This discussion paper was prepared for the Minister of Justice of the Northwest Territories by the Special Advisor on Gender Equality in the justice system.

April 1991

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## Why a gender equality review?

The Government of the N.W.T. has identified the need to examine in detail the functioning of the justice system as it involves and affects women. This need has been articulated repeatedly by concerned organizations, including the N.W.T. Status of Women Council which has a statutory mandate to provide advice on such matters. It has also been identified by the Legislative Assembly, most recently in the form of a motion requesting that the Minister of Justice undertake a review of the justice system.

The establishment of this review represents a commitment on the part of this Government to improve the administration of justice in the Territories and to move toward the realization of an impartial justice system that operates free of bias.

The Gender Equality Review will carry out its activities in order to improve the understanding of gender equality issues by the public and professionals involved in the system, identify obstacles to the achievement of gender equality in the justice system, and make recommendations on ways to achieve gender equality in the system.

## What do we mean by the "justice system"?

A justice system is essentially a mechanism for the resolution of conflicts among citizens and between citizens and their government. The justice system is made up of elements arising from the three branches of government. The legislative branch of government enacts laws, such as the criminal code, to regulate relations in a society and to provide for the fair resolution of conflicts. Laws are made in both the criminal and civil domains. The executive branch implements and enforces the laws, including by means of the police and the office of the Crown Attorney. The judicial branch, through the courts, is responsible for the adjudication of disputes and the interpretation of the laws enacted by the legislative branch.

More specifically, the **justice system** will be defined, for the purposes of this review, to include the administration of both criminal and civil law. This involves policing, prosecutions, legal aid, corrections, the operation of the courts, including Justice of the Peace court, the appointment and discipline of judges, and the law itself, both federal and territorial.

The first requirement for the legitimate functioning of the justice system is that of impartiality. The laws must be applied fairly and equally to all citizens. This right to

equality before and under the law (which is to say, equality in both the content and the administration of the law) is a fundamental right in Canada, and one that is formally guaranteed in the Canadian Constitution.

However, it has become apparent that justice in Canada does not always live up the promise of equality and fairness. Across the country, women's and community organizations, various levels of government, the bar and the judiciary itself, are voicing concerns that the justice system does not serve women equitably. The impartiality of the system is questioned almost daily. One of the most frequent criticisms made against the justice system is that of gender bias.

## What is gender bias? and why is it a problem?

**Gender bias** can be defined as behaviour or decision-making by participants in the justice system which is based on or reveals stereotypical attitudes about the nature and roles of men and women, or of their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations. Gender bias also arises out of myths and misconceptions about the social and economic realities encountered by both sexes.

Gender bias is reflected not only in actions of individuals, but also in cultural traditions and in institutional practices. To the extent that law-makers themselves labour under certain biased attitudes and myths and misconceptions about women and men, the law itself can be said to be characterized by gender bias.

As a result of gender bias in the laws, and in the application and interpretation of laws, women are not always treated fairly by the justice system. To the extent that the justice system suffers from gender bias, the system fails in its primary responsibility to deliver justice impartially. As a consequence, the administration of justice as a whole suffers and in the resulting alienation from the justice system, the legitimacy of the system itself is brought into question.

The values reflected in a system of administration of justice are indicative of the values of the society in which that system operates. The treatment of women by the justice system reflects the treatment of women in the society in general. Gender bias in a legal system is reflection of gender bias in the larger society.

The society from which our current system of justice is derived was very much a male-dominated society. As long as society at large was characterized by an exclusively male

perspective on the world, then it was to be expected that the legal system reflect and express this male perspective. As our society adopts a more balanced perspective, these changes must be reflected in the system of administration of justice.

A few examples serve to illustrate the recent evolution of the legal status of women. In 1928, the Supreme Court of Canada decided that women were not "persons" under the law. This decision may seem incredible to us today, but as recently as 1973, the same court upheld the section of the *Indian Act* which deprived native women of the their rights when they married a non-native man. Only in 1985 was the *Indian Act* amended to allow native women to retain their native status. Six years later, there are still problems outstanding with this amendment and its application.

In the area of relations between a wife and her husband, spousal assault was traditionally considered to be a "family matter" rather than a social problem to be dealt with as a criminal offence. This attitude was reflected in the laws in force at the time. For example, until changes were made to the *Criminal Code* in 1982, the rape by a husband of his wife was not a crime. This state of affairs reflected an understanding of the roles of men and women that is no longer acceptable to our society.

These changes to the law are examples of the ongoing process of removing gender bias from the laws and the application of the laws.

Formal guarantees of equality between men and women are embodied in the Canadian Constitution that came into effect in 1985. But just as changes in society's attitudes about the nature and role of women and men have come about slowly, so has the achievement of equality for men and women in the justice system been a long and painful process.

That we have fallen short of the realization of full gender equality is suggested by the extent of interest in the subject, not just in the Territories, but across the country. There is growing awareness among all parties that gender bias seriously affects the administration of justice and a vast and growing body of literature that concludes that gender unfairness exists in the legal system.

An example of the interest in the question was provided at a recent meeting of the Attorneys General of Canada, the provinces and the territories. At that meeting, an inter-jurisdictional working group was formed to examine gender equality in the Canadian justice system. Over the coming months, they will be looking at such issues as women as victims of violence, women as offenders, women working in the justice system, gender bias in the courts, access to justice for women and substantive law bias against women.

Similarly, at a recent national meeting of the Ministers Responsible for the Status of Women, it was decided to undertake a major study of gender equality in the criminal justice system. It was strongly felt that there is an urgent need for the examination and reform of legislation, policies and programs within the criminal justice system that have a negative impact on women. Furthermore, it was specified that the negative impacts or effects of the system are increased by such factors as race and physical isolation. In other words, native women in the Territories are likely to be particularly poorly served by the criminal justice system.

The achievement of gender equality in the justice system must be an explicit goal in the administration of justice. Gender equality can be said to exist when all personal and cultural bias about gender is absent from the operation of the justice system. Only then can we speak of equality of women and men before and under the law.

## Why this paper?

This discussion paper seeks to provide insight into the nature of gender bias and to promote debate in the Legislative Assembly and beyond, on this important matter. Our goal is to stimulate discussion of these questions, and establish a dialogue with and receive feedback from professionals involved in the system and community residents and organizations.

This paper has been prepared by the Special Advisor on Gender Equality after discussions with concerned groups, direction from the Legislative Assembly and consultation with those working in the justice system. The Special Advisor is pleased to have the cooperation of the judges of the Supreme and Territorial Courts in agreeing that the issues need to be addressed and in expressing willingness to have judges participate in the dialogue. The Minister of Justice is acutely aware of the need to respect the independence of the judiciary, and to have the judiciary itself directly involved in identification of issues and any undertaking of change.

These consultations and discussions are the beginning of what is hoped will be an ongoing and fruitful relationship between the Special Advisor, participants in the system, community representatives and individuals.

This paper raises some of the more important issues that need to be addressed. As such, it aims at asking questions rather than at providing answers. It certainly does not purport to be exhaustive in the questions that it raises. It is hoped only that this paper be a launching point for discussions which will lead to a better understanding of the current

system and to identification of ways to improve it.

**How will the Special Advisor approach the mandate of the Gender Equality Review?**

The purpose of the Gender Equality Review is to enhance understanding of gender issues in the justice system, to identify obstacles to the realization of gender equality and to make recommendations for overcoming gender bias. Because of the nature of the question of gender bias, a formal public process such as a task force is not the best way to tackle the issue, at least in the initial stages. In addition to the problems of resourcing groups and individuals to appear before a formal body, and the costs of such an undertaking, there are serious difficulties involved in having people from the justice system and individuals who have had contact with the system, speak frankly in an open public forum.

In order to better respect the privacy of peoples' experiences and to respect the independence of the judiciary, an informal process of consultations, discussions, workshops and public meetings is a more appropriate mechanism to achieve our purpose.

The Special Advisor will conduct a series of consultations with those directly involved in the justice system, with organisations connected with the administration of justice, and with groups and individuals from the public interested in the question of gender equality.

Part of the mandate of the Special Advisor is to provide a certain degree of public education concerning the administration of justice generally and gender equality issues in particular. It is recognized that some of the criticisms directed toward the justice system, or at least the particular emphasis of some of those criticisms, is coloured by an incomplete understanding of the functioning of the justice system and of the roles of all the components in the system.

It is also recognized that this situation is likely to be more acutely felt when the court is conducted in a language other than the language spoken by the majority of the people affected by the decisions made by the court.

Another factor affecting the public understanding of the justice system is the news media. Public perceptions of the justice system in the N.W.T., as elsewhere, are to a large extent moulded by the coverage given to justice issues by the media. To the extent that this coverage is selective in the kinds of stories it covers, is biased in the way that the stories are covered, is based on an incomplete understanding of the functioning of the justice system, or otherwise contains inaccuracies or mistakes, the impressions that the public take away from that coverage may lead to greater public misunderstanding about the

administration of justice.

The public education aspect of the mandate of the Special Advisor is designed to address some of these difficulties.

As part of the process of dialogue and in order to solicit input from as many sources as possible, it is the intention of the Special Advisor to hold workshops and public sessions with community residents, on a regional basis over the coming months. These workshops will be held over several days in communities in each region of the Territories. The Special Advisor intends to visit at least two communities in each region.

It is hoped that the workshops will fulfil a dual purpose, namely, to provide information about the justice system and to receive peoples' comments, concerns and opinions on the administration of justice in their community. The workshops will provide a forum for community participants to explore issues in detail. Input of this nature from the communities will be fundamental to the formulation of recommendations by the Special Advisor.

The consultations and workshops form the core of the activities of the Gender Equality Review. Other responsibilities include identifying areas where research is needed, and where possible, carrying out that research, and reviewing other initiatives in the Territories that concern the administration of justice.

The Gender Equality Review is part of an ongoing process of maturation and improvement that our justice system is presently undergoing. There are currently a number of initiatives and programs underway designed to improve the administration of justice by recognizing and taking into account the particular circumstances that exist in the Territories. Part of the mandate of the Special Advisor is to examine present and planned initiatives of the Government for their relationship to gender equality issues and for ways to address gender issues within these initiatives.

This examination will include programs such as legal interpreters, victims' assistance, legal aid, maintenance enforcement, justices of the peace, native court workers and family violence prevention. It also includes funding initiatives such as Arctic PLEI, the research into Dene custom law by the Dene Cultural Institute, and special projects such as the Family Law Review.

The Review will work closely with the Advisory Committee on Aboriginal Justice and the Department of Justice in their activities addressing aboriginal issues in the justice system, particularly in areas of potential overlap or mutual concern. In particular, the Advisory

Committee on Aboriginal Justice will be given the opportunity to review the results of the Gender Equality Review and advise the Special Advisor in areas where cultural and gender concerns interrelate, and to append their comments if consensus cannot be reached.

The Special Advisor will prepare an Interim Report in September 1991, and a Final Report to the Minister of Justice in March 1992.

## ISSUES: VIOLENCE AGAINST WOMEN

One in every ten women in Canada is battered by her male partner. One is four women will be sexually assaulted at some time in their life. A recent study by the Ontario Native Womens Association revealed that eight women in ten have been abused or assaulted or can expect to be abused or assaulted.

Family violence and sexual assault are among the most serious and persistent social problems facing the Territories today. They also form the single most important area of criminal justice where there is perceived to be a problem of gender bias. Because a very high proportion of family violence and sexual assault involves violence by men against women, it is appropriate to speak of these as gender-based crimes. The response of the justice system to these problems is, by definition, a gender related question.

In the eyes of many, the response of those charged with the responsibility of dealing with the daily assault on the minds and bodies of women serves to perpetuate and condone the violence done to women and their inequitable status in our society.

The right to security of the person, the right to not be abused and assaulted, is surely a fundamental right in our society, one that the justice system has a primary responsibility to defend. However, the criminal justice system has not been particularly successful in breaking the cycle of family violence. Perhaps this is, at least in part, because our expectation that the justice system perform this task is an unrealistic one.

On the other hand, while the violence against women continues unabated, the justice system has too often been successful in revictimizing the victims of violence and sexual assault. Women that have involvement with the criminal justice system as victims or witnesses, sometimes against their will, often end up feeling that they have been abused by the very system that is supposed to protect them.

The shortcomings of the criminal justice system in this area have kept many victims of violence and sexual assault from using the system to put an end to what are often repeated

incidents of assault.

While society as a whole must come to grips generally with the ever increasing problem of violence, the justice system must also respond appropriately.

**How can the justice system better respond to the problem of violence against women?**

**What can be done to change the way the system operates in order to eliminate the revictimization of victims of violence?**

Three types of responses suggest themselves:

**Firstly**, what changes to legislation, policies and programs could be explored by the various components of the justice system to improve the response of the system? What are the implications for women of each of these avenues?

**Secondly**, do attitudes held by those involved in the justice system toward women and toward the problems of violence against women affect the response of the system? If people in the system had a better understanding of the dynamics of family violence, would their changed attitudes result not only in more sensitive treatment of women, but also in the elaboration of more appropriate policies for dealing with victims and for the provision of services for victims?

**Thirdly**, recognizing that the justice system by itself is not going to provide all of the answers to the problems of violence against women, should there be an emphasis on addressing the issues of violence before they present themselves in a criminal justice framework? What coordination with other departments, governments and agencies is necessary to respond effectively to the problem?

We can examine each of these questions in detail.

## GENDER BIAS IN LEGISLATION, POLICIES AND PROGRAMS

### Legislation

Legislation governing criminal matters is a federal concern, and is largely contained in the *Criminal Code*. In 1982, major amendments were made to the *Criminal Code*. These changed replaced existing rape law with gender-neutral sexual assault provision. Rules of evidence limiting the admissibility of prior sexual history were added. Some of these rules are currently being challenged in court under the *Canadian Charter of Rights and Freedoms*.

In the area of civil law, the Family Law Review, undertaken on behalf of the Government of the N.W.T., is expected to make recommendations for substantial changes in a number of important areas. This review is in its final stages. It is hoped that the Special Advisor will have an opportunity to make comments on the report.

### Policies: Charging and prosecution policies

In terms of mechanisms within the justice system for dealing with violence against women, the so-called **mandatory charging policy** of the police is an important element. (The expression "mandatory charging policy" is not completely accurate. There is a degree of flexibility in the policy that allows the police and the Crown not to proceed in exceptional circumstances. In spite of being somewhat a misnomer, the name has stuck.)

In December 1983, the Solicitor General for Canada issued new policy directives for R.C.M.P. and Crown Attorneys investigating and prosecuting spousal assault in the N.W.T.. The police were to fully investigate all complaints of family violence, and to arrest and lay charges, in consultation with the prosecutor, regardless of the complainant's wishes, where there was sufficient evidence to support a charge. The companion directive to the Crown Attorneys was to prosecute spousal assault cases wherever there is sufficient evidence.

At the time these policies were announced, both the police and the prosecutors were also instructed to provide assistance and support to the victim.

The policies came about because of public pressure for the government to acknowledge that wife battering is not a "family matter", or a mere "domestic dispute" to be resolved

within the confines of the home. The policies recognize that spousal assault is a social problem and that wife battering is a crime. The policy change also recognizes that the exercise of discretion by the police and Crown Attorneys in laying and prosecuting spousal assault charges reflected the social belief that spousal assault was a "domestic problem". The policy was meant to send out a strong message to the public that wife assault is as serious an offence against society as is assault of a stranger.

The policy has the effect of limiting the discretion of police and the Crown in the laying and the prosecution of assault charges. It sought to relieve the victim of pressure from various sources to drop charges. The victim often feared retaliation if she was unable to convince the police to drop the charge. Now the approval of the Department of Justice in Ottawa is needed to drop a charge in a spousal assault case.

This policy was designed to address a growing awareness of the widespread nature of spousal assault and a growing sentiment that it was absolutely unacceptable. It was designed to help the justice system combat one of the most pervasive forms of violence against women.

However well-intentioned was the policy, it has given rise to situations where women are victimized by the justice system when they are forced to proceed in cases where charges cannot be withdrawn for appropriate or compassionate reasons. It has, for example, given rise to contempt of court proceedings against women as unwilling witnesses.

The Special Advisor will examine this policy in consultations and workshops.

**Is mandatory charging an appropriate policy in spousal assaults?**

**Is this policy an effective way to send the signal that spousal assault will not be tolerated?**

**Is this policy applied consistently?**

**How does it affect the response of police to situations of domestic violence?**

**Is it appropriate to pursue certain cases for the public good, for example, to get a violent offender off the streets?**

**Do women who are in abusive situations or who are in immediate physical danger avoid calling the police because they know that once the police have been called in, they will probably end up in court?**

**If so, does this reduce the ability of the police to intervene in crisis situations?**

**Could modifications be made to the policy to lessen any negative effects for the victims?**

**Are there instances in which the operation of the policy is misused by the complainant?**

**How does society address the question of balancing the need to denounce this crime for the general benefit against the particular needs of the victim?**

## Victim impact statements

There have been recent policy changes concerning sentence hearings that could have a direct impact on how victims are dealt with by the justice system. Federal legislative amendments in 1988 gave the victim the right to provide the court with a victim impact statement. The implementation of victim impact statements will depend on the adoption of appropriate policies by the provincial and territorial governments. Once implemented, the policy will allow the victim to make a statement to the court, at the time of sentencing, about the impact that the offender's actions have had on the victim.

Some concerns have been expressed about the use of victim impact statements.

**Is there a danger, particularly in the case of spousal assault, that the victim may be subject to certain pressure from the offender not to make a statement or to minimize the impact of the assault?**

**Is it possible that the statement will underestimate the impact of a violent offence because much of the emotional impact may become apparent only over a period of years?**

**Will the victim making a statement risk being revictimized if the content of the victim impact statement is not accepted by the defence counsel and counsel cross-examines the victim on the statement?**

**Should there be any limit to the right to cross-examine?**

## Programs: Services to victims

This raises the broader question of the treatment of victims by our system of criminal justice. The needs of victims of crime have been largely ignored by the criminal justice system. Services to victims in the N.W.T. are largely absent.

Our system has developed an elaborate series of mechanisms designed to protect the rights of the accused, and rightly so. These mechanisms include the presumption of innocence, the onus of proof on the Crown to proof guilt beyond a reasonable doubt and the provision of legal services for those unable to pay for these services on their own. These mechanisms exist in order to reduce the danger of the state imposing sanction on an unjustly accused person.

On the other hand, a victim of crime, who has already been treated unjustly through no fault of their own, by virtue of being a victim of a crime, often may feel that they have no rights in the justice system. It is appropriate that mechanisms be established that guarantee certain rights for victims of crime, particularly crimes of violence.

In 1988, the Minister of Justice was a co-signatory, with the Federal, Provincial and Territorial Ministers of Justice, of the Statement of Basic Principles of Justice for Victims of Crime. The principles elaborated in the statement outline appropriate treatment of victims including respect for personal safety, and fair, prompt and compassionate treatment by the criminal justice system, and providing information about the criminal proceedings and other remedies to victims.

Recent Federal and Territorial legislation passed in response to the 1983 report of the Federal-Provincial Task Force on Justice for Victims of Crime represents a important step toward the recognition of the rights and needs of victims.

The Territorial *Victims of Crime Act* gives victims basic rights to information and enables judges to impose a surcharge on certain offences to provide funding for services to

victims. Amendments to the *Criminal Code* allow for surcharges on criminal offences. These funds are administered on behalf of the Department of Justice by the Victims Assistance Committee that serves as a funding agency. The Committee is not directly involved in service delivery.

There is no agency or part of the justice system that is specifically mandated to provide assistance and support to victims. The police and the Crown Attorneys may provide such information as they are able but they have limited resources to bring to a task that is outside their specific mandate.

**What should be the responsibility of the various elements of the justice system toward the victim?**

**Should we look at changing or coordinating practices and procedures of these elements so as to better serve victims?**

**What is the role of the Crown Attorney's office in the provision of services to victims?**

**Should we be examining the possibility of establishing distinct victim assistance programs?**

**Who should take the initiative in the establishment of any new programs or services?**

**Are victims adequately protected by mechanisms available to them under peace bonds and restraining orders?**

**Are there any changes that could be made to legislation or policy that would facilitate access to restraining orders?**

## GENDER BIAS ON THE PART OF THOSE WORKING WITHIN THE JUSTICE SYSTEM

To turn to our second question, the issue of the attitudes of those working within the justice system is a very sensitive one.

On one hand, determining someone's attitude is a very difficult problem. On the other hand, an attitude characterized by bias of any kind, including gender bias, may directly affect the outcome of cases, and affects how offenders and victims are dealt with.

Particularly sensitive is the question of the attitudes of members of the judiciary. Merely to raise the issue is to challenge what some have characterized as the "myth of judicial neutrality". Judges, by virtue of their elevation to the bench, are supposed to be free of all bias. Our expectations of judges are very high, as is the responsibility they bear. The issue must be addressed with prudence, and with due respect for the independence of the judiciary. We must recognize at the same time that we are all products of our respective environments.

The principle of the independence of the judiciary is a foundation stone of our system of justice. It is recognized as essential that judges be free from even the suggestion of interference from the executive branch of government or indeed from any particular or political interest. In 1984, important elements of the *Justice of the Peace Act* were struck down exactly because it was considered that the justices of the peace, under certain provisions of that legislation, lacked the necessary independence from government.

At the same time, it is recognized that there should be some mechanism for considering complaints of judicial misconduct. That mechanism is provided in the Territories by the Judicial Council, and at a federal level with respect to superior court judges, by the Canadian Judicial Council.

The Judicial Council of the N.W.T. was created in 1978 following the example of similar institutions created in each of the provinces over the last two decades. Although there is a certain degree of variety across the country in terms of the composition, function and powers of Judicial Councils, most of the councils share a responsibility for the selection and discipline of judges in their respective jurisdictions. The federal Judicial Council however, does not maintain a role in the selection of superior court judges.

The Special Advisor will be examining the make-up and mandate of judicial councils in

other jurisdictions in Canada as well as the federal Judicial Council to see how the question of judicial discipline is dealt with elsewhere. The Special Advisor will also study what procedures are in place in other jurisdictions for choosing judges.

**Who selects judicial candidates?**

**What criteria are used?**

**Is lay participation on judicial councils appropriate?**

**Is there any mechanism for ensuring that the candidates are free from gender bias?**

**Should certain of the functions of the judicial council be open to the public?**

**Do judicial councils, or any other body, have a role in ensuring the ongoing education of judges, of sensitising judges to the evolving social context in which their decisions are made?**

The most effective way to address the question of gender bias in the judiciary, and the one that best respects judicial independence, is for the judges themselves to recognize the gender bias question as the serious problem that it is, and to act accordingly. In the United States, this is exactly what has happened.

In 1983, the New Jersey Supreme Court Chief Justice established a task force on gender bias. Since that time, judges in over 30 states have set up similar bodies to examine the nature and extent of gender bias in their jurisdictions, and to develop strategies for overcoming gender bias. The clear findings of every task force show gender bias to be a serious problem that needs to be addressed, particularly in domestic violence cases. What is significant here is that the judges themselves came to these conclusions. The advantages of this "self-scrutiny" are many. The findings are given great credibility because of the source, and the judges are uniquely well-placed to implement such reforms as judicial education on gender bias.

In Canada, a similar process has not taken place. However, there have been initiatives on the part of the judiciary to put gender bias on the agenda. The Canadian Judicial Centre has prepared a video and is offering seminars on gender bias in the courtroom. The Western Judicial Conference of Provincial and Territorial Court judges has put together

a series of three annual workshops where the social context of judicial decision-making is examined. The emphasis is placed on the justice system's service to aboriginal people and to women. The third of these workshops will be held in Yellowknife this June. These workshops represent an important innovation on the part of the judiciary and should be welcomed as such. The Special Advisor will look at these initiatives as part of what must be an ongoing process of sensitizing the judiciary to the problem of gender bias.

The Special Advisor will also look at training provided to other persons involved in the justice system.

**Does this training address issues related to the dynamics of family violence and other gender issues?**

This question could be asked of the federal Crown Attorneys as the body responsible for prosecutions in the Territories; of the R.C.M.P. as the body responsible for providing policing on behalf of the Federal government, the Territorial government and in many cases, municipal governments as well; of the justices of the peace, who provide the only available level of court in most communities for most of the year; and of counsel appearing before the court as advocates.

The question of sensitivity to cultural questions must also be addressed. To date, members of the judiciary, Crown Attorneys, many of the justices of the peace and most police officers in the N.W.T. are of non-native origin. To the extent that they are given cross-cultural training, they must depend on "experts" to provide opinions on cultural practices and beliefs. This raises questions as to who provides the expertise and what is the content of the expert opinions. These questions arise both in terms of education and training for persons in the justice system and in terms of "expert witnesses" in the courtroom setting.

**If training is provided on cultural matters, who does the training?** (which is to say, who defines the culture?)

**Does the need for sensitivity to aboriginal cultures lead persons in the justice system to make "allowances" for certain behaviour based on the opinion of experts?**

**Do persons in the justice system have inappropriate attitudes about the acceptance of spousal assault or sexual abuse in native cultures?**

**Might such attitudes affect how the justice system deals with spousal assault and sexual abuse?**

**Are aboriginal women vulnerable to inequality both because they are aboriginal and because they are women?**

**Are aboriginal women given appropriate opportunities to "define" their culture or their position or has this been done for them by non-aboriginals or by men?**

**Does a lack of familiarity with or understanding of native cultural practices lead those working in the justice system to make unfair conclusions about the credibility of witnesses?**

**In any enhancement of community-based justice, is the role of women adequately considered?**

The Justice of the Peace court plays a particularly crucial role in the adminstration of justice in the Territories, as it is the only level of court available in many communities on an ongoing basis. It is also quite likely that as the justices of the peace have greater access to training, they will assume more responsibility within the justice system. Any initiative concerning community-based justice will almost certainly involve the justices of the peace.

As the jurisdiction of justices of the peace expands, questions about the selection and training of justices of the peace assume particular importance.

**Are there appropriate mechanisms in the selection process and in training to ensure sensitivity to cultural and gender issues?**

**If community participation in justice is available by having elders sit with and share authority with the justice of the peace, how is gender equality to be ensured?**

Another question that should be posed is whether there is any mechanism for members of the public to express concerns about bias on the part of those working in the justice system.

**Are there mechanisms for lodging complaints?**

**Is the public aware of these mechanisms?**

**Is the complaint procedure effective?**

**Are there specified grounds on which a complaint may be made?**

**Is gender bias considered grounds for complaint?**

## AVENUES BEYOND CRIMINAL JUSTICE

We have suggested above that it is an unrealistic or unreasonable expectation that the criminal justice system alone should solve the problem of violence against women. The criminal justice system is, or should be, the dispute resolution mechanism of last resort. It may also not be the most appropriate mechanism because the system itself is often perceived as "violent" to victims of crime.

Our system of criminal justice resolves conflicts in an adversarial manner. Crown counsel representing the state or the public interest, and the defence counsel representing the interests of the accused, confront each other in the courtroom. Each often attempts to discredit the witnesses of the other. In many cases the victim herself is the only or at least the most important witness for the Crown. In these circumstances, many women come to feel victimized by the process of "getting" justice, that is, by what many have characterized as the "violence of the courtroom".

What alternatives are there to criminal proceedings?

The 1985 Report of the Task Force on Spousal Assault recommended that appropriate authorities consider **diversion** of offenders in certain cases. "Diversion" refers to a procedure whereby, instead of proceeding with a criminal charge, the prosecutor refers the offender to an agency who will give the offender the opportunity to take responsibility for the offence. The offender is "diverted" from the criminal justice system. The process of having the offender take responsibility for his actions presumably provides greater potential for rehabilitation than does a prison term. In cases of spousal assault the diversion would involve **counselling** of some sort.

This procedure recognizes the limited rehabilitative potential of custodial sentencing, spares the victim having to go through the violence of the courtroom, and relieves some of the strain on the criminal justice system resulting from the dramatic increase in case

load over the last few years. This increase may result in serious delays in criminal proceedings. These delays are inevitably stressful to the victim and may be interpreted by the courts as prejudicial to the right of the accused to a fair trial within a reasonable period.

Diversion looks like an attractive alternative on a number of counts, but the process must be approached with caution.

**Exactly what sort of counselling would be appropriate?**

**Is there any data indicating that the counselling is effective?**

**Would there be an evaluation to determine which offenders are likely to be successful candidates of counselling?**

**Would this counselling be part of a system of counselling for all family members affected by violence?**

**Is there any follow-up procedure for evaluating the "success" of the counselling?**

**Is there any legal recourse in the event that the offender fails to abide by the terms of the diversion agreement?**

These questions should also be asked of any counselling program mandated by the court as part of sentencing.

There are other more fundamental questions to be asked of any mechanism that seeks to avoid the full criminal process. Prison sentences serve other purposes than merely providing an opportunity for the rehabilitation of the offender.

In theory, a prison term should deter an offender from repeating an offence and act as well as a general deterrent to the public. Perhaps more importantly, it serves to publicly denounce a crime as socially reprehensible, as an act that will not and must not be tolerated.

**If we are considering counselling as an alternative to criminal proceedings or even as an alternative to custodial sentencing after a finding of guilt in criminal proceedings, what are we**

**saying about the seriousness of violence against women?**

**Are we still sending a message to the public that spousal assault is an intolerable crime against society?**

**Would a women going through the criminal justice process to find the offender sent a counselling program feel victimized by the justice system?**

**What do communities members expect of the sentencing process?**

Given the limitations of the justice system in responding to the problem of violence against women, it is also appropriate that we look at mechanisms for resolving disputes at an earlier stage, before the conflict enters the criminal arena.

**Are there alternative dispute resolution mechanisms that should be looked at?**

**What is the success of these mechanisms elsewhere?**

**How would these mechanisms be resourced?**

**What are the implications of these alternative mechanisms for women?**

**What should be the role of the various components of the justice system in any alternative system?**

The Task Force on Spousal Assault made a large number of recommendations to the Government on how to deal with the problem. The response of the Government came in the form of "Choices...", a three-year plan of action for all departments of the Government. A number of the recommendations of the Task Force have been implemented. The Family Violence Prevention Program, which funds shelters across the Territories, is now in the base funding of the Department of Social Services. Unfortunately, the action plan provided for no mechanism to ensure the continuing application of policies and the implementation of programs to address spousal assault. Nor is there any mechanism to evaluate the effectiveness of these policies and programs.

**How may other departments and agencies respond to the issue in a manner complementary to the justice system?**

**In what way could they intervene in situations to avoid solutions being sought in the criminal arena?**

## GENDER BIAS IN CIVIL LAW

The mandate of the Special Advisor extends beyond criminal justice to include civil law. Civil law, which establishes rights under both Territorial and Federal statutes, includes such areas as divorce, separation, support or maintenance, custody of children and division of matrimonial property. A person may seek help or remedies under the provisions of laws governing these areas.

As in the area of criminal justice, the application of the law in civil matters, and indeed the laws themselves, are liable to reflect gender bias and hence deserve the attention of the Special Advisor. One area of civil law that falls entirely within the jurisdiction of the Government of the N.W.T. is that of maintenance enforcement.

When a relationship ends, the court may order one partner to make regular payments to the other for the support of that person, for the support of children of the relationship or both. These payments are commonly called maintenance, being either spousal maintenance or child maintenance. The most common type of maintenance award is for the support of childen.

In the huge majority of maintenance cases, these orders oblige former husbands to make a contribution to the costs of raising children in the custody of the former wife. In a great number of cases, the former husband fails to make these payments. In the past, in order to collect money that was legally owed to her, the woman would have to go through the costly procedure of hiring a lawyer to take the defaulter to court. Few women had the means to pursue this course. As a result, many women lived in poverty and suffered undue and unjust deprivations.

Recent legislation in this area has improved the situation. The *Maintenance Orders Enforcement Act* passed in 1988, provides for the establishment of the office of a maintenance orders administrator within the Department of Justice. The administrator, on behalf of the former wife, assumes the responsibility of ensuring that the debtor makes

regular payments as required by the court order. The legislation provides the administrator with a number of procedures for ensuring the payment is made, including garnishment of wages. This Act marks a great improvement over the previous regime.

**Does the *Maintenance Orders Enforcement Act* provide sufficient powers for the efficient and effective enforcement of maintenance orders?**

**Has the maintenance orders administrator been provided with sufficient resources to effectively enforce maintenance orders?**

**Are people across the Territories aware of the existence of maintenance orders as a civil remedy?**

**Are people able to access this remedy?**

**Are there appropriate reciprocal arrangements with other jurisdictions to allow enforcement should the debtor leave the N.W.T. and reside elsewhere?**

In order to access remedies such as court ordered maintenance, the person seeking this remedy usually requires the assistance of a lawyer. Yet many women often find themselves in impoverished circumstances and are unable, from their own resources, to afford the services of a lawyer.

**Is there adequate financial assistance through legal aid programs in the Territories to allow women to access these remedies in the courts?**

**Are the resolution of these issues in the courts readily available given the crowded court schedules?**

**Do the members of the judiciary bring with them adequate expertise to appropriately adjudicate these issues?**

**Are the economic realities of women with dependent children known to those participants in the justice system who are involved in the resolution of these disputes?**

Resolution of family law matters such as custody and maintenance through the courts necessarily involves the adversarial process. Yet the adversarial process is particularly ill-suited to the resolution of family law issues. It often results in the permanent deterioration of communication relationships between separated persons. The tension and anxiety associated with litigation may have adverse and lasting effects on children. For these reasons, mediation services are often seen as a potential solution to some family conflicts.

**Should attempts at mediation be required prior to utilizing the court process?**

**Are adequate mediation services available in the Territories?**

**How should such services be resourced?**

**Are mediators adequately trained and sensitive to issues of gender inequality?**

In the event that custody, maintenance and other family law issues do proceed to court, this usually occurs in the Supreme Court of the N.W.T.. With respect to divorce, the Supreme Court is the only level of court which may adjudicate. This often results in many of the proceedings occurring in Yellowknife and the accessibility of the justice system to person living in outlying communities is questionable.

**Are there aspects of family law, other than divorce, which may be handled at the community level by justices of the peace?**

**Do justices of the peace receive adequate training to adjudicate family law matters?**

## CONCLUSION

The goal of this paper is to raise understanding of the nature of gender equality in the justice system and to stimulate as broad a discussion as possible of the question. The paper issues a challenge to all of us.

The issues related to gender equality in the justice system are very broad and encompass many questions that we have not touched on in this paper. In another jurisdiction, an examination of gender bias may take on a different focus entirely. Those other concerns are real, but our resources do not permit an exhaustive examination of of all the aspects

gender bias in the justice system. We have focused our inquiry, based on discussions with a large number of groups and individuals, on those issues that are particularly important in the N.W.T.

The issues that are raised in this paper relate to questions that are fundamental to the administration of justice: access to justice; equality, fairness and integrety; independence and accountability; and public confidence. The issue of gender bias in the justice system is not a women's issue: it is an issue for the justice system as a whole, for all of those involved in the administration of justice, for all of us.

Stereotypes about women and men, judgments about their relative worth, and a lack of appreciation for certain economic and social realities can result in a lack of fairness in the treatment of men and women in the justice system. These stereotypes, judgments and lack of understanding are, to a large extent, based on unchallenged social or cultural assumptions about men and women in our society.

If the issues in this paper represent a challenge to those in the justice system to examine deeply held beliefs, it is also an opportunity, both for those in the system and people outside it, to work together and establish a dialogue that will ultimately result in a justice system that is fairer and more equitable for all.