

LAW COMMISSION OF CANADA

COMMISSION DU DROIT
DU CANADA

MINISTER'S REFERENCE
ON INSTITUTIONAL
CHILD ABUSE

INTERIM REPORT

LES SÉVICES CONTRE
LES ENFANTS PLACÉS
EN ÉTABLISSEMENTS

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Minister's Reference
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Child Abuse

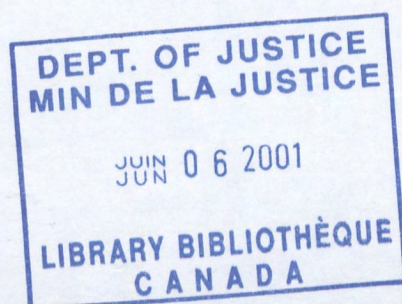
Interim Report



LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA

Minister's Reference
on Institutional
Child Abuse

Interim Report



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Preface

In November 1997, the Minister of Justice of Canada asked the Law Commission of Canada to examine and assess processes for redressing the harm inflicted on children who were physically and sexually abused in government-funded or government-run institutions.

This Interim Report is the initial stage of the Law Commission's response to the Minister's request. It outlines the issues, identifies the research we think needs to be done, and indicates the people who we believe must be involved in our research process.

The Law Commission expects to release a Discussion Paper next fall. This Paper will take account of on-going research, feedback received from the Study Panels we will be constituting to assist us, as well as other material collected by the Law Commission.

This Interim Report is our first attempt to trace the dimensions of the work that lies ahead. We welcome your comments and ideas.

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I Introduction

As the child victims of institutional physical and sexual abuse reach adulthood and find their public voice, the question of how to respond has become a concern for the federal government, many provincial governments, First Nations and various religious and other organizations. The complex nature of the problem and the extent of the harm caused contribute to the difficulty of finding appropriate responses. The traditional legal responses—civil actions and criminal prosecutions—seem inadequate to address the far-ranging consequences of institutional child physical and sexual abuse. It has become clear that other approaches must also be considered.

On November 14, 1997, the Minister of Justice requested the Law Commission of Canada to prepare a “report addressing processes for dealing with institutional child physical and sexual abuse.” The Minister’s letter is attached as Appendix I to this Interim Report.

In framing the Reference, delivered pursuant to section 5(1)(b) of the *Law Commission of Canada Act*, the Minister charged the Law Commission with the task of providing “governments, and Canadians generally, with an inventory and comparative assessment of approaches available.”

The Reference directs the Commission to conduct its research “in consultation with all interested parties and constituencies.” It is also specific about the nature and content of the study the Minister envisages:

The result of the Commission’s study should be analytical, conceptual and non-prescriptive. It should include a discussion of approaches in Canada and elsewhere, but should not be structured so as to pre-empt or derail any ongoing processes in place or under consideration. More specifically, it is not intended to displace, delay or in any way be in lieu of the federal government response to the recommendations of the Royal Commission on Aboriginal Peoples. Nor is this reference to the Law Commission intended to provide a public forum for redress either of general situations or specific cases.



The Commission interprets the Minister's letter as directing it to undertake two distinct tasks:

- First, the Commission is to develop an inventory of instances of institutional abuse that have come to light and responses that have been implemented. Current problems and ongoing investigations are outside the scope of this research.
- Second, the Commission is to assess the strengths and weaknesses of possible models for addressing institutional child abuse. Existing models will be analyzed for the values they promote, their inherent risks and their effectiveness once implemented.

The Minister's letter suggests that the Commission should submit "an initial report, outlining the issues and identifying the required research and studies, including the range of constituencies that must be involved in the process" by the end of January 1998. On the basis of documentation and reports reviewed, this Interim Report reflects the Commission's assessment of the current state of experience in this field (see Appendix II). It also reflects the Commission's best judgment of where evaluation of that experience and additional research could be helpful, a judgment that may evolve as our work progresses.



II Situating the Reference

Having been asked to examine the processes for dealing with past physical and sexual abuse of children in institutions, the Commission was presented with a complex set of policy choices: should it approach the terms of the Reference from a broad perspective, and if so, what framework should it adopt?

Initially, the Reference can be placed in the framework of some fundamental questions concerning abuse.

1. What are the causes and context of abuse (given the preconditions of abuse: access, opportunity and authority)—why does it occur, where does it occur, who is involved in the commission of abuse and its perpetuation?
2. What are the consequences of abuse—what are the physical, psychological, emotional and other impacts on the victims—what effects does it have on the victim's family, community and society?
3. What are the factors that influence healing—the age of onset of abuse, its duration, the number of perpetrators, the influence of effective intervention, the time between abuse and disclosure?
4. What are the possible approaches to addressing past abuse—what are the formal legal approaches—what are the services that victims require?
5. What are the possible approaches to preventing abuse—how can factors identified as contributing to the context of abuse be eliminated or mitigated?

It is possible that an informed and appropriate response to the fourth question (which is identified specifically in the Reference) requires a solid grasp of the answers to the first three questions. These elements then point the way to a response to the fifth question.

If this broad perspective were adopted, the first question would require an understanding of what factors actually contribute to abuse, how they contribute to it and to what extent they contribute to it. Those lines of inquiry would have to be pursued with respect to each element of the abusive situation:

- the setting
- the perpetrator(s)
- the victim(s)
- other parties in the abusive setting



- parties outside the abusive setting who should or could perceive a threat or need to protect the victim or victim group.

Since these questions extend beyond the confines of institutional child abuse, the Commission could expand the line of inquiry to look for commonalities in a range of experiences of abuse, including:

- abuse in settings other than institutions
- abuse of persons other than children
- types of abuse other than physical and sexual.

Such an expansion of the scope of inquiry might permit the Commission to discover linkages between the institutional physical and sexual abuse of children and other situations of abuse. It could provide insights into the dangers of abuse faced by groups other than children. Our society continues to rely on institutions to provide housing, care and services to persons other than children, who potentially are just as vulnerable—the elderly, the chronically ill, the mentally disabled, to cite a few. An expanded inquiry could also provide insight into the abuse of children in non-institutional settings, which include domestic and organizational settings (e.g., amateur sports leagues and voluntary youth organizations).

The Commission does not discount the possibility that the main locus of child abuse currently might be the domestic rather than the institutional setting. While society seems to have recognized that institutions are rarely an appropriate setting for a child, it has apparently been slower to recognize and respond to the dangers of abuse in the home and elsewhere. Abuse is fundamentally about abuse of power, and its potential exists almost everywhere. Lessons learned in the context of institutional child abuse might help avoid or mitigate the danger of child abuse in other settings as well.

The Commission recognizes the importance of all of these lines of inquiry but they are of a broad scope and are intricately linked with other considerations. It would therefore be more appropriate to address these larger questions as part of distinct and more comprehensively framed research programmes the Commission may develop under its own Strategic Agenda. While an inquiry into processes for addressing institutional child abuse necessarily raises an array of issues, the Commission considers it best to satisfy the Minister's request by limiting its response to the specific questions in the Reference.



III Addressing Past Abuse

The design and choice of ways to address past institutional abuse is influenced by the outcomes sought and the range of available processes. While the outcomes sought by individual victims of abuse will vary, certain common themes prevail. Experience in Canada suggests that victims of abuse generally seek some or all of the following outcomes:

- self-empowerment
- healing
- acknowledgment of the harm they have suffered
- denunciation or punishment of those who committed the harm
- accountability of the institution where the harm was committed
- redress for the damage done
- systemic change to prevent future abuse
- closure (to the extent this is possible).

The main processes to achieve these outcomes that have been attempted or proposed in Canada are:

- criminal charges
- civil suits
- public inquiries
- administrative compensation programmes
- alternative processes oriented to restorative rather than retributive justice.

While these options are not mutually exclusive, certain processes naturally favour certain outcomes. For example, only a criminal charge can result in a prison sentence for an abuser. Similarly, a public apology from the body responsible for the institution where the abuse occurred may be a necessary remedial component for some victims. The effectiveness of any one process or combination of processes will depend on a number of variables, including personal circumstances of the victim, context of the abuse and responses adopted by other entities (e.g., religious organizations).



A review of approaches to cases of institutional abuse across Canada indicates that certain factors are likely to have a bearing on their success. While these factors may be considered in the abstract, their presence and impact in particular cases often cannot be known until the process of redress is under way. The following are key factors to be considered.

The process

Who chooses and drives the process? Have the victims initiated and/or participated in designing the process, is it the State or those responsible for the institution where the abuse took place, or is the process negotiated by all parties?

The context of abuse

Was the abuse committed by one person or a small group; or was it systemic? Was it an isolated incident, or did it continue for a period of years or decades? What is the nature and range of the abuse committed, for example, physical, sexual, psychological, ritual and emotional? What was the level of sophistication of the perpetrators? Was there an intent to cause dissociation? How structured was the abuse? The duration of the abuse and the number of victims will have a bearing on how individually specific and tailored the approach can be.

The victims of abuse

What is the number of victims? What is the effect of the abuse on the victims? What is the ripple effect of the abuse on the families of the victims, their communities and society? Have the claimants come forward as a group or as individuals? Is there a cohesion to the response sought by the victims?

Assessing the efficacy of various approaches to dealing with institutional abuse requires a clear identification of the outcomes sought. The parties involved may not seek all the same outcomes and may not assign the same priority to the outcomes they do seek in common. For example, for some, the offer of a financial compensation package may seem an adequate admission that the abuse perpetrated in an institution was wrong. For others, however, a clear, unequivocal and public apology may be a necessary contribution to the healing process. In the end, it is primarily the victim of



abuse who must be satisfied that the approach adopted was equitable and that the results were appropriate to the circumstances. This requires posing at least the following questions.

- How do those who suffered the abuse understand and live their experience?
- What are the key outcomes sought by those who suffered the abuse?
- What (or who) are the major obstacles to achieving these desired outcomes?
- What processes are most likely to facilitate the effective and efficient achievement of those outcomes?
- What parties must or should be involved in developing the response to past abuse?
- How much experience do we need with particular approaches before we can assess or measure their effectiveness?



IV The Research Questions

The Reference permits the Commission to review all possible approaches to addressing institutional child abuse. It presents an opportunity to reflect on all aspects of redress. This includes rethinking such basic questions as what constitutes evidence, what constitutes proof, how damages are defined and how they are assessed. Evaluating the approaches already implemented for their strengths and weaknesses may highlight the limited effect of a legal response on pathological behaviour and the need for other types of responses.

The Commission's preliminary overview of this subject suggests that further research is required. To the extent that studies or reports on these topics exist, the Commission will continue to collect and evaluate them. To the extent that gaps exist, the Commission will undertake to fill them. This may involve identifying archival and historical documents, collecting first-hand the experiences of survivors of institutional child abuse and awarding appropriate research contracts. The Commission has identified the following critical themes:

1. A detailed inventory of known cases of institutional child abuse in Canada; a review and categorization of approaches to addressing such abuse and specifically, the extent to which each approach included the following:
 - Criminal prosecutions
 - Civil suits
 - Public inquiries
 - Negotiation—mediation—dispute resolution
 - Apologies (public or private, individual or collective)
 - Other
2. New ways of conceiving of frameworks for responding to institutional child abuse.
3. A review of approaches to past institutional or state-sanctioned abuse in other countries; for example, Argentina, Chile, South Africa, Rwanda and Australia.



4. A review and analysis of the outcomes identified by victims.
5. A review and analysis of the outcomes identified by governments or other bodies responsible for the institutions where the abuse occurred.
6. An analysis, to the extent possible, of the strengths and weaknesses of the various approaches to satisfy these outcomes and the effect of a combination of these approaches.
7. An assessment of the extent to which the means adopted determine the ends achieved, as well as the extent to which the ends sought determine the means adopted.
8. A discussion of possible new approaches to addressing past institutional child abuse and an assessment of their relative merits and risks.

Once the studies addressing these questions and others, which will emerge from the Commission's research, have been completed, the Commission will consult broadly with Canadians about its response to the Minister's Reference. Consultation is fundamental to the Commission's work and an explicit part of the Reference, which requests the Commission to identify "the range of constituencies that must be involved in the process." Initial research suggests that those constituencies should include at least the following:

- victims of institutional abuse
- families and communities of the victims
- those who have treated the victims
- those who have represented the victims in the pursuit of redress
- those responsible for institutions where abuse has occurred
- those employed in institutions where abuse has occurred

Before engaging in these and other public consultations and finalizing its research plan for the Reference, the Commission will contact a small number of people representative of interested constituencies to ensure there are no serious problems with how it has framed its inquiry and no major gaps in the research proposed.



Conclusion

This Interim Report is grounded in the recognition that discussion of approaches to dealing with institutional child abuse cannot be attempted in isolation. An understanding of broader issues concerning abuse—of persons other than children, in settings other than institutions—is vital if, as a society, we wish to redress past abuse and, equally, prevent its recurrence.

The Commission is just beginning to articulate its own specific research programmes under four broad research themes: personal relationships, social relationships, economic relationships and governance relationships. Several additional topics of study that could be extrapolated from the Reference would fit within these themes. Abuse generally could be explored in the context of personal relationships (when do legitimate relationships become abusive—who are the perpetrators—who are the victims?) or social relationships (how does society care for vulnerable persons—how does it help victims—how does it deal with perpetrators?). Child abuse in settings other than institutions could be explored in the context of personal relationships. Institutional abuse could be considered in the context of social relationships (why do we institutionalize certain groups) or governance relationships (why do we create particular kinds of institutions—how do we ensure that they fulfil their intended purpose?).

To the extent that the Commission's work on this Reference suggests further avenues of inquiry that will better situate a response to the Minister, it will be sensitive to integrating these into its evolving research agenda.

Appendix I

The Minister's Letter



Mr. Roderick A. Macdonald
President
Law Commission of Canada
473 Albert Street, 11th Floor
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Dear Mr. Macdonald:

I am writing further to our recent discussions concerning a reference to the Law Commission of Canada. As you are aware, I very much appreciate the role that the Law Commission can play in providing independent advice on reform of the law of Canada and its effects, with a view to ensuring that the legal system meets the changing needs of Canadian society and of individuals in that society.

With this in mind, I ask the Commission to undertake, pursuant to s.5(1)(b) of the *Law Commission of Canada Act*, a report addressing processes for dealing with institutional child physical and sexual abuse.

The federal government and many provincial and territorial governments are confronted with the difficult issue of responding to victims of physical and sexual abuse that occurred in government-run, as well as government-funded and sponsored institutions, in the past. Cases of this nature raise sensitive issues for the individuals involved, for their families and for the communities. Governments are concerned about how best to deal with these issues in a responsible and fair way. While it is clear that lengthy civil and criminal trials are not ideal processes in this context, it is less clear what types of processes would best address wrongdoing, while affording appropriate remedies, and promoting reconciliation, fairness and healing.

As an independent, multidisciplinary agency mandated to consider law and justice, the Law Commission of Canada is well suited to examine processes to deal with institutional abuse. It can provide governments, and Canadians generally, with an inventory and comparative assessment of approaches available.



The Commission is being asked to conduct its research and study in consultation with all interested parties and constituencies. However, the Commission should not address processes that affect Aboriginal peoples until national Aboriginal leadership is closely consulted as to how best to involve Aboriginal peoples in carrying out the reference.

The result of the Commission's study should be analytical, conceptual and non-prescriptive. It should include a discussion of approaches in Canada and elsewhere, but should not be structured so as to pre-empt or derail any ongoing processes in place or under consideration. More specifically, it is not intended to displace, delay or in any way be in lieu of the federal government response to the recommendations of the Royal Commission on Aboriginal Peoples. Nor is this reference to the Law Commission intended to provide a public forum for redress either of general situations or specific cases.

I would suggest that the Commission's work be multi-staged. An initial report, outlining the issues and identifying the required research and studies, including the range of constituencies that must be involved in the process, could be completed by the end of January 1998. A comprehensive analysis of all the facets of the problem could follow in June 1998. The Final Report, reviewing various approaches and their implications, is to be submitted in November 1998.

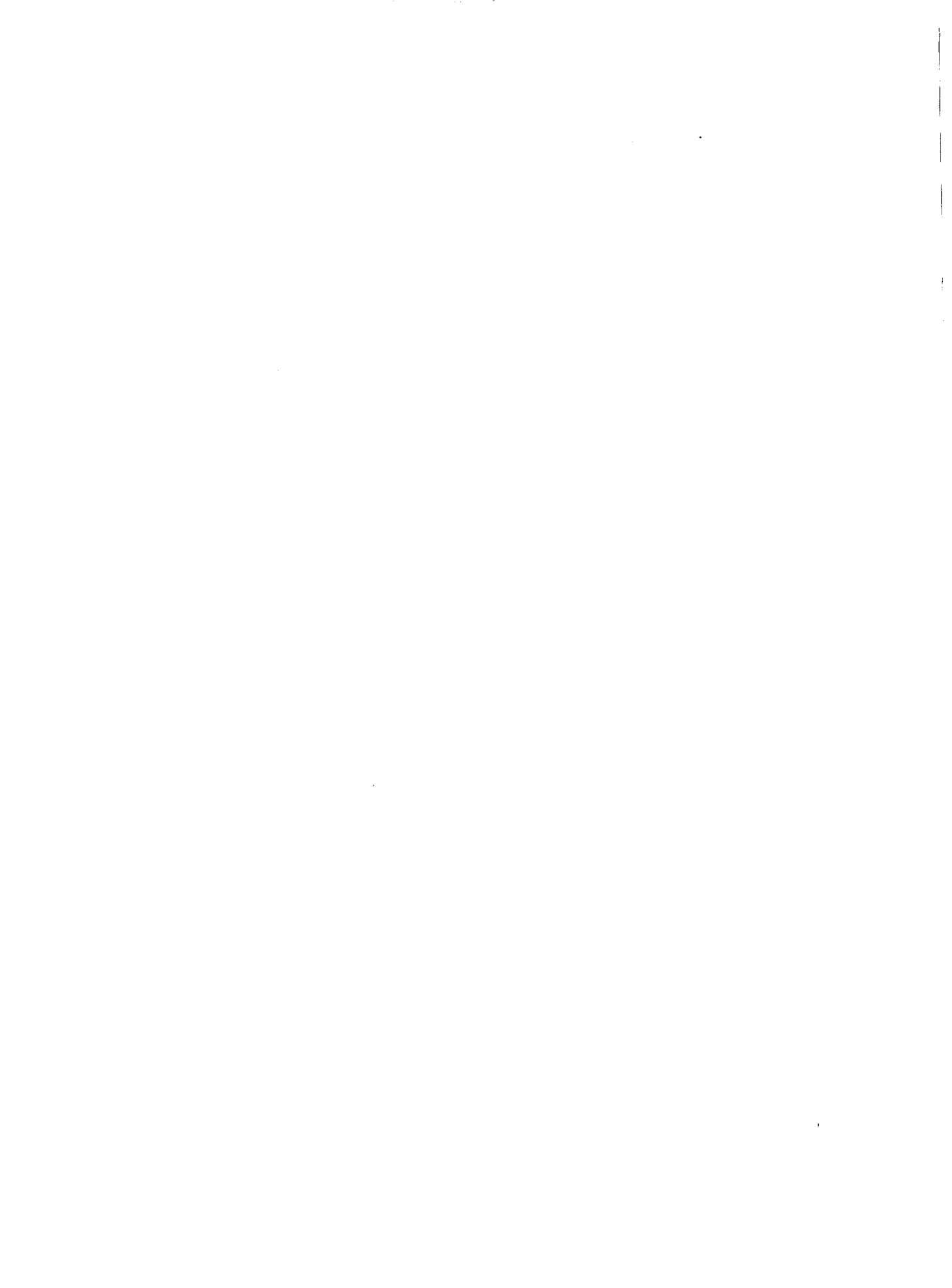
I look forward to receiving the Report of the Law Commission of Canada on this complex and important issue.

Sincerely yours,

A. Anne McLellan

Appendix II

Reports Examined





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