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DUE JUSTICE FOR ALL

PART ONE: A SURVIVOR-FOCUSED ANALYSIS OF CANADA'S LEGAL RESPONSES TO SEXUAL VIOLENCE

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LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform, and public education using the *Canadian Charter of Rights and Freedoms*.

This publication was created as part of the Due Justice for All Project, an initial collaboration between LEAF, METRAC – Action on Violence, and WomenatthecentrE. WomenatthecentrE was not involved in the research or drafting of this report, and instead created their own report: *Declarations of Truth: Documenting Insights from Survivors of Sexual Violence*. LEAF encourages readers to review this report, which is grounded in survivor-led community-based participatory research and includes a transformative justice model. LEAF is committed to developing a trust-based relationship with WomenatthecentrE moving forward.

Unless otherwise noted, content in this report is current as of 2018.

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Introduction

Sexual assault, defined in the criminal context as an offence consisting of unwanted sexual touching,[1] denies women their rights to substantive equality, personal freedom and physical, psychological, and sexual autonomy. Men, women, and gender-diverse people can be both perpetrators and victims of sexual violence. However, statistics show that sexual assault is a crime disproportionately committed by men against women. Sexual assault is deeply harmful, impacting women's safety, autonomy, human dignity, freedom, and equality. Even for those rare women who have not been personally affected by sexual violence, the threat of sexual assault shapes women's lives and daily decision-making.

Despite legal reforms across the civil and criminal law, the legal processes available to respond to this violence often traumatize and fail complainants. This is an area of law that calls out for new alternatives aimed at meeting the needs and priorities of complainants.

This report provides an analysis of existing legal responses to sexual violence against women, focusing specifically on how and whether these responses meet the justice interests of sexual assault survivors. This report serves two purposes: first, it will further our understanding of the elements of particular justice mechanisms that are beneficial for survivors, as well as those that are problematic. Second, it identifies gaps in Canada's legal response to sexual assault, in order to better understand how an alternative to existing legal systems might fill those gaps.

This report is divided into four parts:

1. Part 1 provides an introduction to the context of sexual violence in Canada.
2. Part 2 examines the particular justice interests that female survivors of sexual violence seek from the legal system.

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[1] *R v Chase* [1987] 2 SCR 293, 1987 CanLII 23 at p 302.

3. Part 3 identifies and explains innovative legal avenues to justice for sexual violence and considers their capacity to meet the goals associated with the justice interests of survivors.
4. Part 4 highlights the conclusions reached in this report regarding elements of a justice model that work or do not work for survivors.

In the various studies and cases cited in this report, women who have experienced sexual assault are referred to using the following terms: survivor, victim, survivor/victim, and complainant. As a result, in summarizing the research and case law, this report uses these terms interchangeably.

Context of sexual violence against women

Sexual assault is gendered, with extensive research showing that it is committed predominantly by men against women and girls. Statistics show that sexual assault profoundly affects the lives and the well-being being of thousands of Canadian women every day. As detailed below, it has a particularly dire impact on women who experience intersecting grounds of marginalization.

A. Sexual assault is a gendered crime

According to the 2014 General Social Survey's data on criminal victimization, 87% of sexual assaults that year were committed against women.[2] Of sexual assaults not committed by a spouse, 94% were perpetrated by men.[3] Among women who suffered incidents of sexual assault that year, 24% of them reported experiencing two incidents within twelve months, while 26% reported experiencing three or more such incidents within twelve months.[4] After

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[2] Shana Conroy & Adam Cotter, *Self-reported Sexual Assault in Canada, 2014*, 37 Juristat 1 (Canadian Centre for Justice Statistics, 2017) at 6.
[3] *Ibid* at 13.
[4] *Ibid* at 6.

controlling for other risk factors in data from 2014, women were found to be six times more likely to be sexually assaulted than men.[5] In analyzing police-reported sexual violence specifically, Maire Sinha found that women were eleven times more likely than men to be sexually victimized.[6] In terms of reporting, relative to men, in 2014, Canadian women reported approximately 555,000 incidents of sexual assault, far more than the 80,000 incidents reported by men.[7]

B. Women who experience intersecting grounds of oppression experience higher rates of sexual violence.

The disproportionate rate of sexual assault against women is compounded by other axes of oppression– including racism, poverty, homophobia, lesbophobia and transphobia, and disability discrimination.[8] Men were more likely to target women living with multiple forms of oppression, such as being young, Indigenous, lesbian or bisexual; having a disability; and living in poverty.[9] There is no disaggregated data illustrating the rate of sexual violence faced by Black women, including Black trans women, in Canada.[10] Racialized women, including racialized trans women, however, face higher rates of sexual violence.

More specifically, data from 2014 show that the rate of sexual assaults against Indigenous people was approximately three times greater than among non-Indigenous people.[11] Young Indigenous women face an astronomical rate. In one survey, nearly 25% reported being sexually assaulted in the 12 months leading up to the survey.[12]

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[5] *Ibid* at 10.
[6] Maire Sinha, *Measuring Violence Against Women: Statistical Trends*, 33 Juristat 1 (Canadian Centre for Justice Statistics, 2013) at 11.
[7] Conroy & Cotter, *supra* note 2 at 6.
[8] *Ibid* at 3.
[9] *Ibid.*
[10] "Ombudsman's statement on Sexual Assault Awareness Month" (1 May 2021), online: Office of the Federal Ombudsmen for Victims of Crime https://www.victimsfirst.gc.ca/media/news-nouv/nr-cp/2021/20210501.html.
[11] Conroy & Cotter, *supra* note 2 at 3.
[12] *Ibid* at 8.

People with disabilities generally had twice the risk of sexual assault compared to people without disabilities,[13] while people with mental disabilities specifically had five times the risk.[14] Poverty is also a risk factor for sexual assault – people who have previously experienced homelessness faced a rate of sexual assault three times higher than people who had never been homeless.[15]

Canadians who identified as lesbian or bisexual had a rate of sexual assault that was six times higher than those who identified as heterosexual.[16] Trans PULSE Canada found that 26% of trans and non-binary people in Canada had been sexually assaulted in the five years preceding their 2020 study.[17] That number rose to one in three for racialized trans and non-binary people.[18]

C. Sexual assault is underreported

These statistics capture sexual assaults reported to police[19] and sexual assaults that were self-reported. Self-reported data are critically important because sexual assault is the most underreported violent crime in Canada. Estimates indicate that only 5% of incidents were reported to the police in 2014.[20] Between 2009 and 2014, there were 117,238 police reported incidents of sexual assault,[21] while self-reported data demonstrate that there were

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[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid* at 9.
[16] *Ibid* at 8.
[17] The Trans PULSE Canada Team, *Health and Health Care Access for Trans & Non-Binary People in Canada* (10 March 2020) at 8, online: Trans PULSE Canada https://transpulsecanada.ca/results/report-1/.
[18] Caiden Chih et al, *Health and Well-Being Among Racialized Trans and Non-Binary People: Violence, Discrimination, and mistrust in police* (2 November 2020) at 5, online: Trans PULSE Canada https://transpulsecanada.ca/results/report-health-and-well-being-among-racialized-trans-and-non-binary-people-in-canada/.
[19] Sinha, *supra* note 6 at 5.
[20] Christine Rotenberg, "Police-reported sexual assaults in Canada, 2009 to 2014: A Statistical Profile" (2017) 37 Juristat 1 (Canadian Centre for Justice Statistics) at page 4. Note that this statistic is to be used "with caution".
[21] *Ibid* at 6.

636,000 incidents of sexual assault in 2014 alone.[22] Accordingly, the vast majority of sexual assaults never reach the criminal legal system, and may never face adjudication through any legal proceeding or justice mechanism.

D. Sexual assault interferes with women's equality

Sexual assault has a profound effect on women. It seriously interferes with women's equality, undermines women's financial security and participation in public life, disrupts their personal relationships, and traumatizes their communities. Justice Canada has estimated that the annual economic impact of sexual assault is nearly five million dollars.[23] The devastating consequences to women, particularly women who face additional grounds of marginalization, demonstrate the need for an analysis of sexual assault that is intersectional and focused on substantive equality.

Sexual violence harms women at a fundamental level: it interferes with the victim's autonomy, sexual integrity, and human dignity. It reinforces women's inequality. In the words of Chief Justice Beverley McLachlin, "we now see sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity."[24] Justice Cory emphasized the negation of women's dignity, stating that sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women."[25]

The physical and psychological impacts of sexual assault are significant. Survivors report experiencing shame, self-blame, depression, post-traumatic stress disorder (PTSD),

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[22] *Ibid* at 3.
[23] Josh Hoddenbagh, Ting Zang, & Susan McDonald, "An Estimation of the Economic Impact of Violent Victimization in Canada" (Research and Statistics Division, Department of Justice Canada; 2014) at 179.
[24] *R v Mabior*, 2012 SCC 47 at para 48.
[25] *Osolin v The Queen*, [1993] 4 SCR 595 at 669.

self-harm, substance abuse, suicide, and other negative consequences.[26] Victim/survivors also report physical responses such as chronic diseases, headaches, eating disorders, gynecological symptoms, and damage to the urethra, vagina, or anus.[27]

Sexual assault also may have serious financial costs, including loss of earnings, loss of earnings capacity, medical expenses, and counselling expenses. Many survivors of sexual violence require time off from work following the sexual assault, and experience job loss and unemployment.[28] Further, sexual violence can interfere with women's future earnings potential. For example, mental health symptoms can interfere with survivors' performance at work, which impacts promotional opportunities and can disrupt survivors' educational performance and attainment, impacting future earnings.[29] Therapy and medical treatments can be very expensive, particularly for unemployed women who do not have extended health benefits. Accordingly, sexual violence contributes to the feminization of poverty.

Further, sexual assault impacts women's relationships and communities. It can have profound effects on the relationships and social life of the survivor, impacting intimate partner, friend, and family relationships.[30] Non-perpetrator family members, partners, friends, and children of survivors are also affected by a sexual assault and its aftermath.[31] This is because, "[f]ollowing the sexual assault of a family or loved one, family and friends often experience considerable emotional distress and physical and psychological symptoms that

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[26] Ross Macmillan, "Violence and the Life Course: The Consequences of Victimization for Personal and Social Development" (2001) 27 Annual Review of Sociology 1 at 8; "Effects of Sexual Violence", online: RAINN (Rape, Abuse & Incest National Network) https://www.rainn.org/effects-sexual-violence.
[27] Zoe Morrison, Antonia Quadara & Cameron Boyd, "'Ripple effects' of sexual assault" (2007) 7 Issues: Australian Centre for the Study of Sexual Assault 1 at 2.
[28] Rebecca Loya, "A Bridge to Recovery: How Assets Affect Sexual Assault Survivors' Economic Well-Being" (2015) 5 SAGE Journals 1 at 2.
[29] Rebecca Loya, "Rape as an Economic Crime: The Impact of Sexual Violence on Survivors' Employment and Economic Well-Being" (2014) 30 Journal of Interpersonal Violence 2793.
[30] Morrison, Quadara & Boyd, *supra* note 27 at 6.
[31] DM Daane, "The ripple effects: Secondary sexual assault survivors", in F Reddington & B Kreisel (Eds.), *Sexual assault: The victims, the perpetrators and the criminal justice system* (Durham: Carolina Academic Press, 2005) at 113-131.

can disrupt their lifestyles and family structures."[32] These responses include shock, helplessness, rage, guilt, and an experience of devaluation.[33] Families may also have "a sense of isolation and estrangement from others. They may feel violated and different. They may lose their sense of community and belonging".[34] Given that this crime is disproportionately committed against certain communities, for example Indigenous and racialized communities, those communities will experience disproportionate rates of secondary harm caused by sexual violence.

In short, sexual violence severely impacts women's rights to substantive equality. It undermines women's physical and emotional health, it negatively impacts women's financial security and participation in public life, it disrupts women's personal relationships, and it traumatizes women's communities.

Accordingly, advancing gender equality requires improved justice responses to sexual assault. This report seeks an equality-enhancing legal response to sexual violence, rooted in intersectional principles of substantive equality, which will advance women's capacity to use the justice system to address sexual violence.

Women's justice interests

The impact of sexual assault on women's equality provides critical context for considering an appropriate response to sexual violence. In order to assess existing responses and hypothesize alternative solutions, it is necessary first to have a theoretical framework through which to analyze these responses. In this project, in view of the specific and gendered impact of men's violence on women, we apply a framework based on the particular

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[32] Morrison, Quadara & Boyd, *supra* note 27 at 10.
[33] *Ibid.*
[34] *Ibid.*

needs and goals of women who have experienced sexual violence and assess the capacity of justice responses to meet those needs.

In applying this framework, it is important to understand that the justice interests of women do not encompass only their individual well-being. As Kathleen Daly suggests, the efficacy of justice responses to sexual violence, which she terms "justice mechanisms,"[35] should be assessed based on the capacity of the responses to meet victims' justice interests.[36] Justice interests are distinct from the therapeutic outcomes of a justice mechanism, such as closure, recovery, and healing. Justice interests, instead, are what Daly defines as the "prior moral and political matters of what *victims as citizens* should expect in seeking justice". Daly argues that "we should not focus on a victim's well-being *alone* as a justice objective."[37]

Accordingly, in this project, while we assess justice mechanisms in part through the lens of therapeutic outcomes, such as enabling or preventing recovery and healing, we are also focused on women's justice interests. The next and more difficult question is identifying *what* women's justice interests are. A number of researchers have asked survivors this question. While the conclusions from each study are not identical, a number of themes emerge related to both the process and the outcome of the justice mechanism.

Kathleen Daly, in her summary of a number of research projects dedicated to identifying women's justice interests, found the following as core interests articulated by survivors: participation, voice/expression, validation, vindication, and offender

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[35] Kathleen Daly, "Sexual violence and victims' justice interests" in Esteele Zinsstag and Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Responses"* (London: Routledge, 2017). Daly defines a justice mechanism as "a justice response, process, activity, measure or practice." Examples include criminal prosecution; bans and purges; reparations (financial, employment, symbolic); investigations (truth commissions or independent inquiries); institutional reform; immunity (amnesties and pardons) and memory projects: 113.

[36] *Ibid* at 111 (emphasis in original).

[37] *Ibid* at 111 (emphasis in original).

accountability.[38] Similarly, Judith Lewis Herman conducted a series of interviews of sexual assault survivors in which she asked survivors what outcomes they sought from a justice response to sexual violence. She also identified validation, accountability of the perpetrator, and community acknowledgement of the harm experienced by the survivor, as well as better treatment of survivors by the justice system itself as core justice interests.[39] Other conceptions of survivors' justice interests include "social acknowledgment, a sense of control, an opportunity to tell one's story, not having to continually relive the crime, and not being required to confront a perpetrator directly,"[40] or the ability "to tell their story, be heard, have input into how to resolve the violation, receive answers to questions, observe offender remorse, and experience a justice process that counteracts isolation."[41]

In a study examining the insights of sexual violence survivors on their understandings of 'justice,' Clare McGlynn, Julia Downes, and Nicole Westmarland conclude that survivors' interests are diverse and often change depending on the circumstances. They discuss the concept of "kaleidoscopic justice", in which justice is "a continually shifting pattern; constantly refracted through new circumstances, experiences and understandings. … Within this conception, there are a number of different elements to the kaleidoscope including social and cultural change, prevention, voice, recognition, consequences, dignity and support."[42] Community, personal identity, and intersecting individual characteristics will also contribute to a shifting kaleidoscopic among survivors.

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[38] *Ibid* at 115-123.
[39] Judith Lewis Herman, "Justice From the Victim's Perspective" (2005) 11 Violence Against Women 571.
[40] Kathleen Daly, *Conventional and innovative justice responses to sexual violence* (Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Students, 2011), part 1.
[41] Mary Koss, "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" (2006) Ann NY Acad Sci 206 at 209.
[42] Clare McGlynn, Julia Downes & Nicole Westmarland, "Seeking Justice for Survivors of Sexual Violence: recognition, voice and consequences" in Esteele Zinsstag and Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Responses"* (London: Routledge, 2017) at 181.

While many of these studies occurred outside of Canada, including in the United Kingdom, the United States, and Australia,[43] similar themes appear in Canadian research. In a Canadian example, Bruce Feldthusen, Olena Hankisky, and Lorraine Graves interviewed 87 Canadian survivors of sexual violence about their involvement with the justice system, and found that survivors sought to "obtain public affirmation that they had been wronged, to seek justice, to obtain closure, to secure an apology, to prevent the perpetrator from harming others, and to take revenge."[44]

Wendy Larcombe has also written about feminist goals in reforming sexual assault law in the Australian context. In addition to examining justice outcomes, she suggests that an appropriate measure of the efficacy of rape law and policy reform is "whether the position of the complainant in a rape prosecution is habitable or harmful. To be habitable, the position of complainant must be accessible to women of all ages, backgrounds, and abilities. Moreover, its occupation must not expose the victim/survivor to re-victimization: the rape complainant's interests, needs, and wishes must be appropriately recognized and her autonomy and dignity protected through a criminal investigation and prosecution."[45]

On a related but unique point, this project recognizes that women often face barriers to engaging with the legal system. These barriers may include fear of calling the police or the financial cost of hiring a lawyer. In some cases, women may be unwilling or unable to report sexual violence if the perpetrator is, for example, their employer, their spouse, or their landlord. As such, this project considers the accessibility of various justice mechanisms and considers whether they erect barriers that make it more difficult for women to engage with the system.

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[43] As commonwealth countries, the main features of the justice response in those jurisdictions is substantially similar to the Canadian system.
[44] Bruce Feldthusen, Olena Hankisky & Lorraine Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000) 12 Can J Women & L 66 at 67.
[45] Wendy Larcombe, "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19 Fem Leg Stud 27 at 39.

In addition to these general goals, women from diverse communities may have particular justice interests. These needs, however, have not been fully studied. Structural barriers, including systemic racism, colonialism, ableism, and other systems of oppression, mean that the experiences of racialized women, Indigenous women, women with disabilities, and trans women are often absent from research processes and findings.

One example highlighting the experiences and needs of a group of Indigenous women can be seen in research into the Grandview Agreement in Ontario. This involved a class settlement for survivors of institutional abuse at a custodial institution for girls, many of whom were Indigenous. Participants reported that the incorporation of Indigenous practices, such as using an eagle feather in the taking of the oath and conducting smudging ceremonies before the hearings, in addition to the presence of Indigenous adjudicators and the participation of elders, was particularly important.[46] However, Indigenous adjudicators raised concerns that the harms experienced by Indigenous women, specifically the racialized dimensions and cultural dimensions of the harm, were not adequately addressed.[47] More research is needed to fully understand the diverse justice interests of women from marginalized communities, but this case underscores that women may have specific needs and concerns that are not addressed in the general themes outlined above.

That said, while recognizing that justice interests change over time and will vary depending on the circumstances and the impacted communities, it is nonetheless apparent that the themes emerging from the studies referenced above are often consistent. These papers indicate that the outcome of the justice mechanism and the process itself are both significant components of survivors' justice interests. Survivors seek validation of their experience, vindication that what was done to them was wrong, and consequences for the

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[46] Reg Graycar & Jane Wangmann, "Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution" (2007) 7 Sydney Law School Research Paper No. 07/50 at 38.
[47] *Ibid.*

offender. In addition, they seek the opportunity to tell their story, to participate and exercise some degree of control over the process, and to be treated with dignity and respect throughout the process, regardless of the outcome.

In this project, therefore, we assess existing justice mechanisms based on the themes identified in the various research projects outlined above. We focus on: participation, expression, validation, vindication, and offender accountability. We also assess how potential justice mechanisms treat survivors: the so-called "habitability" of the justice mechanisms, and the accessibility of the justice mechanism to diverse groups of women.

This analysis seeks to take into account that processes are deeply embedded in cultural practices and values, and as a result, a process in which some women may find they can give expression, participate actively, and feel respected, may not be experienced this way by other women. While more research on the particular needs and interests of diverse groups of women is needed, we strive to consider the capacity of justice mechanisms to respond to and integrate the particular justice interests of members of marginalized communities.

A. Participation

Survivors require participation in the legal process. In order for survivors to participate in the process, they require information about the process and what options are available to them. Meaningful participation also means that survivors must have a degree of control over the process and outcomes, including the capacity to make decisions and influence the direction of the process.[48]

In a survey of sexual assault survivors, Haley Clark found that "victims/survivors repeatedly emphasised the value of having clear accessible information about the criminal

[48] McGlynn, Downes & Westmarland, *supra* note 42 at 184; Lewis Herman, *supra* note 39 at 582.

justice system and its procedures,"[49] including "practical information about the various stages of the system, the key players, their role in the procedures, the potential implications for them of the legal processes, and possible outcomes."[50] This information allowed survivors to make informed decisions about engaging with the system and to properly prepare for such engagement.[51] In an analysis of access to justice for Indigenous survivors of sexual violence, Patricia Barkaskas and Sarah Hunt note that "lack of information about available supports and about the workings of judicial processes is a critical issue that can lead to feelings of powerlessness or lack of control over one's fate."[52] Accordingly, information is fundamental to participation.

Participating in decision making and exercising some control over the process is also very important. The literature indicates that lack of participation in the process causes women to feel alienated from the justice system, and is a major concern for survivors.[53] McGlynn, Downes, and Westmarland found that survivors felt marginalized from and disempowered by the traditional criminal legal system, with one participant stating that she felt "like 'a bit of evidence' rather than the person most directly harmed by the offence."[54] Survivors seek to "be more central to, and in control of, the justice process: to make decisions and influence the direction of the process."[55]

Participation in the justice process is also central to Larcombe's argument regarding habitability. Larcombe argues that a fundamental aspect of habitability is ensuring that participation in the process does not "disempower, humiliate or harm the complainant,

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[49] Haley Clark, "What is the justice system willing to offer? Understanding sexual assault victim/survivors' criminal justice needs" (2010) 85 Family Matters 28 at 31.
[50] *Ibid.*
[51] *Ibid.*
[52] Patricia Barkaskas and Sarah Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault" (Department of Justice: Canada, 2017) at 33.
[53] Larcombe, *supra* note 45 at 38.
[54] McGlynn, Downes & Westmarland, *supra* note 42 at 183.
[55] *Ibid.*

precisely as the originating assault did."[56] In her interviews, Herman found that many survivors experienced their marginal role in the justice system as "a humiliation only too reminiscent of the original crime."[57] As noted above, the survivors interviewed by McGlynn, Downes, and Westmarland found their exclusion from the process disempowering. Accordingly, to be "habitable", a justice mechanism must allow survivors to participate in an informed manner.

Participation, therefore, is critical to survivors. It is necessary to minimize disempowerment, alienation, and humiliation. A justice mechanism therefore should be assessed based on whether and how it enables information to be communicated to survivors, and empowers survivors to act on that information and make autonomous choices.

B. Expression

Expression, or the ability to articulate one's story, is one of the most frequently mentioned justice elements. Expression has been defined as "telling the story of what happened and its impact in a significant setting, where a victim-survivor can receive public recognition and acknowledgement."[58] McGlynn, Downes, and Westmarland also note expression as a core justice component. In their study, they found that survivors "wish to give voice [or expression] to the harms they have suffered and for this to be recognised. … Survivors wish to 'name their own experience and 'tell their story in their own way.'"[59]

In research on the criminal trial process, scholars have critiqued the manner in which 'truth' is elicited from survivors, with a question-and-answer format that does not permit survivors to explain what happened and its impact in their own words. Judith Herman writes that in order to truly give meaning to the interest of "expression," researchers should

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[56] Larcombe, *supra* note 45 at 38.
[57] Lewis Herman, *supra* note 39 at 582.
[58] Daly, *supra* note 35 at 119.
[59] McGlynn, Downes & Westmarland, *supra* note 42 at 183.

examine whether a justice mechanism enables the survivor to tell their story and to articulate everything they wanted to say, in a setting of their choosing, and to construct a coherent and meaningful narrative specific to their experiences.[60]

This interest will manifest differently for different communities. Patricia Barkaskas and Sarah Hunt similarly argue that "Indigenous survivors need approaches in which they can tell their stories on their own terms." However, they emphasize that this includes the specific need to "be able to name their experiences in terms that make sense to them and that account for intersecting local, cultural and personal dynamics, including those of collective silencing."[61] This indicates that different groups may view the interest in expression differently, and these differences should be taken into account.

Accordingly, we will assess the extent to which a justice mechanism provides an opportunity for survivors to articulate what has happened to them and the harm it caused on their own terms.

C. Validation/recognition

Together with the need to tell their own story, survivors have articulated the need to be validated by their community. As defined by Daly, validation means "affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed for what happened. It reflects a victim's desire to be believed and to shift the weight of accusation from their shoulders to others (family members, a wider social group or legal officials)."[62] Generally, validation means that the survivor is satisfied that what happened has been recognized by society. In the context of Indigenous survivors specifically,

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[60] Lewis Herman, *supra* note 39 at 574.
[61] Barkaskas & Hunt, *supra* note 52 at 27.
[62] Daly, *supra* note 35 at 120.

Barkaskas and Hunt write that being heard and believed is "key to taking back power whether within or outside of the justice system."[63]

McGlynn, Downes, and Westmarland articulate validation similarly, although they use the term recognition. In their assessment, "a sense of recognition was fundamental to survivors' senses of justice."[64] Similarly, in Herman's research, validation from the community was survivors' most important objective.

The interest in validation is two-fold. First, it involves society accepting the survivor's account of events as existing or true, including "acknowledging the basic facts of the crime and the harm it caused."[65] Second, it requires an acknowledgment, not just of the events, but of the significance of the survivor's experience. According to McGlynn, Downes, and Westmarland, validation/recognition entails "a form of acknowledgement conveying support. Recognition, therefore, is more than simply 'being believed'. Recognition encompasses the significance of the experience being acknowledged."[66]

Significantly, for many survivors interviewed, the perpetrator admitting what he had done was "neither necessary nor sufficient to achieve the end of validation."[67] While acknowledgement from a perpetrator was one aspect of what constitutes recognition to survivors, validation from the community, including by-standers, friends, family, and the community at large, was of equal or greater importance.[68]

Accordingly, we assess the capacity of models to provide survivors with this validation. The model will meet this justice interest if it provides the survivor with the opportunity to both tell her story and to receive confirmation that the community believes

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[63] Barkaskas & Hunt, *supra* note 52 at 6.
[64] McGlynn, Downes & Westmarland, *supra* note 42 at 181.
[65] Lewis Herman, *supra* note 39 at 585.
[66] McGlynn, Downes & Westmarland, *supra* note 42 at 181.
[67] Lewis Herman, *supra* note 39 at 585.
[68] *Ibid.*

that the offence in fact occurred, and provides acknowledgement of the significance and weight of the survivor's experience and the harm that it caused her.

D. Vindication

A step beyond validation, survivors also seek vindication. Broadly, vindication means that the community rebukes the offender's conduct. As noted by Herman, survivors want to see their communities "take a clear and unequivocal stand in condemnation of the offense."[69]

Daly defines vindication in two ways: "vindication of the law (affirming *the act* was wrong, morally and legally) and vindication of the victim (affirming *this perpetrator's actions* against this victim were wrong)."[70] Beyond recognition of the harm the offender caused, vindication requires that others (family members, a wider social group, legal officials) "do something to show that an act (or actions) was wrong by, for example, censuring the offence and affirming their solidarity with the victim."[71] Vindication is crucial to survivors in part because it relieves them of the burden of the offence. In Herman's study, community denunciation of the crime was of great importance to the survivors because it "affirmed the solidarity of the community with the victim and transferred the burden of disgrace from victim to offender."[72]

Accordingly, models must be capable of both validating the harm that the survivor experienced and specifically censuring the offender for inflicting that harm. The nature of the censure is addressed in the next justice interest, offender accountability and consequences.

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[69] *Ibid.*
[70] Daly, *supra* note 35 at 121.
[71] *Ibid.*
[72] Lewis Herman, *supra* note 39 at 585.

E. Offender accountability/consequences

McGlynn, Downes, and Westmarland note that all survivors spoke of their wish for perpetrators to experience tangible consequences.[73] Daly similarly identified offender accountability as a primary justice interest, which she defines as "requiring that alleged perpetrators are called to account and held to account for their actions; and if admitting to or convicted for offences, expecting that they will take active responsibility for their wrongful behaviour."[74]

However, the particular consequences survivors seek are diverse, and often do not reflect conventional understandings of justice or punishment.[75] The majority of survivors Herman interviewed did not endorse conventional aims either of punishment or of rehabilitation, and most were not particularly interested in seeing their perpetrators suffer. Rather, "the goal most frequently sought by this group of informants was exposure of the perpetrator."[76] Survivors sought to deprive the perpetrator of undeserved honor and status rather than to deprive him of either liberty or fortune. Of the women McGlynn, Downes, and Westmarland interviewed, some sought prison and jail, while others sought consequences such as exposure and social ostracism such as being removed from school or the community as preferable outcomes.[77] Most importantly, "the informants were unanimous in their wish for family and community to see through the perpetrator's deceptions and lies."[78]

Of those who sought prison as a consequence, Herman finds that, "of the four basic aims of criminal justice—deterrence, retribution, incapacitation, and rehabilitation—this

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[73] McGlynn, Downes & Westmarland, *supra* note 42 at 186.
[74] *ibid*.
[75] *ibid*.
[76] Lewis Herman, *supra* note 39 at 593.
[77] McGlynn, Downes & Westmarland, *supra* note 42 at 186.
[78] Lewis Herman, *supra* note 39 at 593.

group generally endorsed only one: incapacitation. Their priority was safety, for themselves and for others."[79]

Accordingly, it is clear that some degree of offender responsibility and consequences is a necessary component of any justice mechanism, though these studies indicate that the appropriate consequence will differ depending on the circumstances and justice interests of the particular survivor in question.

F. Habitability

We will also assess the "habitability" of a justice mechanism. Larcombe writes that rape law reform must ensure that participation in the justice system does not "exacerbate the rape victim/survivor's trauma or expose her to re-victimisation, inside or outside the courtroom."[80] We will therefore assess the capacity of a justice mechanism to treat survivors with dignity and respect and prevent re-victimization of the complainant.

Larcombe provides a theoretical framework for such an assessment. She distinguishes between "occasions of respect" and "occasions of oppression." She advocates understanding occasions of respect as "ones in which the complainant is listened to by a criminal justice officer who feels a responsibility to provide accurate and relevant information and to facilitate the victim/survivor's access to appropriate services and support."[81] Occasions of oppression, by contrast, are interactions that "confirm the fears of victim/survivors that they will not be believed by those in authority, or that the abuse they experienced will be trivialised and dismissed. More broadly, disclosure of sexual violence will be an occasion of oppression if survivors are discouraged from talking about the abuse, advised to forget it and

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[79] *Ibid* at 594.
[80] Larcombe, *supra* note 45 at 38.
[81] *Ibid* at 41.

move on, or to keep silent for the sake of the family, their relationship with the offender or the benefit of someone other than the victim herself."[82]

In determining whether participation in the justice system is an occasion of respect for survivors, Larcombe invites us to ask:

> Is the victim/survivor enabled to access the assistance and support she needs for her recovery irrespective of the decision she takes about assisting an investigation or giving evidence at trial, and irrespective of her capacity to act as a legally credible witness? Is she supported to regain control of her life, rather than only supported to the extent that she plays a part in the legal drama? … Was she treated with respect and consideration by appropriately trained officers? Were her recovery, safety and wellbeing given priority? Was evidence, including her statement, collected sensitively and efficiently? As a result of contact with police, does she know where to get assistance and of the various forms of assistance available to her (including counselling, medical care, victims of crime assistance, and so on)? Has she experienced consistency and continuity in personnel and information (for example, through a 'one-stop shop') or has she been referred to service after service, requiring her to repeat her account and 'start again' each time? Has she been advised of the legal actions that she might take (seeking an intervention order, pursuing a civil action, crimes compensation)?[83]

As we assess these mechanisms and their capacity to meet a survivor's justice interests, we will also consider the impact of the process on the survivor. We will utilize these questions in assessing whether or not the complainant's participation in the justice mechanism is an occasion of respect.

G. Accessibility

Finally, we will consider the accessibility of each model. This examines whether the model imposes barriers to access that make it difficult or impossible for some women to engage in the justice mechanism. As is explained in greater detail throughout the report, some such barriers include: the requirement to rely on police services as a gateway to

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[82] *Ibid.*
[83] *Ibid.*

accessing the justice mechanism, the financial cost of participating in the justice mechanism, or risks that participation poses to one's employment, immigration or migrant status, or living arrangements. To the extent that a justice mechanism does not require significant financial investment or risk, or put women at risk of criminalization, unemployment, or deportation, among other risks, the justice mechanism will be considered more accessible.

This analysis also recognizes that models that may be accessible to some women are often inaccessible to others. For example, Hunt and Barkaskas argue that the inherently colonial nature of Canadian law renders the justice system a poor means of addressing sexual violence against Indigenous women.[84] We assess whether and to what extent the models reduce these barriers - to be an effective justice mechanism, the mechanism must be capable of providing a meaningful response to sexual violence committed against all women.

This report assesses the capacity of different legal models to accomplish these justice interests, in order to provide survivors with meaningful access to justice for sexual violence.

Canada's legal models

There are a variety of means for women to seek justice for sexual violence through existing legal models in Canada. This section examines the advantages and disadvantages of the following models:

1. the criminal legal system;
2. civil litigation;
3. human rights law;
4. criminal injuries compensation boards; and
5. professional regulatory bodies.

[84] Barkaskas & Hunt, *supra* note 52 at 16, 21.

Although perhaps obvious, it is worth noting that what a legal model provides for on paper will not always resemble how the model is applied. Different survivors will have different experiences. That said, this section explores the broad advantages and disadvantages of each model that may make it more or less appropriate for different women depending on their particular interests and goals. It aims to provide greater understanding of the diversity of options available to survivors looking to decide which, if any, avenue to pursue. Further, this analysis provides insight into the particular elements of a legal model that are advantageous for sexual assault survivors, as summarized in the conclusion.

A. Criminal legal system

The criminal legal system is a mechanism by which the state prosecutes offenders in the criminal courts. The complainant can initiate this process by making a complaint to law enforcement, at which point law enforcement then takes over and police and Crown counsel (depending on the province), will decide whether to proceed with laying charges and whether to arrest the accused. The complainant is not a party to any proceedings that are initiated; her role in a prosecution is to act as a witness for the Crown.

The criminal system seeks to determine whether the accused acted contrary to criminal law. Canada's *Criminal Code* criminalizes sexual touching without consent.[85] It also lists circumstances in which consent is vitiated, for example, if the complainant was too young to consent, not capable of consenting, or the consent was induced by fraud.[86] The *Criminal Code* also criminalizes sexual exploitation of a young person, aged 16-18, which is defined as a sexual relationship between a young person and a person in a position of trust and authority towards that young person.[87] A successful prosecution would lead to a

[85] *Criminal Code*, RSC 1985, c C-46, s 273.1.
[86] *ibid*, s 273.1(c)
[87] *ibid*, s 153.

conviction of the accused and subsequent punishment. In order to secure such a conviction, the Crown must prove the accused's guilt beyond a reasonable doubt.

i. Advantages

The criminal legal system is a valuable avenue for some survivors for several reasons. First, the criminal law is the only avenue for sexual assault complainants that provides criminal consequences such as incarceration or restraining orders. Second, a criminal conviction has symbolic power – it is the mechanism through which society condemns wrongful behaviour. Third, in determining whether a sexual assault has occurred, Canada's criminal law has made significant strides to better protect the equality rights of complainants. Finally, the complainant is not a party to the proceeding, which may be less of a burden for some women than participating as a party in a civil proceeding would be.

a. Provides for safety-protecting consequences

The criminal system is the only system through which an offender may be imprisoned or subject to criminal consequences such as restraining orders or probationary conditions. For women who are at immediate risk of continued violence, such measures may be essential. They may be particularly important to survivors of ongoing male sexual violence, who resort to the criminal legal system to protect themselves and their children from future violence, or who wish to ensure that the accused is prevented from committing future violence against others. Incarceration can therefore contribute to the justice interest of offender accountability through incapacitation – bearing in mind that incarceration is virtually always time-limited for sexual assault and there can be safety risks for women when their abuser is released.

b. Symbolic power of a criminal conviction

Criminal convictions can also provide important symbolic public denunciation of sexual violence. This may contribute to the justice interests of validation, vindication, and offender accountability.

Empirical evidence suggests that survivors turn to the legal system in order to expose the offender and seek external validation of their attempts to stop the violence and of their right to live without violence.[88] Many complainants express an interest in exposing the offender's wrongdoing and having the community condemn his behaviour.[89] To this end, a criminal conviction acts as a public denunciation of an offender's conduct and, more broadly, of all conduct involving violence against women. Consequently, if a criminal trial results in a criminal conviction, and particularly if it leads to penalties as provided for under the criminal law, it can be an effective tool for validating the complainant's experience and rebuking the offender's conduct, two central justice interests.

It is important to note that the criminal law is a flawed system, which disproportionately criminalizes members of marginalized populations, while simultaneously failing to protect members of those populations. This system, however, continues to operate. Many understand it as the mechanism for penalizing and condemning the most harmful behavior, and as sending the message that particular conduct represents a significant wrong. There is a risk that removing only sexual violence from the criminal legal system, without broader transformation, would send a message that sexual violence is less serious than those crimes remaining in the system.

c. Significant equality enhancing reforms in Canada's criminal law

While the Canadian criminal law has been criticized for the ongoing operation of myths and stereotypes, there have been significant improvements to the law, through precedent setting legal decisions and legislative reform, that have improved women's access to justice and equality in the criminal legal system.

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[88] Julie Stubbs, "Beyond apology?: Domestic violence and critical questions for restorative justice" (2007) 7 Criminology & Criminal Justice 2 at 182.
[89] Lewis Herman, *supra* note 39 at 593.

Notably, in 1992, Parliament introduced Bill C-49, which modernized sexual assault law in Canada. It codified the definition of consent as the "voluntary agreement of the complainant to engage in the sexual activity in question".[90] It also introduced section 273.2 of the *Criminal Code*, which limits when an accused's claim of mistaken belief in consent can be used as a defence.[91] The bill also reintroduced the "rape shield" provisions, which had been struck down by the Supreme Court in *R. v. Seaboyer*,[92] which limit the admissibility of sexual history evidence and specifically exclude reference to the "twin myths" of sexual history: that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief.[93] Similarly, 1997's Bill C-46 codified the test for production of the complainant's private records, which requires the Court to consider the impact of such disclosure on the equality rights of the complainant and society's interest in the reporting of sexual offences, among other factors.[94]

Improvements to sexual assault law for women's equality have also been achieved in the courts. For example, in the landmark decision *R. v. Ewanchuk*[95], the Supreme Court of Canada confirmed that consent cannot be "implied" from the circumstances. Only affirmative, voluntary agreement to participate in the sexual activity in question constitutes consent. In *R. v. JA,*[96] the Supreme Court of Canada confirmed that consent must be contemporaneous with the sexual activity and can be withdrawn at any time. In *Canadian Newspapers Co. v. Canada,* the Supreme Court of Canada upheld s. 442(3) of the *Criminal Code*, which allows the complainant or Crown to apply for a judicial order that would ban

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[90] *Criminal Code of Canada*, RSC 1985, c C-46, s 273.1(1).
[91] *Ibid*, s 273.2.
[92] *R v Seaboyer,* [1991] 2 SCR 577.
[93] *Criminal Code of Canada*, RSC 1985, c C-46, s 276.
[94] *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, SC 1997 (2d Supp), c C-30.
[95] *R v Ewanchuk,* [1991] 1 SCR 330.
[96] *R v JA*, 2011 SCC 28.

publication of the complainant's identity or any other information that could disclose their identity.[97] In *R. v. Mills,* the Court confirmed that the content of the accused's fair trial rights must be informed by the complainant's equality rights.[98] Additionally, the Supreme Court of Canada has recognized that there is no one way that a sexual assault survivor should react/respond and a trier of fact cannot make adverse credibility findings on the basis of how a typical sexual assault victim ought to behave.[99]

These legal changes have improved the criminal legal system's capacity to respond to sexual violence, although significant work remains to be done. Steps to affirm women's equality and exclude myths and stereotypes from the criminal trial increase the habitability of the criminal system and, importantly, facilitate the criminal legal system's search for truth, making it more likely that survivors will achieve validation and vindication from the process, as well as see consequences for the accused.

d. Relieving some burdens on survivors

Criminal trials may also be preferable for women who do not wish to be directly responsible for the prosecution or resolution of their cases. Once the offence is reported to the police, and assuming prosecution is pursued by the Crown, survivors participate in the trial indirectly as witnesses rather than directly as parties.

This has a number of advantages. First, the Crown bears the financial cost of prosecuting criminal cases, producing evidence and constructing the arguments necessary for a conviction. Second, prosecution of the case by the Crown can alleviate the emotionally challenging and time-consuming nature of pursuing personal legal action against the offender. Some complainants may prefer this mechanism because it does not require them (or a lawyer on their behalf) to communicate directly with the accused, for example, by

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[97] *Canadian Newspapers Co v Canada*, [1988] 2 SCR 122 at 125.
[98] *R v Mills,* [1993] 3 SCR 668.
[99] *R v AJRD,* 2018 SCC 6

requesting disclosure, arranging hearing dates, etc. The Crown is responsible for developing the case, which may allow the complainant to carry on with other aspects of her life.

Third, the Crown's carriage of the case may minimize the ability of abusers to manipulate complainants and reduce the perceived severity of their abuse. Some evidence suggests that survivors may feel fear, guilt or partial responsibility following an assault. The separation between the prosecutor and complainant may be preferable in these circumstances to ensure that women are not manipulated by offenders in an effort to reduce the severity of the consequences they face.[100] For example, empirical evidence indicates that men may be motivated to apologize if an apology is viewed as a means of controlling the situation.[101] Considering these gendered dynamics, a criminal proceeding, which requires an uninterested intermediary to stand between a survivor and the offender, may be a more effective way to pursue fair and just consequences that are not skewed by power dynamics. The criminal system also has a number of mechanisms, which vary in effectiveness, to keep the accused away from the complainant while the process is ongoing.[102]

It is important to note that the complainant is not a party and therefore the decision to accept a guilty plea lies with the Crown and sentencing with the judge, informed by the Crown's position. The complainant, however, should be consulted during the process and can offer her views in a victim impact statement, which she has the right to present to the court.

The 2015 *Canadian Victims Bill of Rights*[103] provided victims with certain important rights, including the right to information about the criminal legal system and their role in it, the status and outcome of the investigation, and information about the offender's release

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[100] Stubbs, *supra* note 88 at 174.
[101] *Ibid* at 175.
[102] For example, *Criminal Code*, RSC 1985, c C-46, s 810.
[103] *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

timing and conditions. Victims are also entitled to the right to protection; the right to participation, including through a victim impact statement; and the right to restitution.[104] These statements can enable survivors to achieve some of their interests in participation and expression, while avoiding the stress of directly participating in a trial. However, it is worth noting that these rights are difficult to enforce, as there is no cause of action to victims who are denied the rights provided for in the *Act*.[105]

e. Legal assistance available in some cases

While women are not entitled to representation in the hearing itself, they do have a right to representation in third party records hearings and, most recently, in hearings regarding the admissibility of evidence about their sexual history.[106] In many provinces, funding is available for representation in such hearings. Further, many women may choose to seek out representation for advice in respect of a criminal law proceeding, even if that lawyer does not directly represent them in the trial itself. Ontario has established a limited *Independent Legal Advice for Survivors of Sexual Assault Pilot Program*,[107] which provides eligible survivors with up to four hours of free independent legal advice to help survivors make informed decisions about their next steps. However, legal representation is not provided under this pilot program.

Building on this initiative, in 2016 the Federal Department of Justice offered funding to interested provinces and territories to explore implementing similar projects, and have funded projects in Nova Scotia, Newfoundland and Labrador, Saskatchewan, and Alberta. The models for offering independent legal advice to victims differ slightly from province to

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[104] *Ibid*, ss 6-16.
[105] *Ibid*, s 28.
[106] *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s 278.93(3).
[107] *Independent Legal Advice for Survivors of Sexual Assault Pilot Program*, online: Ontario Ministry of the Attorney General https://www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php.

province, but all work towards the objective of providing victims with information about their options in the wake of sexual assault.

ii. Disadvantages

Notwithstanding the goals of the criminal legal system,[108] much has been written criticizing its treatment of sexual violence. The disadvantages of pursuing justice through the criminal system can be divided into the following broad categories:

1. the criminal legal system, from reporting to sentencing, sees significant attrition of sexual offences;
2. the criminal law of sexual assault has rigid procedural and substantive rules, designed to ensure a fair trial to the accused, which can make it challenging for sexual assault complainants to obtain justice;
3. discriminatory myths and stereotypes about sexual assault survivors continue to influence the criminal process;
4. the complainant is not a party to the proceeding and the process does not provide opportunities to shape the process or obtain personal remedies;
5. the criminal system process is traumatic for complainants;
6. participating in a criminal trial can be expensive for complainants; and
7. a criminal process can impact other legal proceedings.

These disadvantages can make the criminal legal system an imperfect or inappropriate avenue for some survivors of sexual violence.

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[108] The Criminal Code states that the goals of sentencing in criminal law include deterrence of the offender and others, separating offenders from society where necessary, and denouncing unlawful conduct, among other purposes: *Criminal Code*, RSC 1985, c C48, s 718.

a. Low reporting and convictions

First, sexual offences face particularly low rates of reporting and high rates of attrition relative to other crimes. At the outset, police act as gatekeepers to the criminal system, and the vast majority of survivors do not report sexual violence to the police. Of those offences that are reported, police and Crown prosecutors may exercise their discretion not to proceed with a criminal charge or prosecution, which denies many survivors access this legal avenue to justice. Of those sexual offenders who are prosecuted, only half lead to convictions.

Low reporting rates of sexual violence

In the 2014 Canadian General Social Survey, only five percent of women who experienced sexual assault stated that they reported this to the police, down from eight percent in 2004.[109] In explaining why they did not report sexual violence to the police, women who survived sexual violence have identified concerns about "[being] blamed or judged, shame and embarrassment, fear of retaliation by the perpetrator, a belief that police would not, or could not, do anything about it, and fears about how they will be treated by the police or the trial process."[110] Women's decision to report to police is also informed by their awareness that myths and stereotypes will impact whether or not the police will take them seriously. Women whose experience does not reflect the stereotypical "real rape" may self-select out of reporting because they do not think they will be believed.[111] Further, women are deterred from reporting due to concerns about the trial process itself, which can be intimidating and traumatizing for complainants.[112]

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[109] Conroy & Cotter, *supra* note 2 at 11.
[110] Holly Johnson, "Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police" (2017) 29 Can J Women & Law 36 at 37.
[111] *Ibid* at 49.
[112] *Ibid* at 37.

The issue of underreporting is particularly pronounced for racialized, Indigenous, or otherwise marginalized women, who may decline to rely on the police because of their negative relationship with police.[113] Human Rights Watch (HRW) has documented the extensive abuse that Indigenous women and girls experience at the hands of the RCMP in British Columbia, which in turn deters women in those communities from relying on the police for safety from violence.[114] Further, HRW indicates that police officers engaging with women and girls "bring a general presumption of criminality to their interactions with [I]ndigenous girls in the north."[115] The criminalization of these women can deter them from calling the police about sexual violence.

Involving state authorities may also put women at risk in other ways. For example, women with no or precarious immigration status may not want to involve state authorities for fear of deportation.[116] Women may fear that they will be subjected to child protection orders or have their children taken from them as a consequence of involving the state in their personal lives. This is a particular concern in Indigenous and Black communities, where children are apprehended at a disproportionate rate.[117] Women with addictions or criminalized women may wish to avoid police investigations that would reveal illegal behaviour.[118] If the system does not inspire confidence in survivors of sexual violence, they will not turn to the system following a sexual assault.

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[113] Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia*, Canada (2013); Barkaskas & Hunt, *supra* note 52 at 23-24.
[114] *Ibid.*
[115] *Ibid* at 47.
[116] Swati Shirwadkar, "Canadian Domestic Violence Policy and Indian Immigrant Women" (2004) 10 Violence Against Women 8, at 289; Migrant Mothers' Project, "Unprotected, Unrecognized: Canadian Immigration Policy and Violence Against Women, 2008-103" (Toronto: University of Toronto, 2014) online: http://www.migrantmothersproject.com/wp-content/uploads/2012/10/MMP-Policy-Report-Final-Nov-14-2014.pdf.
[117] Barkaskas & Hunt, *supra* note 52 at 13-14; Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (Ontario Human Rights Commission, 2018) at 4.1-4.2
[118] Kristen Carbone-Lopez, Lee Ann Slocum, & Candace Kruttschnitt, "'Police Wouldn't Give You No Help': Female Offenders on Reporting Sexual Assault to Police" (2016) 22:3 Violence Against Women 366 at 370-371.

Low charge and conviction rates for sexual violence

Police officers serve as gatekeepers to the criminal legal system. This poses a significant barrier to the current system's capacity to meet the needs of survivors where officers, who may hold conscious or unconscious discriminatory beliefs, engage in discriminatory conduct.

Of those sexual offences reported to the police, only a fraction lead to criminal prosecutions and convictions. This attrition indicates that the system is failing in its responsibility to meet survivors' justice interests, including the interests of validating complainants' experiences and holding offenders accountable.

Examining data from the year 2014, Johnson estimates that 0.3% of sexual assaults led to a criminal conviction. Johnson demonstrates the various stages at which this attrition occurs. First, of cases reported to the police, many are deemed unfounded. This means that the police officer to whom the survivor reported the assault determined that the facts as alleged by the survivor did not constitute a crime. However, once a complaint of sexual assault is declared "founded," police still may choose not investigate a crime if they do not believe there is sufficient evidence to lead to a conviction. When cases are not investigated, no charge is laid. Even where charges are laid, not all lead to a prosecution. Of cases prosecuted, many do not lead to a conviction.[119]

The result is as follows: in 2014, 555,000 sexual assaults were self-reported by women in Canada.[120] Of sexual assaults self-reported by all people in 2014, only 5% were reported to

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[119] Holly Johnson, "Limits of a criminal justice response: Trends in police and court processing of sexual assault" in E Sheehy (Ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism.* (Ottawa: University of Ottawa Press, 2012) 613.

[120] Conroy & Cotter, *supra* note 2 at 6. This estimate likely undercounts the actual number of sexual assaults as some women may be unwilling to disclose these very personal experiences to survey interviewers.

police.[121] From 2009 to 2014, of the sexual assault offences that led to a conviction, just over half (56%) resulted in custodial sentences.[122]

Holly Johnson provides an estimation of the attrition of sexual assault cases in the criminal law system, using numbers from Statistics Canada's 2004 victimization survey. In that survey, 460,000 sexual assaults were self-reported. Johnson estimates the number of "founded" cases reported to police as 15,200. Of these founded cases, less than half (5,554) led to a criminal charge and about half of those (2,848) led to prosecutions. About half of those prosecutions (1,406) led to convictions. These numbers – 1,406 convictions out of 460,000 self-reported assaults – reflect a 0.3% conviction rate for perpetrators of sexual assault.[123]

The severity of this problem is apparently unique to sexual assault. Christine Rotenberg for Statistics Canada documents that, "when compared with physical assaults, sexual assaults were far more prone to dropping out of the justice system between police and court: while three-quarters (75%) of physical assaults proceeded to court after being charged by police, only half (49%) of sexual assaults did."[124] Of those that proceeded to court, not all reach a completed court case. In the period of this study, one in five (21%) sexual assaults reported by police led to a completed court case, compared with nearly double the proportion (39%) of physical assaults.[125]

The significant attrition rates in cases of sexual violence relative to other crimes are caused partly by the biases and myths around sexual assault, which impact decision making

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[121] Samuel Perreault, *Criminal Victimization, 2014*, (2015) Juristat 1 at at 25, available online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14241-eng.htm.
[122] Christine Rotenberg, "From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014" (2017) 37 Juristat 1 at 3.
[123] See Johnson, *supra* note 119 at 630-631.
[124] Rotenberg, *supra* note 122 at 3.
[125] *ibid.*

by police, prosecutors, and judges. Research indicates that "negative attitudes and beliefs about sexual assault complainants often overshadow the facts of the case in police charging, prosecutorial decision making and jurors' deliberations."[126] These biases and myths "influence decisions made by police to treat the complaint as false, prosecutors' decisions not to proceed with a prosecution, jurors' decisions that complainants' claims of non-consent are not credible, and judges' decisions about sentencing in the rare event that a perpetrator is convicted."[127] Indeed, in Rotenberg's study, she found that cases that did not meet predefined conceptions of "real" sexual violence had greater rates of attrition. For example, women who reported an offence to the police immediately after the offence had far greater charge and conviction rates than women who waited to report. Further, survivors sexually assaulted by someone they knew were far less likely than those victimized by a stranger to see their assailant go to court after a charge was laid (47% versus 64%).[128]

There is reason to believe that these rates are even higher among racialized and Indigenous women. While the statistical data does not officially track these rates, Jane Doe's study of sexual assault survivors' experiences of the justice system documents such a pattern. In the course of in-depth, semi-structured interviews with survivors and community-based sexual assault and rape crisis centres, there was unanimous agreement from the participants that Indigenous, racialized, and immigrant women endure racism when they report sexual violence to authorities.[129] Young women, poor women, lesbians, trans women, and sex workers were also identified as less likely to be believed by police and the courts because of their social placement.[130]

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[126] See Johnson, *supra* note 119 at 624.
[127] *Ibid* at 625.
[128] Rotenberg, *supra* note 122 at 3.
[129] Jane Doe, "Who Benefits from the Sexual Assault Evidence Kit?" in Elizabeth Sheehy, ed. *Sexual Assault Law in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 363.
[130] *Ibid* at 363.

The stark statistics set out above demonstrate that only a very small number of sexual assault survivors will see benefits from the criminal system. This is indicative of both the need to reform the criminal legal system, and of the need for alternative avenues for those women who do not obtain or choose not to pursue justice through the criminal law.

b. Rigid procedural rules: presumption of innocence and burden of proof

For those women who do see charges laid and a criminal prosecution, the strict procedural rules that govern a criminal trial, designed to ensure a fair trial for the accused, can pose a barrier to survivors' justice interests in the criminal system.

In criminal law, to convict a person of an offence, the Crown must convince the judge or jury that the accused committed the offence beyond a reasonable doubt. This standard, while important for the presumption of innocence, makes the criminal system extremely challenging for complainants. The standard is high and difficult to obtain in any case, and is particularly difficult in the context of sexual assault cases. Where the Crown does not convince the Court of the accused's guilt beyond a reasonable doubt, the accused is acquitted and, barring a Crown appeal, faces no further consequences.

The criminal standard of proof poses a particular challenge in sexual assault cases because, in many of those cases, there are no witnesses to the assault. In such cases, the complainant's testimony, and any supporting medical evidence, are often the only evidence of the crime. The challenge in these cases is that believing the complainant's testimony is not necessarily enough to establish guilt beyond a reasonable doubt,[131] nor is rejecting the accused's evidence.[132] A complainant may see this as discrediting her experience or accepting

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[131] Christine Boyle, "Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality" (2009) 13 Int'l J Evidence & Proof 269 at 272-281.
[132] The Honourable Justice Lynne Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNBLJ 10 at 20.

that the acts occurred but failing to view them as criminal behaviour, which undermines the complainant's interests in both validation and vindication.

Further, Mary Koss argues that the presumption of innocence often prevents complainants from receiving acknowledgement of the crime from the offender himself. Koss states that, under the adversarial system, marked by the principle of 'innocent until proven guilty', "legal counsel often advise offenders to maintain innocence until a favorable plea agreement is reached, or in trials, throughout the proceedings and even afterward to preserve appeal rights."[133] This can be particularly traumatic for survivors, "when offenders continue to deny the [survivor/victim]s' assertions and maintain that the act was consensual sex and not a crime."[134]

Exacerbating this problem is the fact that Canadian law has not fully integrated a trauma-informed approach to memory. Studies have documented that experiencing trauma can impact memory formation,[135] which means survivors may not recall key details of the event or may recount events differently in testimony than those recounted to the police.[136] In the absence of an analysis of the complainant's evidence that is informed by the relationship between trauma and memory, inconsistencies or gaps in the evidence can be used to imply that the complainant is not credible.[137] Similarly, some women's memory of the sexual assault may be impaired due to intoxication, particularly because intoxicated women are especially targeted by sexual violence.[138] Gaps in memory do not mean that the assault did

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[133] Koss, *supra* note 41 at 219.
[134] *Ibid.*
[135] Lars Schwabe et al, "Memory formation under stress: Quantity and quality" (2010) 24 Neuroscience & Behavioural Rev 4 584.
[136] Deryn Strange & Melanie T Takarangi, "Memory Distortion for Traumatic Events: the Role of Mental Imagery" (2015) 6 Front Psychiatry 27.
[137] Brian Bornstein & Stephanie Muller, "The credibility of recovered memory testimony: exploring the effects of alleged victim and perpetrator gender" (2001) 25 Child Abuse & Neglect 1415.
[138] Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22 Can J Women & L 435.

not happen, but can be used to conclude that the evidence is not sufficiently credible or reliable to convict the accused.

A related problem for complainants is that the accused may not testify at all. Because the Crown bears the burden of establishing the accused's guilt, the accused is not required to testify and the Court is not entitled to draw any inferences from the accused's silence. In these circumstances, the complainant is faced not only with an official denial of the allegations, through the accused pleading not guilty, but she also experiences a process in which the accused is not required to publicly take the stand, account for his actions, and be subjected to cross-examination. Therefore, while the complainant may be subjected to a traumatic cross-examination that tests and questions her actions and motives (as further described below), the accused is permitted to avoid this process entirely.

The burden of proof thereby can undermine the criminal system's capacity to meet complainants' justice interests. The challenge in securing a guilty finding can limit its capacity to provide validation or vindication to the complainant. In the absence of a finding of guilt, the accused bears minimal consequences imposed by the criminal system itself. For those who seek acknowledgement of the offence from the accused, the punitive and adversarial criminal process is unlikely to generate such a result.

c. Discriminatory myths and stereotypes

The discriminatory myths and stereotypes noted above pervade the criminal system's response to sexual violence, including the legal analysis itself. As Justice L'Heureux-Dubé wrote in *R. v. Seaboyer,* "[t]his mythology finds its way into the decisions of the police regarding their "founded"/"unfounded" categorization, operates in the mind of the Crown when deciding whether or not to prosecute, influences a judge's or juror's perception of guilt or innocence of the accused and the "goodness" or "badness" of the victim, and finally, has

carved out a niche in both the evidentiary and substantive law governing the trial of the matter."[139]

While *Seaboyer* was written in 1991, and many reforms have been made to the criminal law since then, "complainants are not yet fully protected against the operation of myths and stereotypes when consent or credibility are at stake."[140]

Emma Cunliffe's review of the Supreme Court of Canada's sexual assault decisions in 2011 illuminates the pervasiveness of myths and stereotypes.In *R. v. A. (J.)*[141] and *R. v. H. (J.M.)*,[142] the (contested) sexual history between the accused and complainant was used to discredit the complainant's assertion that she did not consent. In *R. v. A. (J.A.)*[143] and *A. (J.)*, the notion that women fabricate sexual assault complaints to gain a strategic advantage on separation underpinned defence arguments and some judges' reasoning. In *A. (J.A.)* and *H. (J.M.)*, a reasonable doubt was seemingly founded in part on the lack of corroboration of the complainant's story. In *H. (J.M.)*, that doubt was strengthened by reasoning about how women and girls react to sexual assault, and how they should protect themselves against it. All of these cases rely to some extent on the proposition that women consent to sexual activity before being prompted by regret or vengeance to fabricate allegations of sexual assault. Closer attention to substantive equality in each of these cases might help contest some or many of these stereotypes.[144]

These myths and stereotypes obscure the search for the truth. Triers of fact should be making assessments based on accurate facts, not myths. However, triers of fact are urged to use their "common sense," yet often common sense is rooted in myths and stereotypes,

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[139] *R v Seaboyer*, [1991] 2 SCR 577, at 654 per L'Hereux-Dubé J, dissenting.
[140] Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 SCLR 295 at para 2.
[141] *R v A (JA)*, 2011 SCC 17.
[142] *R v H (JM)*, [2009] OJ No 6377.
[143] *R v A (J)*, 2008 ONCJ 195.
[144] Cunliffe, *supra* note 140 at para 41.

resulting in the unfair and inaccurate assessment of a victim's credibility and reliability. The influence of discriminatory myths and stereotypes in legal decision making (and among police officers, Crown counsel, defence lawyers, and judges) therefore interferes with the capacity of this system to meet survivors' core justice interests: to be heard, validated and understood, to see the offender held accountable, and to engage with a habitable system that takes women's experiences seriously and treats them with dignity and respect.

While other systems are not immune to discriminatory myths and stereotypes, their influence may be particularly significant in the criminal legal system due to the high standard of proof. Further, complainants are more likely to face these myths in a criminal trial, as many other models settle before reaching the point of formal adjudication.

d. Complainant not a party to the proceedings/no personal remedies

As outlined above, criminal law proceedings are pursued by the state against the accused. The complainant is not a party. This can prevent women from realizing any interest they have in participating in the process, or from having any control over the process. Mary Koss states that, in this model, complainants' particular needs and interests are often not recognized, and are superseded by criminal law procedures.[145] Haley Clark similarly found that survivors were "largely excluded from the process, not consulted on their case progress and not able to fully contribute in a way that they believed would be helpful for prosecuting the case."[146]

This system may also undermine women's ability to tell her story in the manner that she chooses, a core component of the "voice" interest. In the criminal process, the Crown and defence determine how the complainant will tell her story through examination and cross-examination. The extent to which the Crown engages the complainant in that decision

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[145] Koss, *supra* note 41 at 219.
[146] Clark, *supra* note 49 at 34-35.

making varies. Haley Clark's interviews indicated that many women pursued a criminal trial for the purpose of having the opportunity to tell their story publically, to have their "day in court". However, their experience of the trial did not actually allow them "to tell their story as a whole or to explain what the assault meant to them."[147] As Clark explains:

> Victim/survivors in this study who went through a court process found the de-contextualisation and reworking of their story within the trial and committal to be particularly distressing and unjust. More than silencing their voice and undermining their experience, these victims/survivors felt they were manipulated, humiliated, degraded and forced to endorse lies.[148]

As noted, many women experienced their marginal role in the criminal system as "a humiliation only too reminiscent of the original crime."[149] Accordingly, the role accorded to the complainant in a criminal sexual assault trial can be a barrier for sexual assault survivors seeking justice.

Further, the criminal system may not provide the kinds of remedies that complainants seek. Because the complainant is not a party to the criminal trial, the remedies available in the criminal legal system are criminal penalties against the accused for the wrong committed against the state. The criminal law model does not compensate the survivor for the wrong committed against her, including the often very high financial cost of sexual violence.[150]

In terms of criminal penalties, as noted by the various researchers into women's justice interests, many women do not seek prison for the perpetrator as a remedy for the harm caused by the perpetrator.[151] Of those who do, survivors may feel disappointed by

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[147] *Ibid* at 34.
[148] *Ibid* at 34.
[149] Lewis Herman, *supra* note 39 at 582.
[150] The many financial consequences for sexual assault survivors are outlined in this report at 10.
[151] Lewis Herman, *supra* note 39 at 590.

abusers receiving light sentences, diversion, or pleading guilty to lesser offences, and thereby avoiding what complainants view as the proper consequences for their conduct.

e. Impact on complainant as witness

In addition to issues in the criminal law of sexual assault, the criminal process can be traumatizing and inhospitable to complainants. Elaine Craig describes the trial process as marked by "humiliating exposure of the personal, and … overall cruelty."[152] Judith Herman remarks: "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."[153]

To thoroughly explore the many ways in which participating in a sexual assault trial as a complainant is traumatic and challenging would be impossible in a research project of this size. However, for the purposes of proposing alternative models, it is useful to provide an overview of the problems in order to try to avoid these harms in any alternative system envisioned, and potentially for the related purpose of proposing reform to the criminal law.

Providing testimony

Complainants have identified the requirement to testify as a particularly challenging element of the trial. As one Canadian complainant stated, "[w]hen they say you get raped again on the stand, I initially didn't believe it to be true but it absolutely is."[154]

It is important to note that most complainants will not have a choice about providing testimony. In almost all cases, the complainant's testimony will be a necessary component of the Crown's case. If she decides not to testify, her case may be dropped. Further, complainants may be subpoenaed, and refusing to testify in such circumstances puts them at

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[152] Elaine Craig, "The Inhospitable Court" (2016) 66 U of Toronto Law J 197 at 201.
[153] Lewis Herman, *supra* note 39 at 574.
[154] Elaine Craig, *Putting Trials on Trial*, (Quebec: McGill-Queen's University Press, 2018) at 4.

risk of arrest and incarceration. A particularly egregious example can be seen in the case of *R. v. Blanchard,* where the Indigenous complainant, who had survived a violent physical and sexual assault, was shackled, jailed, and forced to testify.[155] Testifying in a criminal trial is, therefore, almost always a requirement for women seeking justice for sexual violence through the criminal system.

In terms of the negative elements of testifying, first, the testimony itself involves intimately recounting, in front of the accused, strangers, and sometimes media, the incidents that lead to the charge. These are, by their nature, traumatic and intimately personal, difficult memories to recount.

Second, the nature of testifying in a legal proceeding involves answering questions that have been put to the witness, rather than the witness telling their story in their own way. Herman argues that this rigid format thwarts any personal attempt on the part of the survivor to construct a coherent and meaningful narrative.[156] It does not allow survivors the opportunity to provide the full context of the offence, to address the impacts of the assaults, or to explain their understanding about the truth of the sexual offending. The limits on how they tell their story prevents survivors from realizing their interests in exercising control over the process, gaining a meaningful voice, and participating in a meaningful way.

Third, complainants are often subject to rigorous credibility assessments that seek to undermine or disprove their testimony. "Often when complainants describe the trauma of the trial, they identify the experience of being cross-examined by defence counsel as most distressing."[157] As Koss notes, in the age of DNA testing, the most common defence in a sexual assault case is that the complainant in fact consented to the sexual contact.[158] Defence

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[155] *Independent Report on the Incarceration of Angela Cardinal,* (2017), online: Alberta Justice https://justice.alberta.ca/publications/Documents/IndependentReportIncarceration-AngelaCardinal.pdf.
[156] Lewis Herman, *supra* note 39 at 574.
[157] Craig, *supra* note 154 at 11.
[158] Koss, *supra* note 41 at 219.

counsel seek to suggest that the complainant is lying about having not consented or is responsible for the assault by misleading the accused and causing him to believe she consented through her own behaviour. Koss explains that these strategies can re-victimize the complainant, particularly given that the questioning may exacerbate self-blame.[159]

Moreover, defence counsel often subject complainants to questioning that is humiliating, offensive, and discriminatory. Counsel regularly require complainants to respond to questions infused with discriminatory logic, such as "why they failed to fight back, why they failed to scream, whether they flirted with the accused, why they went to his house alone, or whether they were wearing underwear, and if so, of what type and colour."[160] Despite legal reforms designed to limit cross-examination on a complainant's sexual history, such questioning is still prevalent. Defence lawyers require women to provide testimony about intimate and personal details, often for the purpose of embarrassing the complainant[161] and promoting the "twin myths" of sexual assault, "deployed to discredit the complainant through reducing her to a sexualized body - the unchaste seductress whose 'no' must mean 'yes' and whose story is rendered unreliable by her emphatic sexuality."[162]

This discriminatory questioning posits that the complainant is responsible for the events leading to the charge, which reinforces "the social dynamics of shame and self-blame."[163] Craig argues that "when legal professionals invoke, reason upon, or fail to reject these gendered stereotypes, the shame experienced by sexual assault complainants is aggravated."[164]

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[159] *Ibid* at 219.
[160] Craig, *supra* note 154 at 9.
[161] David Tanovich, "Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014) 45 Ottawa L Rev 495 at para 13.
[162] Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) Alberta L Rev 43 at 745.
[163] Craig, *supra* note 154 at 9.
[164] *Ibid.*

The tone of cross-examination also can be problematic. Often the cross-examination of sexual assault complainants is aggressive and demeaning. Craig documents various cases in which the defence cross-examination was so aggressive that it concerned the judge. For example, in *R. v. Schmaltz,*[165] "the trial judge described the defence counsel's cross-examination as 'unnecessarily confrontational' … He concluded that the cross-examination was getting 'out of hand' and that 'most of all [he] had a sense that [the complainant] was truly being and felt insulted by the process."[166]

In another case, in which the complainant testified that she had fallen asleep on the accused's couch and woke to find him with his fingers inside her vagina, the defence lawyer tried to elicit evidence that the complainant enjoyed the assault due to the fact that her vagina had produced fluids. The complainant was required to repeatedly deny this suggestion, ultimately having to explain that she had had to clean herself in the bathroom, not because she was stimulated, but because she "felt disgusted."[167]

This kind of questioning is not uncommon. Indeed, David Tanovich documents the defence strategy of intentionally embarrassing and humiliating complainants to dissuade them from proceeding with the trial.[168] Moreover, complainants are particularly vulnerable to this kind of questioning in the criminal system, where they have no right to representation by their own counsel. Instead, the complainant must rely on the Crown lawyer to object to discriminatory or abusive questioning, which they may or may not do for strategic reasons that are unrelated to the complainant's personal justice interests. As the Canadian Senate, in

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[165] *R v Schmaltz*, 2015 ABCA 4.
[166] Craig, *supra* note 152 at 201.
[167] *Ibid* at 207.
[168] Tanovich, *supra* note 161 at para 13.

a study of sexual offences in Canada, noted: "it is not unusual during a criminal trial for the interests of the Crown to diverge from those of the complainant."[169]

In the end, attempts to undermine the complainant's version of events, or to imply that the complainant is responsible for the events, coupled with discriminatory, offensive, and aggressive questioning, undermine women's interest in having their experience validated and in having the harm caused by the offence recognized and affirmed. This kind of cross-examination is another example of an "occasion of oppression,"[170] which undermines the habitability of the court process and prevents the justice system from meeting the interests of complainants.

It is worth noting that many of the other models may also require the survivor to give evidence in testimony. It is likely that experience will be equally traumatizing. However, in some models, such as the civil system, the plaintiff is able to decide whether or not to proceed to trial or to settle, which provides the survivor with control over the litigation and the option to avoid this process. In other models, the misconduct may be easier to establish, for example, in a regulatory proceeding in which all sexual contact constitutes professional misconduct, regardless of whether consent is present. In such contexts, the complainant may not be subject to as rigorous an examination regarding her consent.

Providing disclosure

In addition to requiring the complainant to testify, the criminal process may require the complainant to produce private records, such as therapeutic or medical records, to the accused. Despite the *Criminal Code* restrictions on accessing records in the possession of third parties and in which the complainant has a reasonable expectation of privacy, accused

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[169] Senate Standing Committee on Legal and Constitutional Affairs, Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report, (Ottawa: Senate of Canada, 2012) at 9-10.
[170] Larcombe, *supra* note 45.

persons still regularly make requests for such records, and they are often ordered.[171] Consistent case law reviews[172] document rates of production to the court as high as 50%, and rates of disclosure to the accused as high as 35%. A national survey of sexual assault centres[173] found that 57% had received defense applications for their records, with 19% indicating that their records had been sought in the previous year. The consequence is that the very individual who committed an act of sexual violence against the complainant has the subsequent ability to comb through her personal medical or state records, and to attempt to rely on those records to undermine her testimony.

This invasion into the complainant's personal records can be worse for certain categories of complainants, especially women and children who have been extensively documented. This includes: "children under the care of child welfare authorities; women with mental health histories or disabilities; Aboriginal women; racialized women; women who work in the sex trade; and women who have made other allegations of sexual assault."[174] The invasion of the complainant's privacy compounds the inhospitability of the criminal process.

f. Cost of participating in criminal trial

As outlined above, some women seek legal representation when participating in a criminal trial, either to represent them in opposing a third party records application or to provide them with ongoing legal advice throughout the trial. While many provinces provide legal representation for third party records applications, in provinces where the service is

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[171] Gotell, *supra* note 162 at 757.
[172] See e.g. Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the *Criminal Code*" (2008) 20:1 Can J Women & Law 111 at 125-126; Susan McDonald, Siavosh Pashang, Anna Ndegwa, "Third Party Records: The Case Law from 2003-2010," (2016) Victims of Crime Research Digest, online: http://www.justice.gc.ca/eng/rppr/cjjp/victim/rd7rr7/p5.html.
[173] M Beres, B Crow, and L Gotell, "The perils of institutionalization in neoliberal times: Results of a national survey of Canadian sexual assault and rape crisis centres." (2009) 34 Can J of Sociology 135.
[174] *Ibid* at 757.

funded through legal aid, not all women will qualify. Studies indicate that representation is likely to lead to significantly lower rates of disclosure, but it comes at a cost that some women cannot afford.[175]

Similarly, the independent legal advice pilot outlined above provides only four hours of legal advice for survivors navigating the legal system. Beyond that, should women choose to seek out representation for advice in respect of a criminal law proceeding, they will have to independently bear that cost. This funding gap compounds the financial implications of the criminal trial, which, as noted above, does not compensate survivors for the damages incurred as a consequence of the sexual assault.

g. Consequences outside of the criminal legal system

Finally, criminal trials can negatively impact other proceedings. Complainants are increasingly seeing the risk of being named in a defamation proceeding following an unsuccessful prosecution. In one example of a successful case, *Haight v. R.B,*[176] a woman complained of sexual assault to the police. The man was charged criminally, but the Crown withdrew the charge. The man then successfully sued the complainant for defamation and she was ordered to compensate him $23,000. Even in cases that are not successful, a woman may have to incur legal costs defending against such a claim.

Further, it is not uncommon for survivors to be involved in other proceedings with the accused that can be negatively impacted by the criminal case. Often times, the failure to secure a conviction in the criminal realm can have negative ramifications for the complainant in other forums, such as in family, immigration, or child protection proceedings, as the court

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[175] Gotell, *supra* note 172 at 125-126.
[176] *Haight v RB,* 2017 ONSC 5359.

may view an acquittal of the male partner as evidence that the survivor is being dishonest about the man's use of physical or sexual abuse.[177]

While pre-trial disclosure compelled in family and civil proceedings is protected from disclosure by the deemed undertaking rule, exceptions to this rule make it possible in some instances for this evidence to be introduced in a criminal proceeding, including for the purposes of attempting to impeach the credibility of a complainant.[178] Similarly, evidence given or filed in court in a family or civil matter may, in some circumstances be used in a criminal proceeding. It is also possible, in some instances, for a family court judge to order production of a Crown's brief from a related criminal trial, which includes information disclosed to the accused in the course of that trial, and therefore could potentially include third party records such as therapeutic records.[179] This means that women who have participated in a criminal trial against former partners risk having their therapeutic or other private records entered into a family law proceeding.

B. Civil litigation

Civil lawsuits provide another avenue for women who have been sexually assaulted to pursue justice, including consequences for their abuser and remedies for themselves. The process allows individuals to bring legal action against their offender in the civil courts. In contrast to the criminal law, in this context the plaintiff is a party to the dispute. Under the civil system, the plaintiff[180] is required to prove on a balance of probabilities that the sexual assault occurred, that the perpetrator and/or another individual or institution is/are responsible for it, and that the damages claimed were caused by the assault. The

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[177] Department of Justice Canada, *Best Practices Where There is Family Violence* (Minister of Justice and Attorney General of Canada, 2014) at 34.
[178] *Ibid.* See also *SC v NS*, 2017 ONSC 5566.
[179] Department of Justice Canada, *supra* note 177 at 43.
[180] In the civil system, the survivor who files a suit against the offender is referred to as a plaintiff.

defendant(s) will then be ordered to make the plaintiff whole for the harm caused, usually in the form of paying monetary damages.

In order to secure an award of damages in a civil action, the plaintiff must establish that a defendant caused or materially contributed to harms for which he is liable. There are several bases upon which such liability may be found. Perpetrators of sexual assault may be liable in assault and battery where they intentionally cause harm through physical contact. In cases where a trust relationship existed between the perpetrator and survivor, the perpetrator may also be liable for breach of fiduciary duty.

Unlike in criminal law, institutions and individuals other than the perpetrator also may be liable for the perpetrator's conduct in some circumstances. Under the doctrine of negligence, a third party may be liable for the harms caused by sexual assault where the defendant breached a duty of care owed to the plaintiff, causing the plaintiff harm. For example, an educational institution could be liable for sexual abuse if it failed to properly screen employees working with children and those employees went on to cause the children harm. Other parties who have been named in negligence actions include child welfare agencies, religious institutions, school boards, and police officials, in addition to individuals such as mothers who failed to protect their daughters from sexually abusive fathers and stepfathers.[181]

Another ground for liability can arise when the person committing the abuse is in a particular relationship of trust to the survivor, giving rise to a fiduciary obligation.[182] This can be a basis for liability in the case of sexual assault and abuse by doctors, parents, religious leaders, teachers, or others in relationships of trust or authority vis-à-vis the subject of the

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[181] Bruce Feldthusen, "Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa Law Rev 203 at 209.
[182] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 534-544.

abuse. Typically, where such a trust relationship is found to exist, courts will vitiate any nominal consent that may have existed.

Individuals and institutions may also be vicariously liable for sexual assault in some circumstances. For example, an employer may be liable for a sexual assault committed by an employee, even where the assault occurred outside or in conflict with their duties. This liability arises in circumstances where there is a sufficient connection between the employee's conduct and their job duties, such that it can be said that the employer introduced the risk of the wrong, making it fair to require the employer to manage and minimize the potential for that wrong. An employer can also be vicariously liable for the actions of their employees if the employer materially increased the risk that the assault would occur (e.g., by granting an adult authority over or unsupervised access to a child). The Supreme Court of Canada stated in *Bazley v. Curry* that "vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires."[183]

Moreover, under the doctrine of non-delegable duty, governments or institutions can be liable for the conduct of third parties even though they do not have direct care or control over them. Non-delegable duties are duties of care that cannot be delegated by the possessor of the duty to another person. This special responsibility can be generated in many circumstances, such as between hospitals and their patients, schools and their students, or governments and children in government care. Where a non-delegable duty exists, the holder of the duty is ultimately responsible to the party to whom the duty is owed, even if a third party carries out the actions required to fulfil the duty. For example, governments can be

[183] *Bazley v Curry*, [1992] 2 SCR 534 at para 41.

liable for sexual abuse caused by third party institutions if they delegated the duty of child care to those institutions.[184]

i. Advantages

A civil action can be advantageous to the survivor in a number of ways. Advantages to participating in the civil system include:

1. the lower standard of proof;
2. the relative equality between plaintiff and defendant;
3. the plaintiff is a party to the proceeding;
4. the plaintiff has the ability to seek damages from third parties and not just the immediate perpetrator;
5. the plaintiff is provided with remedies, including financial compensation;
6. as many cases settle, there is less of a chance of having to testify at a trial; and,
7. having an option to pursue justice where engagement with the criminal law is either not desirable or not possible.

a. Lower standard of proof

First, the standard of proof in a civil court is lower than in a criminal court. As discussed, in criminal law, the legal standard of guilt is "beyond a reasonable doubt". In a civil court, the threshold is a "balance of probabilities". The plaintiff must establish that it is more likely than not that the defendant engaged in the conduct alleged. As outlined above, the higher "beyond a reasonable doubt" standard of proof poses significant barriers to justice for sexual assault complainants, many of whom are forced to prove their case on the basis of their credibility and testimony alone. While these so-called "credibility contests" may leave the trier of fact with reasonable doubt in the criminal context, in a civil suit, the plaintiff's

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[184] Project Committee on Civil Remedies for Sexual Assault, *Civil Remedies for Sexual Assault,* (British Columbia Law Institute, 2001), online: http://www.bcli.org/sites/default/files/CivilRemRep.pdf.

version need only be more credible than the defendant's. As Bruce Feldthusen explains: "In the civil suit it is reasonably possible for a victim standing alone to be believed."[185] In this way, to the extent that survivors seek to have their experience believed, they may experience the civil system more positively. The lower standard means that the plaintiff's story is more likely to be validated.

b. Relative equality between plaintiff and defendant

Second, this system also puts the plaintiff and defendant in a position of formal equality. In the criminal legal system, the accused and the Crown are not in the same position. The Crown has public resources and the authority to investigate and ultimately potentially punish the accused. At the same time, the accused holds rights that the Crown does not, including rights to disclosure and rights against certain evidence being adduced. Most importantly, in civil law the defendant is not protected by the right to remain silent; he must submit himself to questioning during the discovery phase of the litigation as well as at trial. He must directly address the allegations against him. This obligation not only makes the case easier to prove, it also creates greater equality in the relative power positions of survivors and perpetrators,[186] which arguably renders the system more habitable. In addition, reciprocal disclosure rights can guard against survivors being surprised by evidence in cross-examination and allows women to more adequately prepare for trial.

c. Plaintiff is a party to the proceeding

Third, in civil litigation, the plaintiff is a direct party to the action, rather than a witness. She frames the allegations, commences the process, and directs decision-making throughout the process. In most instances, she decides whether to settle the case or proceed to trial. This allows the plaintiff to exercise more control over the process and may facilitate

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[185] Feldthusen, *supra* note 181 at 215.
[186] *Ibid* at 214.

women's justice interests in participating in the justice process. As noted by Feldthusen, Hankivsky, and Greaves, some plaintiffs enter the civil process with this express purpose: "they see claiming the process as having a role, often a critical role, in their recoveries or well-being."[187]

Further, being a party to the action often allows the survivor greater control over how her story is told. "She can choose what facts are brought before the courts, what expert evidence is presented and how, and what legal theory of tortious wrongdoing constitutes her case. The plaintiff may explain in detail the damaging consequences of the battery from her own personal point of view."[188] This provides a greater ability for survivors to have a meaningful voice in the adjudication of the harms committed against her.

In addition, because the plaintiff is a party to the proceeding, she can obtain direct representation for the entirety of the litigation process. Legal representation can enable survivors to properly prepare for the discovery and trial process, in particular for cross-examination, which can mitigate some of the challenges women face in cross-examination in the criminal law.

d. Third parties may be liable

Fourth, civil law allows a plaintiff to pursue a tort action against a third party who is also partly responsible for the sexual assault.[189] This ability to sue third parties is beneficial for a few reasons. It recognizes that many parties may be responsible for sexual abuse beyond just the perpetrator and can allow the plaintiff to identify those parties. It also allows the plaintiff to target systems that contributed to her marginalization, such as child welfare services or educational institutions. Further, often institutions are better placed to provide

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[187] Feldthusen, Hankivsky, & Greaves, *supra* note 44 at 75.
[188] Feldthusen, *supra* note 181 at 216.
[189] Project Committee on Civil Remedies for Sexual Assault, *supra* note 184 at page vi.

financial compensation – accordingly, institutional liability can allow for higher damage payments.

Additionally, by identifying the systemic flaws that contributed to the abuse, the legal action may result in the institutions making changes that ultimately improve safety or reduce the risk of future abuse.

e. Remedies provided to the plaintiff

The fifth important advantage of a civil suit is the remedies it can provide. The civil system provides remedies to the plaintiff as opposed to the state, allowing survivors to be compensated for the harm caused by the assault, including financial losses or emotional pain and suffering. Relative to other, non-criminal avenues, civil remedies tend to provide higher damage awards.[190] To the extent that financial compensation is a primary goal of the survivor, civil litigation could be the most favourable option.

Financial compensation can make immediate, tangible differences in the survivor's life. It can help her to get back on her feet and finally move forward, through affording therapy, housing security, or the necessary time out of the workforce to heal. It can bring the cycle of poverty to an end. While some survivors indicated that money would never heal the wounds, it can nonetheless contribute to giving women the financial leeway to recover and move past the assault.

Further, remedies provided directly to plaintiffs may be more likely to vindicate the survivor's experience. According to Feldthusen, Hankivksy, and Greaves, "many respondents linked the award to their self-reported therapeutic priorities. They explained that the financial award was gratifying because it symbolized an acknowledgement and

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[190] In a recent Ontario Court of Appeal judgment, the court upheld an award of $200,000 in damages: *Zando v Ali*, 2018 ONCA 680. In contrast, the maximum award at the Criminal Injuries Compensation Board is $25,000: *Compensation for Victims of Crime Act*, RSO 1990, c C-24, s 19.

understanding of the impact of their experiences of assault and abuse. As Fiona Bawden noted, '[a] substantial sum of money can be seen as an important recognition that the woman has been through a terrible ordeal and can give back power to someone who may have felt totally powerless during the rape.'"[191]

f. Likelihood of settlement

Often, women will achieve much of the compensation outlined above without having to participate in a trial, as the vast majority of civil cases settle out of court. Thus, women may accomplish their justice interests without the significant stress and trauma of litigation, and in particular, providing testimony. However, even for cases that settle, most survivors will likely still have to participate in examination for discovery.

g. Alternative to the criminal law

Finally, civil remedies can be an alternative for women who, for any reason, choose not to engage with the criminal system. As outlined above, these reasons may include not viewing incarceration as a proper remedy. They also may include women for whom accessing the criminal legal system, including police officers, poses personal risks.[192]

It is also an alternative for women who make reports to the police that are considered unfounded or where charges are not laid for another reason, such as a finding of no reasonable prospect of conviction based on the high standard of proof. Since there is no appeal process for police decisions not to lay charges, many women who have made reports of sexual assault that did not result in charges must look for another forum for justice. For women who do see a criminal trial, many turn to the civil system to find satisfaction if they were unsatisfied with the outcome in criminal court.[193] A civil suit may be successful even

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[191] Feldthusen, Hankivsky, & Greaves, *supra* note 44 at 97.
[192] See this report's earlier section on the disadvantages of the criminal law system.
[193] Feldthusen, *supra* note 181.

where the accused was acquitted in criminal court, and can achieve the plaintiffs' interests in validation and vindication through a legal finding, as well as imposing financial consequences on the offender.

It is also important to note that, pursuant to section 16 of the *Limitations Act*,[194] there is no limitation period in respect of a proceeding based on a sexual assault, providing an advantage over avenues such as the human rights process.

ii. Disadvantages

Civil remedies have a few potential downsides. The remedies provided may be unsatisfactory, particularly where the plaintiff's goals include punitive remedies or incapacitation. Civil litigation can be time-consuming and expensive. Even where the case does not proceed to trial, a plaintiff will likely have to provide evidence through the discovery process. In addition, establishing, quantifying, and collecting financial damages can be challenging. Finally, a plaintiff may need to disclose personal records to the defendant.

a. Remedies may be unsatisfactory

First, while civil remedies may accomplish some of the plaintiff's justice interests, incarceration of the accused is not an option. As such, for those women who seek punitive remedies or incapacitation of the offender, the civil suit may not be the best option.

Similarly, for many women, money does not adequately capture the extent of the harm they have suffered. In Feldthusen, Hankivsky, and Greaves's study, "one recipient of a substantial award still regarded it as inadequate. However, she also noted the futility of attempting to translate her losses into money."[195] For some of the survivors they interviewed,

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[194] *Limitations Act*, 2002, SO 2002, c 24, s 16.
[195] Feldthusen, Hankivsky, & Greaves, *supra* note 44 at 97.

monetary compensation on its own did not provide the therapeutic benefits they were seeking going into the process.[196]

In addition, the majority of civil sexual assault cases settle, and settlements are generally confidential. This means that the perpetrator will not be publicly condemned. The settlement therefore may not meet the survivor's interest in vindication. Further, for those survivors who seek to prevent the perpetrator from harming other women, settlement agreements bind the plaintiff to confidentiality agreements that prevent survivors from warning other women or otherwise publicly interfering with his ability to commit further acts of sexual violence.

b. Legal process may be time-consuming and costly

Second, civil actions can last multiple years. The amount of time it takes to pursue a civil case may interfere with women's ability to move on from the assault. Civil actions can also be very costly.[197] With the caveats of the costs identified in the criminal system above, prosecution in the criminal system is theoretically cost neutral for survivor: the state rather than the plaintiff bears the cost of establishing the guilt of the accused. In contrast, in civil litigation the plaintiff bears the cost. While many Canadian provinces cover independent legal advice for sexual assault survivors, they do not provide for representation in a civil case. The lack of legal aid support may render access to justice illusory for sexual assault plaintiffs who cannot afford representation. While it is very common for lawyers to accept these cases on contingency, their agreement to do so often depends on the realistic chance of receiving payment from the offender. Where the perpetrator is unable to pay, the cost of a civil suit can be high and the returns low.

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[196] *Ibid* at 97-100.
[197] Feldthusen, *supra* note 181.

c. Providing testimony may be challenging

Third, while most civil sexual assault suits settle out of court, plaintiffs in a civil suit will usually have to at least provide evidence in discovery, which can be stressful and traumatizing. Beyond that, in some cases women will be required to testify in court. Similar to the criminal system, this testimony involves providing detailed testimony about intimately personal and often traumatic events. It also involves cross-examination, which can be aggressive and humiliating. Consent is a defence to civil sexual assault suits, and counsel may rely on the myths and stereotypes outlined above in an attempt to prove that the plaintiff consented. Further, the civil system risks permitting more discriminatory questioning than the criminal system, because the civil law does not have the statutory limits on evidence and cross-examination found in the criminal law, including restrictions on evidence regarding the plaintiff's sexual history or personal records. However, as noted above, these downsides may be balanced by the fact that in civil court, survivors have direct representation, greater control over whether or not to proceed to trial or settle, and are entitled to disclosure in advance of testifying.

d. Financial compensation can be difficult to establish, quantify, and collect

Fourth, the most common remedy in civil law is financial compensation, which raises a number of complications. These include the difficulty of proving the injury and the sexual assault that caused it, and appropriately calculating compensation. Establishing, measuring, and quantifying the harm that a plaintiff has suffered can be difficult.

To receive payment in a civil claim, the claimant must establish that the perpetrator committed a sexual assault, and that the assault caused, or materially contributed to, compensable harm. Causation "provides the link between a finding of fault on the part of the defendant, and his obligation to pay damages to the plaintiff."[198] Issues may arise where a

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[198] Project Committee on Civil Remedies for Sexual Assault, *supra* note 184 at 31.

plaintiff's life circumstances, separate from the assault in question, have also caused her emotional or physical injuries. The defendant may argue that, in light of other experiences of trauma or abuse, his wrongdoing did not cause, or was not the only cause, of those injuries. If successful, the defendant will not be found liable for the full extent of the injuries, which reduces the compensation he must pay to the plaintiff.[199] Further, these arguments put the plaintiff's past experiences of trauma in issue, and allow the defendant the opportunity to access and cross-examine her on intimately personal details about her past, which in itself can be traumatizing and undermining.

Once causation is established, quantifying damages can also be problematic. A major advantage of the civil system is that it compensates successful plaintiffs for both tangible damages (for example financial costs of health care, loss of earnings), and intangible losses (including pain and suffering). However, because sexual assault causes harm that is difficult to quantify, such as loss of dignity, personal integrity, autonomy, and personhood, courts have had difficulty in translating these harms into a dollar figure.[200] Courts have also had difficulty taking into account the role racism and other oppressive forces play in sexual assaults, including both in the motivations underlying the assaults and the particular harms caused to marginalized or racialized women. [201]

The quantity of damages itself may be discriminatory. One ground of compensation available to plaintiffs is lost future earnings, if the injury rendered the survivor unable to work. The value of these losses is assessed by reference to what the plaintiff would have earned in the labour market had the assault not occurred. However, courts have traditionally relied on facts such as gender, race, and family background to determine their likely future

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[199] *Ibid* at 32-33.
[200] *Ibid* at 38-39.
[201] *Ibid* at vii.

income, based on the average income for that group.[202] Because women and racialized groups continue to experience barriers to the workforce and pay inequality, women, particularly women experiencing intersecting disadvantages, will receive less compensation for the harms committed against them than men.[203] Further, when predicting future income, the court may make gendered assumptions about women's work and life choices, for example, by discounting damages on the assumption that women will spend some time out of the workforce performing unpaid domestic duties.[204] Where women overcome the assault and go on to have a lucrative career following the assault, their personal fortitude can operate to reduce the amount of economic damages awarded to plaintiffs.[205]

Finally, collecting the damages owed can be challenging and may require further legal action. Similarly, a perpetrator of sexual assault may not have adequate financial resources to satisfy an award, rendering any monetary award against an individual of little practical value. If the defendant can only afford to pay a judgment by periodic payments, these regular payments can have the unintended effect of reminding the survivor about the abuse every time a payment is received.[206]

e. Risk of records disclosure

Finally, a plaintiff in a civil suit must be aware that she may be required to disclose personal health information to the defendant, which may become part of the evidence adduced at trial and placed before the trier of fact. In the civil system, there is no protection akin to s. 276 or s. 278 of the *Criminal Code*, which limit the admissibility of the complainant's

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[202] Elizabeth Adjin-Tettey, "Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies" (2004) 49 McGill LJ 309; Vaughan Black, "Cultural Thin Skulls" (2010) 60 UNB LJ 186; Sherilyn J Pickering, "Feminism and Tort Law: Scholarship and Practice" (2010) 29 Windsor Rev of L & Social Issues 227.
[203] *ibid.*
[204] Elizabeth Adjin-Tettey, "Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work" (2000) 38 Alta L Rev 504.
[205] Interview with Flora Vineberg, Sexual Abuse Lawyer, Jellinek Law Office, May 14, 2018.
[206] Interview with Karen Bellehumeur, Sexual Abuse Lawyer, Bellehumeur Law, January 8, 2019.

prior sexual history or third party records. The primary reason these records are relevant is that causation of damages is usually in issue in a civil trial: a survivor's prior sexual history may be relevant to the harm that the sexual assault caused, and third party records are also considered relevant if they have anything to do with any event in the survivor's life that had an impact on her. In order to establish that the assault caused her harm, and to rebut claims that the harm was caused otherwise, the survivor has to be willing to give up her privacy and provide access to personal information.

C. Human rights law

The human rights process provides another avenue for claimants to confront sexual violence in particular contexts. Human rights legislation in all provinces and territories, and at the federal level, prohibits discrimination on the basis of sex or gender, including sexual harassment, in the following contexts:

1. employment;
2. housing and tenancy;
3. the provision of services (such as attending university or school, seeing a doctor, or shopping at a store);
4. in a facility, such as a gym or in the context of a commercial lease;
5. in a contractual relationship; and
6. as a member of a vocational association such as a trade union.[207]

Sexual harassment includes conduct amounting to sexual aggression and violence. Accordingly, if a woman has been sexually assaulted in one of the contexts protected by human rights statutes, she can file a claim to seek human rights remedies, including financial compensation, and other remedies outlined below.

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[207] E.g. *Human Rights Code*, RSO 1990, c H-19, s 1-9; *Canadian Human Rights Act*, RSC 1985, c H-6, s 5-9.

The accessibility of human rights systems is not uniform across the country. Some provinces, notably Ontario and British Columbia, provide claimants with direct access to an adjudicative body that can hear and decide claims and award remedies. In other provinces, including the Maritime provinces, Manitoba, and Alberta, as well as the federal jurisdiction, there is no right to a hearing. Rather, claims must be filed with a human rights commission, which acts as a gatekeeper to the human rights process. The commission will investigate claims and attempt to settle them. The commission also has the discretion to refuse to refer claims to an adjudicative process. For example, under the *Canadian Human Rights Act*, a claimant must file a complaint at the Canadian Human Rights Commission (CHRC), which will determine whether or not the case will be referred to the Canadian Human Rights Tribunal for adjudication.[208]

i. Advantages

For a woman who has experienced sexual violence in a context covered by the legislation, such as in her workplace, her doctor's office or her educational institution, there are several clear advantages to bringing an application under human rights legislation. These include:

1. the claimant is a party to the proceedings and has a greater degree of control;
2. the process can be more efficient and less complicated than criminal or civil proceedings;
3. human rights tribunals can assess a wider variety of sexually abusive conduct;
4. human rights tribunals can address the racialized harms of sexual violence;
5. there is a lower burden of proof in these proceedings;
6. there is no right to remain silent;
7. human rights tribunals can issue personal and systemic remedies;

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[208] *Canadian Human Rights Act*, RSC 1985, c H-6, s 41.

8. these proceedings provide a means for offender accountability and consequences; and
9. legal representation is available in some cases.

a. Claimant is a party to the proceedings

First, similar to the civil context, the claimant in a human rights proceeding is a party to the process and therefore is able to exercise a greater degree of control over the case than in some other models explored in this report, including a criminal proceeding. The claimant can decide whether or not to agree to a settlement, and on what terms; whether to terminate proceedings; and, most importantly, in provinces with a direct access system the claimant has control over how and whether her claim is taken forward to a full adjudication process. This ability to exercise control over the conduct of the case makes it less likely that a claimant will feel marginalized in the process. As outlined in the civil context, this facilitates survivors realizing their interest in participation and can allow a survivor greater control over how she tells her story, giving her a more meaningful voice in the process.

b. Process can be more efficient and less complicated than criminal or civil proceedings

In Ontario and British Columbia, the direct access human rights process is designed to allow efficient resolution, first through mediation and, failing that, at a hearing. Both tribunals set targets for moving claims to mediation and adjudication, and report on their success in meeting these goals. For example, in British Columbia, the "service standard" is to schedule hearings of 3-days or more within 120 days of the application being ready for adjudication in 80% of cases;[209] in Ontario, the corresponding standard is 180 days.[210]

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[209] British Columbia Human Rights Tribunal, *Annual Report, 2017/2018*, online: http://www.bchrt.bc.ca/shareddocs/annual_reports/2017-2018.pdf, at 11.
[210] Social Justice Tribunals of Ontario, *Social Justice Tribunals of Ontario 2017-2018 Annual Report*, online: http://www.sjto.gov.on.ca/documents/sjto/2017-18%20Annual%20Report.html#hrto3.

Although both tribunals appear to be having some difficulty meeting their service standards, this is still significantly less time consuming than civil suits, which can take years to get to trial.

Further, the Tribunal's rules of evidence are more flexible than those used in court, which may make it more accessible for women who do not have legal representation. For example, Tribunal members have broad discretion to consider hearsay evidence in appropriate circumstances, which is generally inadmissible in court.[211]

The direct access systems in Ontario and British Columbia can be expected to compare favourably in terms of efficiency with the Commission-as-gatekeeper regimes in other provinces and at the federal level. At these models, claimants must wait for an investigation to start and conclude, both of which are time-consuming, before the case is referred to a hearing, which also involves wait times. While insufficient data is publicly available to reliably compare the "age" of complaints as they move through the various resolution systems, in Manitoba claimants may wait up to 22 months for an investigation to start, and another 6 months for it to conclude, before they are able to begin a hearing, should the commission agree to refer the claim for adjudication.[212] In Ontario, before introduction of direct access legislation, the average age of a claim when it was referred to the Tribunal for a hearing was 27.6 months.[213]

This indicates that the timeliness of the human rights model can either be an advantage or a disadvantage, depending on the model used in that jurisdiction.

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[211] *Rules of Procedure*, Applications under the *Human Rights Code*, RSO 1990, c H-19, s 1.6-1.7.
[212] Manitoba Human Rights Commission and Human Rights Adjudication panel, *2017 Annual Report*, online: http://www.manitobahumanrights.ca/v1/about-us/pubs/annual-reports/2017_annual_report_en.pdf.
[213] Ontario Human Rights Commission, *Annual Report 2005/6*, online: http://www.ohrc.on.ca/sites/default/files/2005-06.pdf.

c. Tribunal can address wider range of sexually abusive conduct

Third, human rights legislation generally prohibits a broader range of sexually inappropriate and harassing conduct than that prohibited by the *Criminal Code*. For example, sexual assault that occurs in a workplace will be covered by human rights legislation and the *Criminal Code*, but some forms of sexual harassment that do not constitute a crime under the *Criminal Code* will still be prohibited by anti-discrimination statutes. Similarly, in Ontario, at least some courts have found that sexual harassment is not an independent tort, and cannot be adjudicated in civil courts unless it forms part of a separate, actionable claim.[214] This means that, the Human Rights Tribunal of Ontario (HRTO) can consider a wider range of sexually exploitative conduct than what is covered under the *Criminal Code* or through civil litigation.

Further, human rights tribunals have particular expertise in the power imbalances found between employers and employees and in other public relationships, power imbalances which nuance the analysis of whether a certain form of sexual attention or conduct is discriminatory and therefore contrary to law. This is illustrated by a 2010 decision of the HRTO, in which the Tribunal found that a claimant's failure to complain about unwanted sexual conduct at the time it happened was not, in itself, a basis for questioning whether the incident occurred.[215] This result can be contrasted with many criminal proceedings, where myths and stereotypes about sexual assault survivors, including the myth that women will complain about a sexual offence at the first opportunity, and that those who do not are more likely to be lying about the offence,[216] can impact whether or not an allegation will lead to a prosecution or a conviction. The HRTO finding that evidence of a prior complaint or objection is not necessary is a useful precedent to rely on, to help ensure that

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[214] *Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307 at para 54-57.
[215] *Wagner v Bishop*, 2010 HRTO 2546 at para 31.
[216] See e.g., *R v DD*, 2000 SCC 43.

this myth does not undermine legitimate future sexual harassment claims, including cases involving assault and violence.[217]

d. Tribunal can assess racialized harms of sexual violence

Some women experience sexual harassment or abuse that is also tied to racial discrimination. Claimants before human rights tribunals can plead multiple grounds of discrimination, allowing the tribunal to determine whether an incident of sexual harassment involved racism that caused particular, racialized harms. Although other bases of discrimination may be pleaded in a civil action, courts tend to have less expertise in adjudicating intersectional issues.

Notably, human rights tribunals have for many years recognized the importance of an analysis that recognizes intersecting grounds of discrimination. For example, in *Baylis-Flannery v. DeWilde (No. 2),*[218] a case involving sexual harassment against a Black woman, the HRTO stated that an awareness of the effect of compound discrimination is necessary in order to "[avoid] reliance on a single axis analysis where multiple grounds of discrimination are found, [which] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred."[219]

This analysis may allow human rights tribunals to provide greater validation of the harm actually caused to women who have experienced compound discrimination related to race and sex, as well as other grounds such as disability and age. Indeed, the B.C. Human Rights Tribunal has recognized that discrimination on an intersectionality of prohibited

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[217] See *McNulty v GNF Holdings Ltd* (1992), 16 CHRRD 418 (BCCHR); *Quebec (Commission des droits de la personne) v Larouche* (1993), 20 CHRR D/1; *Wagner v Bishop*, 2010 HRTO 2546 at para 31.
[218] *Baylis-Flannery v DeWilde* (No 2), 2003 HRTO 28.
[219] *Ibid* at para 144.

grounds could have a greater impact on an individual's dignity, feelings, and self-respect than would discrimination on any ground in isolation.[220]

e. Lower burden of proof

A primary advantage of the human rights adjudication process as compared to the criminal process is that it applies a lower burden of proof. As in a civil action, to succeed at a human rights tribunal, survivors of sexual assault need to prove their allegations of harassment or abuse on a balance of probabilities. In other words, the claimant need only prove that it is more likely than not that the harassment or assault occurred. The lower standard of proof enables survivors to bring the accused to justice without having to establish beyond a reasonable doubt that the violation occurred.

As noted, the high criminal standard of proof is difficult to meet, particularly where the claimant is the sole source of evidence of the crime. At a human rights hearing, even where the primary or sole evidence is from the claimant and where the respondent denies the allegations, the claimant has a more realistic chance of proving her case based on her own credibility and the preponderance of the evidence. Moreover, as noted below, if the respondent declines to testify, the tribunal decision-maker can find that this constitutes an implied admission that his testimony would not support his defence.

f. No right to remain silent

Perhaps more importantly, a respondent to a human rights claim has no constitutionally-enshrined right to remain silent by refusing to testify, in contrast to the accused in a criminal trial. If a respondent in a sexual harassment case declines to testify, and does not provide a reasonable explanation for doing so, a human rights tribunal can draw a negative inference against the respondent, treating the failure to testify as an implied

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[220] *Comeau v Cote*, [2003] BCHRTD No 32 at para 131.

admission that his testimony would support the claimant's case. An examination of the issues raised by the accused's right to silence for women's justice interests can be found in the criminal law section.

g. Provides personal and systemic remedies

In terms of remedies, human rights claimants can achieve a variety of possible outcomes, including monetary compensation. In terms of personal remedies, the tribunal can order general damages for injury to dignity, feelings, and self-respect. The Tribunal also has jurisdiction to order out of pocket expenses such as job search costs, relocation expenses, medical expenses, and any other expenses incurred as a consequence of the infringement.[221]

While human rights damages have historically been relatively low, the quantum awarded for general damages in cases of sexual violence has been on the rise. In *Presteve Foods,* the claimant was awarded $150,000 for a claim of sexual abuse, in compensation for her pain and suffering.[222] While the award may not be as high as in civil actions, it is still an advantage over the criminal system, which does not provide any remedies directly to claimants. Further, the costs of the Tribunal are often significantly lower, particularly if the claimant is able to obtain free representation – for example, in Ontario, by the Human Rights Legal Support Centre (HRLSC). In those situations, the claimant will not need to pay for legal fees and therefore would be able to keep a higher quantity of any damages awarded to her.

In addition to financial compensation, the Tribunal can order non-monetary and systemic remedies, some of which may only be available through this system. Non-monetary remedies include: reinstatement to employment, a promotion, or the removal of a harasser from a work environment. Such remedies may be central for women who have lost workplace

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[221] See e.g. *Human Rights Code,* RSBC 1996, c 210, s 37(2)(d), *Human Rights Code,* RSO 1990, c H-19, s 45.2.
[222] *OPT v Presteve Foods Ltd,* 2015 HRTO 675.

opportunities as a result of the harassment or feel unsafe at work due the harassing conduct of a coworker.

Systemic remedies, such as changes to organizational training or requiring the respondent to implement non-discrimination policies,[223] are unique to the human rights process and can be an advantage for women seeking systemic change. Many women's justice interests include an interest in ensuring that the offender does not go on to assault other women. Enforcing institutional change, such as requiring an organization to implement sexual harassment policies and training, can be very meaningful in addressing this interest.

h. Allows for offender consequences and accountability

Although the human rights process does not offer criminal remedies, it does have the capacity to punish the harasser or assailant by exposing him to a public legal process that may be widely and closely reported by the media. As noted in the justice interests section, many women are more interested in exposure of the perpetrator than traditional criminal consequences. This model may be capable of providing some of the accountability outcomes survivors seek while avoiding the stress of a criminal trial.

i. Availability of legal representation in some circumstances

Finally, in some circumstances, human rights claimants will be able to access free legal representation through a provincial legal aid plan or, in Ontario, at the government-funded HRLSC and in British Columbia, through the B.C. Human Rights Clinic. This support has the potential to make the human rights process significantly more accessible than the civil process in the courts. In Ontario, the HRLSC provides initial legal assistance to all potential claimants and will make decisions on eligibility for full representation based on a

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[223] Human Rights Legal Support Centre, *What Remedies Are Available to Me at the HRTO?*, online: https://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto#public at 4.

number of factors including the merits of the claim and the barriers to self-representation faced by the claimant.[224]

For those who do not receive representation from a publicly-funded resource, another consideration is that human rights tribunals tend to permit paralegals, unpaid advocates, or law students to act as a legal representative,[225] which can also be more cost effective. Further, human rights processes are, at least in theory, designed to facilitate self-representation.[226] For example, the HRTO application form is available online and is designed to allow a claimant to answer a series of questions and to tell their own story in their own words. The rules of evidence are more flexible, making the process easier to navigate for those without legal training. However, the form is very long and the process no doubt remains intimidating to some individuals.

ii. Disadvantages

While the Tribunal provides many advantages to claimants, there are some significant disadvantages. These include:

1. The limited scope of human rights legislation;
2. the comparatively short limitations periods;
3. the barrier posed by the gatekeeper model in some provinces and the Federal system;
4. the potential inadequacy of remedies; and
5. the potential cost and length of human rights proceedings.

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[224] Human Rights Legal Support Centre, *Our Services: Eligibility for Legal Services; Eligibility Criteria,* online: http://www.hrlsc.on.ca/en/our-services/eligibility-criteria.
[225] Tribunals Ontario Social Justice Division, *Practice Direction on Representation before Social Justice Tribunals of Ontario* (October, 2013).
[226] BC Human Rights Tribunal, *Frequently Asked Questions About the Tribunal and Who Can Help,* online: http://www.bchrt.bc.ca/law-library/faqs/tribunal-role.htm.

a. Limited to protected areas

The first is that human rights legislation only covers particular contexts, that is, employment, housing, the provision of services, and the other contexts outlined above. It does not govern private relationships.

b. Limitation period

The second, and perhaps biggest, disadvantage is the limitation period under provincial and federal human rights legislation. In B.C. and Ontario, for example, with some exceptions, individuals bringing a claim must bring the claim within one year of the last incident of harassment or assault.[227] Given the nature of the conduct complained of, and the difficulties survivors face in coming forward, these short limitation periods will be a major disadvantage for those who are unable to respond relatively promptly.

c. Gatekeeper model can be a barrier

The commission model used by some provinces can be a barrier to human rights proceedings. The commission model results in very few cases being advanced to a full hearing on the merits. For example, of the 1083 complaints received by the Canadian Human Rights Commission (CHRC) in 2017, only 58 were referred to the Canadian Human Rights Tribunal (CHRT) for a hearing.[228] Once referred to the CHRT, many cases settle or are otherwise resolved without a full hearing. The 2017 CHRT Annual Report indicates that the Tribunal had only 8 ongoing hearings at the end of the year and released only 8 final decisions in 2017.[229] No decisions involving sexual harassment were included in the significant decisions highlighted in the 2017 CHRT Annual Report.

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[227] *Human Rights Code*, RSO 1990, c H-19, s 34(1); *Human Rights Code*, RSBC 1996, c 210, s 22.
[228] "By the numbers" online: Canadian Human Rights Commission https://2017.chrcreport.ca/by-the-numbers.php.
[229] "Annual Report 2017" (2017), online: Canadian Human Rights Tribunal https://www.chrt-tcdp.gc.ca/transparency/AnnualReports/2017-ar/2017-en.pdf at 2.

Further, as addressed above, the commission model can significantly slow down the process. Human rights commissions that oversee the investigation, mediation, and in some cases mandatory conciliation of claims risk becoming backlogged. The investigation itself can take months to start and additional significant time to complete, before a hearing on the merits of the case can begin.

Under these models, women with sexual harassment claims have a reduced likelihood of being afforded a full hearing on the merits, although they may achieve financial and other remedies through mediation or in settlement negotiations.

d. Remedies may be inadequate

Although no financial compensation is available through the criminal process, it is important to note that the quantum of financial compensation awarded by human rights tribunals can be quite low relative to a civil claim. For example, awards at the CHRT are capped at $20,000,[230] with the possibility of another $20,000 if the claimant can prove that the discrimination was willful or reckless.[231] For many survivors, the quantum awarded by a human rights tribunal may be insufficient to compensate victims for the harm of the assault.

Further, the human rights process also does not provide for criminal law consequences, such as incarceration, which some women may seek.

e. Can be costly and time-consuming

Notwithstanding the lower associated costs of the human rights process, as discussed above, a human rights claim can be time-consuming and expensive, even in a direct access system like the Ontario system, particularly for complex cases. If, for example, the respondent actively litigates by bringing unnecessary preliminary motions for time extensions, document

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[230] *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2)(e).
[231] *Ibid* at s 53(4).

production or early dismissal, it can become an expensive process, which, viewed in light of a potentially low damage award, may not be financially worthwhile. This makes the provision of no-cost legal services an essential component of a human rights system that is capable of effectively meeting the needs of survivors of sexual assault, particularly low-income women. Although some women will benefit from the assistance of the publically funded human rights legal representation, most provinces' human rights legal services are not resourced to accept every case that has merit.

Further, human rights tribunals do not order costs, which can be disadvantageous relative to a civil court, which can order the defendant to cover the plaintiff's legal fees. On the other hand, at the Tribunal, the claimant also is not at risk of paying the respondent's legal fees.

D. British Columbia's Crime Victim Assistance Program

Compensation or financial assistance for criminal injuries is available in most jurisdictions across Canada to provide survivors of sexual assault (and other crimes) with financial redress. In British Columbia (BC), those injured as a result of violent crime can apply to the Crime Victim Assistance Program (CVAP).[232]

To be eligible for financial assistance through CVAP, someone must be either injured as a direct result of a prescribed offence (an offence under the *Criminal Code*) which was committed after July 1st, 1972, or a representative acting on behalf of the person who suffered the injury.[233] Injury is defined in the *Crime Victim Assistance Act* as "bodily harm, including psychological harm, or pregnancy."[234] While, in most cases, the applicant must submit their application within one year after the crime took place, this does not apply to sexual

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[232] *Crime Victim Assistance Act*, SBC 2001, c 38.
[233] *Ibid* at ss 2(a)(i), 3(1)(a), 3(1)(d).
[234] *Ibid* at s 1.

assaults.[235] Non-BC residents can apply to the program but the crime itself must have been committed in BC.[236] The alleged offender does not need to have been charged with the prescribed offence for their victim to be eligible to apply to the program.[237]

Victims applying to the program need to fill out an application form and send it to CVAP electronically or by mail.[238] The application form asks for information about the crime and whether or not a report was made to the police.[239] If a police report was not made, the applicant is asked to indicate "who the report was made to (doctor, social worker, counsellor, other)."[240] The form also contains sections for the applicant to report any medical treatment required as a result of the injury, their employment information (if they are requesting compensation for lost employment income), and any other expenses or losses for which they are claiming benefits.[241]

Once an applicant has sent their completed application to CVAP and it is registered, they receive a letter with their CVAP claim number.[242] As the claim is being processed, they may be contacted by CVAP staff members if additional information is required.[243]

The alleged offender does not play a role in the application process. However, while benefits can be awarded whether or not the alleged offender is prosecuted for the prescribed

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[235] *Ibid* at s 3.
[236] "CVAP PROGRAM" online: *VictimsInfo* https://www.victimsinfo.ca/en/services/financial-assistance/cvap-program.
[237] *Ibid.*
[238] "Crime Victim Assistance Program Application Forms" online: Government of British Columbia https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/cvap-forms.
[239] "Crime Victim Assistance Program Victim Application", online: Government of British Columbia https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/publications/cvap-victim-application-web.pdf at 4.
[240] *Ibid.*
[241] *Ibid* at 5-6.
[242] "Financial Assistance for Victims of Violence", online: Police Services of British Columbia https://www.policevictimservices.bc.ca/content/Financial%20Assistance%20for%20Victims.pdf.
[243] *Ibid.*

offence, if a prosecution has been initiated at the time of the application the director can postpone their decision until the prosecution is completed and no further appeal is available.[244]

CVAP applications are approved or rejected by a Director of Crime Victim Assistance.[245] Directors are public service employees designated by the minister.[246] The director has a number of fact-finding powers under the *Crime Victim Assistance Act*. These include the ability to compel the police to provide copies of, or access to, a police incident report.[247] Directors can also require the applicant to provide further information, documents, statements, reports, books, papers or other necessary evidence not included in the initial application.[248] In addition, they can require medical practitioners and health professionals to provide medical reports and the applicant to undergo a medical examination or assessment.[249] Directors also have the power to refuse to provide benefits, or reduce the amount awarded, if the applicant has not reported the offence to law enforcement or has not cooperated with law enforcement.[250]

Once a decision is made, the director must deliver the applicant written notice of any decision for which a request for reconsideration may be made, as well as the reasons for the decision.[251] A request for reconsideration must be made by the applicant in writing within 60 days (unless an extension is granted).[252] The reconsideration is not performed by the same

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[244] *Crime Victim Assistance Act*, SBC 2001, c 38, ss 5(1), 5(3).
[245] *Ibid* at s 18(1).
[246] *Ibid*.
[247] *Ibid* at s 6(1)(f).
[248] *Ibid* at s 6(1)(a).
[249] *Ibid* at ss 6(1)(b)-(c).
[250] *Ibid* at s 9(2)-(3).
[251] *Ibid* at ss 11(1)(a)-(b).
[252] *Ibid* at ss 13(2)(a)-(b), 13(3).

director who made the initial decision.[253] However, the "person reconsidering a decision must consider only the material that was considered in making that decision."[254]

The director is able to issue financial awards in a number of categories including (but not limited to) medical services, prescription drug services, counselling services, protective measures, moving expenses, childcare, maintenance for a child born as a result of a prescribed offence, and transportation expenses. CVAP does not, however, provide compensation for pain and suffering.

The maximum assistance available to applicants varies depending on the category. For instance, the most that a director is able to provide for childcare services is $800 per month.[255] With respect to counselling services, the director can award an applicant one or both of the following: up to 48 one-hour counselling sessions or up to 24 one-hour counselling sessions to be used in relation to a legal proceeding.[256] The amount that is awarded for the maintenance of children born as a result of a prescribed offence is $300 per month for each month that the child resides with the victim at least 50% of the time.[257]

It is important to note that the director will only provide compensation for benefits that are not already covered by other programs available to the applicant (e.g., private insurance, Employment Insurance).[258] Moreover, the director will deduct any amount that the applicant received from a judgement or settlement related to the prescribed offence from the total benefits awarded.[259] The director can also refuse to provide benefits or limit the amount provided if they believe the applicant engages in conduct that is detrimental to their health or

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[253] *Ibid* at s 14(1)(a).
[254] *Ibid* at s 14(2).
[255] BC Reg 161/2002, s 16(5).
[256] *Ibid* at ss 11(3)(a)-(b).
[257] *Ibid* at s 17(2)(a).
[258] "Financial Assistance for Victims of Violence", *supra* note 242 at 1.
[259] *Crime Victim Assistance Act*, SBC 2001, c 38, s 9(4)(a).

safety, undermines the purpose of the benefit, or is contrary to a condition imposed on the receipt of the benefit.[260]

The director has the power to commence civil litigation against the alleged offender where the applicant receives a benefit but has not pursued civil litigation herself, or where the applicant agrees to a settlement after receiving a benefit without getting agreement from the director.[261] A portion of any funds received through this litigation may go to the applicant.[262]

i. Advantages

CVAP offers a number of advantages over other avenues to justice for sexual assault survivors. These include:

1. that the avenue is relatively informal and accessible;
2. that there is no requirement for civil or criminal proceedings;
3. the availability of financial assistance for the survivor;
4. the lack of a limitation period for sexual assault claims; and
5. that the process is relatively less traumatizing than others.

a. Informal and accessible

First, this avenue is relatively informal and fairly quick to access. This is advantageous from a cost and time perspective. A CVAP application is less complex than other available legal processes, and does not require a hearing.

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[260] *Ibid* at s 9(2)(c)(i)-(iii).
[261] *Ibid* at s 16.
[262] *Ibid* at s 17.

b. No requirement for civil or criminal proceedings

Second, filing a CVAP application does not require the applicant to launch a civil action against the alleged offender. Moreover, there is no need for charges to be laid or for the accused to be convicted with respect to the sexual assault in order for an individual to receive compensation.[263] Two caveats apply, however. First, the director retains the power to pursue its own civil litigation. Second, the applicant is still, in most cases, expected to report the assault to law enforcement and cooperate with any investigation.

As a result, applicants can avoid having to pursue civil litigation against the offender, and in some cases also avoid having to participate in a criminal trial, but still receive some financial assistance for costs stemming from the sexual assault. As the payment is made by CVAP, not the perpetrator, this also allows for survivors to access some compensation even when the perpetrator is unable to pay. In the event that the alleged offender does not face charges or is acquitted in a criminal trial, the applicant is still eligible for assistance.

c. Provides remedies to survivor

CVAP provides financial assistance to the survivor. As noted in the other civil models, this is a significant advantage over the criminal legal system, which does not provide remedies directly to the survivor. Financial assistance is also available for a wide variety of expenses, including medical services, prescription drug expenses, counselling, protective measures, childcare, income support, and lost earning capacity.[264] Benefits may also be provided on an interim basis, allowing survivors to access compensation prior to the director's final decision.[265]

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[263] *Ibid* at s 5(1).
[264] *Ibid* at s 4(1).
[265] *Ibid* at s 7(1).

Financial assistance can accomplish some of survivors' justice interests. Some of the applicants interviewed by Feldthusen, Hankivsy, and Greaves, indicated that the payment they received from Ontario's former Criminal Injuries Compensation Board (CICB) was validating of their experience, and vindicating of the harm it caused. One stated, "[It] [w]asn't the amount, it was the fact that someone acknowledged that my life is screwed up because of what happened."[266]

d. No limitation period

A fourth advantage is that there is no limitation period for seeking compensation from CVAP for harms stemming from a sexual assault.[267] This is a major advantage compared to human rights proceedings as many survivors, for a variety of reasons, may wait years to begin legal proceedings.

e. Less traumatizing than other models

CVAP excludes some of the more traumatizing elements of a trial against the accused. For women who seek to avoid confronting the offender, which is one of the justice interests some survivors identified, CVAP may be a good option. This is particularly true if the woman is concerned about confronting the offender through civil litigation. As CVAP requires a report to and cooperation with law enforcement in most cases, however, a criminal trial may still result.

ii. Disadvantages

There are several disadvantages to this model as well. These include:

1. a lack of accountability for offenders;
2. an emphasis on financial assistance rather than compensation; and

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[266] Feldthusen, Hankivsky, & Greaves, *supra* note 44 at 97.
[267] *Crime Victim Assistance Act*, SBC 2001, c 38, s 2-3. The only qualification is that the sexual assault must have occurred after July 1, 1972.

3. the link between a CVAP application and other legal proceedings.

a. Lack of offender accountability

CVAP might not be the correct avenue for those who are looking for accountability for the offender. CVAP does not have authority to punish perpetrators of sexual violence and cannot lay criminal charges, prosecute or convict anyone. Financial assistance received from CVAP comes from the government and the offender has no responsibility to pay or contribute, although the director can pursue civil litigation against the offender. This is something for survivors to consider if they are looking for an offender to be punished or held directly accountable, one of the justice interests articulated by many survivors.

b. Emphasis on financial assistance rather than compensation

The financial assistance provided may not fully address the harms caused by the assault. As noted above, no compensation is available for pain and suffering. Rather, assistance is provided for expenses arising from the assault. Further, as explained in the section of this report addressing civil legal responses, financial payment cannot fully compensate survivors for the harm they have experienced.[268] In Feldthusen, Hankivsky, and Greaves' study, some women felt uncomfortable receiving any money at all. Survivors reported feeling cheap,[269] or feeling as though they were accepting "hush money" or "blood money."[270]

c. Link between a CVAP application and other legal proceedings

A disadvantage CVAP applicants face is the link between a CVAP application and other legal proceedings. First, in most cases, applicants must report the assault to law enforcement. As explained in the section on criminal law, applicants may be unwilling or

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[268] Feldthusen, Hankivsky, & Greaves, *supra* note 44 at 99.
[269] *Ibid* at 98.
[270] *Ibid.*

unable to do this for many reasons. Requiring applicants to report their assault to law enforcement also means that they may end up compelled to participate in criminal proceedings, even if their goal was financial support and not criminal accountability.

In addition, although the applicant does not herself have to pursue civil litigation against the offender, the director may choose to pursue that litigation. This could result in the applicant having to participate in a trial, again even if she did not wish to confront her offender or be subjected to the often traumatic process of testifying in court.

E. Professional regulatory bodies

If an individual has experienced sexual harassment or sexual abuse at the hands of a professional, there are often internal disciplinary processes available at professional regulatory bodies where the survivor can file a complaint. Through this mechanism, a professional regulatory body can implement consequences related to the offender's license to practice in their profession. In some circumstances, the regulatory body will initiate disciplinary proceedings against the offender, which can result in penalties including fines or the suspension or revocation of the individual's license to practice. Some examples of disciplinary processes in Ontario include the Ontario College of Teachers, the College of Physicians and Surgeons of Ontario, and the Law Society of Ontario. Similar professional regulators exist in jurisdictions across the country.

i. Teachers: Ontario College of Teachers (OCT)

The OCT has jurisdiction to regulate the conduct of its members. When a person experiences sexual misconduct by an Ontario Certified Teacher, she can make a report to the College's Registrar. Once the report is received, it is reviewed by intake staff, after which the College investigator creates a document called the "Request to Initiate an Investigation" in

order to formalize the complaint.[271] The investigator may contact witnesses or other individuals with information regarding the complaint as part of their investigation.[272] The Investigation Committee will then meet to discuss the information collected during the investigation and decide on next steps.[273]

Once the investigation is complete, the Committee has a number of options, including dismissing the complaint, issuing a caution, or referring the complaint to the Discipline Committee for a hearing.[274]

Should allegations of professional misconduct of a sexual nature or of sexual abuse proceed to a hearing, they are referred to the Discipline Committee, which is a three-person, quasi-judicial panel.[275] The panel operates independently of the College, with independent legal counsel advising the panel on legal matters. Professional misconduct includes sexual misconduct and sexual abuse. Sexual misconduct is defined as "inappropriate behaviour or remarks of a sexual nature by the member" to which students may be exposed. The definition further specifies that the behaviour or remarks would be found by a reasonable person to create a negative school environment for the student, cause them distress or be detrimental to their well-being.[276] Sexual abuse includes sexual intercourse with a student, sexual touching of a student, or behaviour or remarks of a sexual nature directed towards the student.[277]

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[271] Ontario College of Teachers, *Complaints Process*, online: https://www.oct.ca/public/complaints-and-discipline/complaints-process.
[272] Ontario College of Teachers, *Steps to Take: If You Have a Concern About a Member*, online: https://www.oct.ca/media/PDF/Steps%20to%20Take%20if%20you%20have%20Concerns%20about%20a%20Member/teacher_e.pdf at 3.
[273] *Ibid.*
[274] *Ontario College of Teachers Act, 1996*, SO 1996, c 12, s 26(5).
[275] Ontario College of Teachers, *supra* note 271.
[276] *Ontario College of Teachers Act*, 1996, SO 1996, c 12, s 1(1).
[277] *Ibid.*

In either case, if the Committee finds that the allegation is substantiated, the Committee must reprimand the member. In serious cases of sexual abuse, including sexual touching of the student, the Committee must revoke the member's certificate.[278]

The Committee must also consider any written statement describing the impact of sexual abuse on the student.[279] As of January 2020, the Discipline Committee is also entitled to provide the complainant with funding for therapy,[280] and require the member to reimburse the College for that funding.[281]

ii. Doctors: College of Physicians and Surgeons of Ontario (CPSO)

The CPSO, which regulates physicians and surgeons in Ontario, follows a very similar process. When an individual submits a complaint to the CPSO, or another person or organization reports allegations of sexual abuse to the CPSO, the CPSO will appoint an investigator to obtain all relevant information. It will also notify the accused doctor in order to give the doctor an opportunity to respond. When the investigation is complete, all the material gathered by the investigator is provided to the Inquiries, Complaints and Reports Committee (ICRC), which has a number of options. As set out above with respect to the OCT, in the context of sexual abuse allegations, the ICRC is most likely to dismiss claims it considers clearly unfounded or otherwise refer the allegations for a hearing before the Discipline Committee.[282] The ICRC also may counsel or caution the member if it is concerned about the member's conduct in a manner that falls short of sexual abuse.[283]

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[278] *Ibid* at s 30.2.
[279] *Ibid* at s 30.2(4).
[280] *Ibid* at s 58.1.
[281] *Ibid* at s. 30(4).
[282] The College of Physicians and Surgeons of Ontario, *Sexual Assault Complaints*, online: https://www.cpso.on.ca/Public-Information-Services/Make-a-Complaint/Sexual-Abuse-Complaints.
[283] *Ibid.*

Hearings at the Discipline Committee are again quasi-judicial in nature. If the Committee finds the allegations are proven, it will be required to revoke the member's licence to practise (certificate of registration) in certain situations, including if the member is found to have engaged in sexual intercourse with a patient.[284] For sexual offences where revocation is not mandatory, the Discipline Committee may suspend the member's certificate of registration and order terms, conditions, and limitations.

Similar to the OCT, under the *Regulated Health Professionals Act,* the CPSO provides a program of funding for therapy for persons alleging sexual abuse by a member of the College.[285] The College may require the member to reimburse the College for this funding.[286]

iii. Lawyers: Law Society of Ontario (LSO)

The LSO regulates lawyers and paralegals (called "licensees"). Similar to the processes described above, the LSO uses a preliminary screening process, through the Intake Department, which determines whether complaints made about a lawyer should proceed to investigation.[287] The Intake Department reviews each complaint to determine whether a lawyer or paralegal may have engaged in professional misconduct, including sexual harassment.[288] If the evidence in the complaint does not raise reasonable grounds for a finding of professional misconduct, the complaint will be dismissed.[289] Further, with a few very limited exceptions, the Society will not investigate complaints that are received more than three years from the date the alleged sexual harassment or assault took place.[290]

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[284] *Regulated Health Professionals Act*, RSO 1991, c 18, s 51(5)(3).
[285] *Ibid* at s 85.7.
[286] *Ibid* at s 85.7(12).
[287] Further, if the complaint concerns criminal behavior and there are reasonable grounds to believe that a licensee or any other person has been involved in criminal or illegal activity, the LSO will report to law enforcement. See the Law Society of Ontario, *Process for Reporting Criminal or Illegal Activity,* online: https://www.lsuc.on.ca/reporting-law-enforcement/.
[288] *Ibid.*
[289] *Ibid.*
[290] Law Society of Ontario, *The Complaints Process,* online: https://www.lsuc.on.ca/complaints/.

If the complaint is not dismissed by the Intake Department, the Law Society will conduct an investigation of the complaint. Interviews may be conducted with both parties.[291] Following the investigation, the matter may be referred to a committee of Benchers (the members of the LSO's board of directors), who may authorize the matter to be referred to a hearing at the Law Society Tribunal[292] for a disciplinary proceeding.[293] These proceedings are usually open to the public and are a matter of public record.[294] If the Tribunal finds that the allegations are substantiated, it can issue a formal warning or a temporary suspension, order the licensee to pay a fine, revoke the licensee's licence, or grant the licensee permission to surrender their license. Either party may appeal the decision.[295]

As part of the LSO's efforts to enable equity and diversity in the workplace and the profession, and to help stop discrimination and harassment, the Law Society provides a Discrimination and Harassment Counsel (DHC) service free-of-charge.[296] The DHC provides information and assistance to anyone who may have experienced or witnessed discrimination or harassment by a lawyer, paralegal, or student member of the LSO. The DHC can provide assistance to complainants by clarifying the issues involved and providing confidential information and advice, including advising the complainant of her avenues for recourse.[297]

iv. Advantages

While by no means exhaustive, the professional regulatory processes outlined above provide a few examples of the nature of legal recourse available through a professional

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[291] *Ibid.*
[292] The Law Society Tribunal is an independent adjudicative tribunal within the Law Society of Ontario, consisting of staff and appointed adjudicator: The Law Society Tribunal, *Law Society Tribunal Complaint Process*, (July, 2018), online: https://lawsocietytribunal.ca/Pages/Mainpage.aspx#115.
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*
[296] Law Society of Ontario, "The Discrimination and Harassment Counsel Program," (2018) online: http://www.dhcounsel.on.ca/en-ca/services.
[297] *Ibid.*

regulatory body. There are certain advantages for complainants in proceeding with a complaint in this type of forum. These include:

1. a lower standard of proof than in criminal trials;
2. a broad definition of sexual misconduct;
3. the availability of unique remedies;
4. the fact that the complainant is not a party to the proceedings;
5. in some cases, no limitations periods for bringing a complaint; and
6. the availability of protections for witnesses.

a. Standard of proof

First, professional regulatory tribunals utilize a lower standard of proof than a criminal trial. Similar to the other civil models explored in this report, professional tribunals make their findings on a balance of probabilities rather than a standard of proof beyond a reasonable doubt.

For a more detailed examination of the benefit of such a standard, see the Civil Law and Human Rights sections.

b. Broad definition of sexual misconduct

In addition, the legislation governing most professional bodies defines sexual misconduct broadly. For most colleges, sexual misconduct includes forms of sexual attention and touching that may not constitute a criminal offence, such as leering, sexual comments, and other forms of sexual harassment. As addressed in the human rights context,[298] this broad interpretation can allow complainants to obtain justice for a wider range of non-consensual sexual behaviour than is covered in the criminal law.

[298] See Human Rights Section, above.

Further, in some settings, legislation establishes that any sexual relationship constitutes misconduct, given the power imbalances between the College member (doctors or teachers, for example) and the populations they service (patients, students). The legislation governing physicians and surgeons in Ontario defines sexual abuse to include any sexual activity between the doctor and their patient, including sexual intercourse, sexual relations, sexual touching, or sexual behaviour or remarks by the member towards the patient.[299] Similarly, any sexual relationship between a student and a teacher, regardless of the student's age, constitutes professional misconduct. Accordingly, there is no defence of consent in these cases. This rule provides an advantage in cases where there is no dispute that sexual activity occurred, as complainants are less likely to be subjected to discriminatory arguments and cross-examination seeking to prove that the survivor in fact consented. As outlined in the criminal law section, proving an absence of consent can be a significant hurdle for complainants, particularly in cases in which there is little evidence beyond the complainant's testimony. This is not to say that complainants in the professional regulation context are not subjected to rigorous cross-examination, at times informed by discriminatory stereotypes. Still, avoiding a battle on consent removes one barrier.

While other professionals, such as lawyers, may have sexual relationships with clients without censure, it cannot be as a condition for services rendered or employment opportunities or benefits. This definition is also broader than that found in the *Criminal Code* and therefore makes legal redress available in a context where criminal proceedings might not assist.

c. Provides unique remedies

Further, regulatory bodies are often the only legal mechanism with the authority to revoke or suspend the offender's license to practice in their field. As noted by Herman, many

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[299] *Regulated Health Professions Act*, SO 991, c 18, s 1(3).

survivors do not seek traditional punitive consequences. Rather, they want to see the offender's wrongdoing exposed and to deprive the perpetrator of undeserved honor and status.[300] Revoking an offender's license to practice in their profession may be a very effective way to accomplish this goal.

In addition, while most professional bodies do not order damages to be paid to the survivor, the CPSO and other colleges governed by the *Regulated Health Professionals Act*, are required to provide funding for therapy and counselling for complainants after a finding of abuse.[301] The OCT implemented a similar approach in January 2020. As such, the survivor could be in a position to achieve the goal of offender accountability while still receiving some limited[302] compensation for the financial cost caused by the assault.

d. Complainant not a party

In a disciplinary hearing, similar to the criminal law, the complainant is not a party to the proceeding. The case is prosecuted by the regulatory body, and the complainant acts as a witness. This position has benefits and disadvantages, as explored in the criminal law analysis. The advantage for the complainant is that she does not bear the cost of prosecuting the case, and can be relieved of the stress and time involved in participating in a legal proceeding as a direct party. Further, in some models, the complainant may be entitled to independent legal advice to assist her in the process. For example, the LSO provides Discrimination and Harassment Counsel to assist with reports of discrimination and harassment. The CPSO also provides a witness support person to complainants and will fund independent legal advice from a lawyer not involved in the case.

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[300] Lewis Herman, *supra* note 39 at 593.
[301] *Regulated Health Professionals Act*, RSO 1991, c 18, s 85.7; see also *Funding for Therapy or Counselling for Patients Sexually Abused by Members*, O Reg 59/94.
[302] The maximum funding provided is 200 half-hour sessions with a therapist over a five-year: *Ibid.*

e. Limitation period

Some professional regulators, such as the LSO, impose a limitation period on complaints. In the case of the LSO, the limitation period is three years. However, other regulators, such as the CPSO, do not. For a thorough discussion of the problematic nature of imposing a limitation period of claims of sexual abuse, refer to the Human Rights Tribunal analysis. Accordingly, depending on the particular regulatory body's procedures, the limitation period will either be an advantage or a disadvantage.

f. Protections for witnesses

Some regulatory bodies have useful protections for witnesses. For example, the OCT provides accommodations for young people who have made an allegation of sexual abuse. In addition to allowing complainants to testify behind a screen or on a closed-circuit television, the Discipline Committee allows complainants who have brought an allegation of sexual abuse to bring a support person to the hearing, who may accompany them during their testimony.[303] Further, the Discipline Committee may restrict the accused member's cross-examination of the complainant or prohibit the member from personally cross-examining the student. The OCT also imposes a blanket restriction on sexual history evidence of the complainant, unless that evidence is relevant to an issue in the trial and is not unduly prejudicial.[304]

As another example, the newly implemented *Protecting Patients Act* provides for some additional protections for sexual misconduct complainants. For example, the disciplinary panel must hold an admissibility hearing for third party records in which the complainant has a reasonable expectation of privacy, and the complainant is entitled to

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[303] Ontario College of Teachers, *Rules of Procedure of the Discipline Committee and Fitness to Practice Committee*, (November, 2018), s 13.
[304] *Ibid* at s 13.

standing in such a hearing.[305] While requests for private records are intrusive and can be traumatizing for survivors, these rules mark an improvement in the process by providing greater protections for complainants' privacy. These processes increase the habitability of participating in the disciplinary hearing and can facilitate the complainant's interest in expressing herself in her own way, and exercising control over how her story is communicated to the adjudicators.

v. Disadvantages

While there are some advantages, this route also has some shortcomings and may not be sufficient for all survivors. These disadvantages include:

1. that the complainant is not a party to the proceeding;
2. the risk of gatekeeping by committees and investigators preventing complainants from being heard;
3. the trauma associated with testifying;
4. privacy concerns; and
5. the risk of governing bodies not using all remedies available to them.

a. Complainant not a party to the proceeding

As noted, generally the professional governing body will "prosecute" the case, with the complainant acting as a witness. This process is in place because the mandate of the governing body is to maintain proper conduct among its members rather than to provide a patient or client with an opportunity to bring a case against the practitioner.[306] The complainant is not entitled to standing and has little control over whether their complaint proceeds to a hearing. If the case does proceed to a hearing, the complainant will not have the opportunity to determine how the hearing will be conducted. Further, complainants may

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[305] See *Protecting Patients Act*, 2017, SO 2017, c 1, s 42.2(1).
[306] See e.g. College of Physicians and Surgeons of Ontario, *Governance Process Manual* (December, 2016), at 3.

be required to testify at the hearing, even against their will, and can be subpoenaed to attend, at risk of arrest if they fail to do so.[307]

Similar to the criminal law, her position as a mere witness can be undermining for complainants' interest in having a voice in the process and participating in decision making. The 2016 ministerial task force report, "To Zero: Independent Report of the Minister's Task Force on the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991" (2016 Task Force) states that patients have been negatively impacted by this lack of participation, and "have described themselves as feeling 'disposable' and frustrated, with no direct say in a process in which they are deeply invested."[308]

In response to some of these concerns, the task force recommended that the *Regulated Health Professions Act* be amended to provide complainants with the right to participate in the proceedings as a full party, with their own legal representation provided by the college, and to allow complainants a support person of their choice at a hearing at the expense of the college.[309] Although these recommendations have not been implemented, as set out above, the CPSO offers funding for independent legal advice to complainants.

b. Gatekeeper function can deny complainants opportunity to be heard

Similar to the criminal legal system and the Canadian Human Rights Tribunal, a college's use of gatekeeper intake committees and investigators, who determine whether or

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[307] See e.g. *Ontario (College of Physicians and Surgeons of Ontario) v Kayilasanathan*, 2018 ONCPSD 50.
[308] Ontario Ministry of Health and Long-Term Care, "To Zero: Independent Report of the Minister's Task Force on the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991" (September 9 2016) online: http://www.health.gov.on.ca/en/common/ministry/publications/reports/sexual_health/taskforce_prevention_of_sexual_abuse_independent_report.pdf at 76.
[309] *ibid.*

not a case will proceed to a disciplinary hearing, can have the effect of denying justice to survivors of sexual assault.

According to Sanda Rodgers, only 5.53% of cases involving allegations of sexual abuse against a physician considered between 1994 and 2005 ever reached the disciplinary stage.[310] At the OCT, while the number of dismissals of sexual allegations specifically has not been studied, a 2012 report indicates that, between 1998-2011 the Investigative Committee referred between 25-50% of complaints to the Discipline Committee, with the rest dismissed.[311]

Whether or not a complaint makes it to a disciplinary hearing stage may engage a number of important legal considerations, including determinations of admissibility, credibility, and prosecutorial viability. This risks allowing systemic biases about how women respond to sexual assault to impact the progress of the complaint, and can lead to legitimate complaints of sexual abuse being dismissed without a hearing. Indeed, Rodgers found that at the CPSO, allegations that are uncorroborated by additional witnesses were significantly less likely to be referred to a discipline committee than corroborated allegations.[312]

Further, as addressed in the criminal legal system, many survivors do not file complaints of abuse for reasons including shame, trauma, and the fear that one will not be believed. The result is that many acts of sexual misconduct by professionals will never lead to a disciplinary outcome.

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[310] Sanda Rodgers, "Zero Tolerance Some of the Time? Doctors and Sexual Abuse in Ontario" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 358.
[311] The Honourable Patrick J. LeSage CM O Ont, WC, *Review of the Ontario College of Teachers Intake, Investigation and Discipline Procedures, Outcomes, and the Dispute Resolution Program* (May 2012), online: https://www.oct.ca/~/media/PDF/Lesage%20Report/EN/LeSage_Report_e.ashx at 34.
[312] Rodgers, *supra* note 310 at 358.

c. Testifying can be traumatic

As with many of the models this report examines, should the complaint proceed to a hearing, the complainant will likely be required to testify. In some cases, this can be highly stressful for survivors. The 2016 Task Force on sexual abuse in regulated health professions found that unduly harsh and abusive cross-examinations were a barrier to justice for complainants, who found that the traumatic experiences in the hearing undermined their belief they would obtain a just outcome.[313]

In an attempt to make this less stressful, in the context of health care, the 2016 Task Force recommended a number of changes, many of which have already been implemented at the OCT:

1. complainants in sexual misconduct/abuse proceedings have the option to testify behind a screen or by closed-circuit electronic means;

2. where the member is found guilty, complainants should have the opportunity to submit a victim impact statement to be taken into account in the assessment of a remedy or penalty;

3. a videotape of an interview with the complainant may be admitted in evidence if the complainant, while testifying, adopts the content of the videotape; and

4. under no circumstances should the alleged perpetrator of the sexual abuse be permitted to cross-examine the complainant personally.[314]

This trauma is far from unique to the professional regulation model, but nonetheless impacts on the habitability of the model.

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[313] Ontario Ministry of Health and Long-Term Care, *supra* note 308 at 76.
[314] *Ibid* at 24.

d. Privacy concerns

In some cases, survivors may face privacy concerns in pursuing a complaint at a regulatory college. First, many colleges do not allow anonymous complaints, which can be a barrier for some survivors.[315] In addition, under some procedures, such as those followed by the CPSO and the College of Nurses of Ontario, a complainant must consent to the collection of certain medical records by the investigative team, meaning some medical information likely will become available to the defence and become part of the public hearing.[316]

e. May not utilize powers and remedies

As with many models, there is some evidence that regulatory colleges do not always fully utilize the powers and remedies available to them. For example, the 2016 Task Force found that in sexual abuse cases in the health care context, "colleges are using their discretionary authority to find health care professionals guilty of lesser charges, such as 'professional misconduct,' instead of fully exercising their authority under the *RHPA* to find them guilty of the 'sexual abuse of a patient'."[317] The Task Force was concerned that the trend toward lesser charges minimized the severity of the behaviour and its significant adverse impact on the patient. This concern suggests some limit in the capacity of this model to meet survivors' interests in meaningful accountability for perpetrators of sexual violence.

Conclusion

To conclude, it is clear that each model provides particular advantages and disadvantages. Moreover, although many common themes emerge, complainants are unique individuals and there is no perfect model for every complainant. That said, the themes that do emerge from existing models provide insight that can inform a new justice alternative,

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[315] Ontario College of Teachers, *supra* note 271.
[316] Often in sexual abuse cases, there would be a publication ban protecting the complainant's identity.
[317] Ontario Ministry of Health and Long-Term Care, *supra* note 308 at ix.

with the aim of better meeting the goals articulated by survivors, at least in some circumstances.

At the outset, a legal response to sexual violence should take concrete steps to eliminate the impact of myths and stereotypes from the process. These steps will improve its functionality and capacity to provide survivors with justice. Where a legal system engages a gatekeeper model, those gatekeepers must be well trained in sexual assault and violence, including how survivors respond to sexual assault. There also should be no limitation periods for complaints of sexual violence.

During the legal process, it is preferable for the survivor to be able to exercise control over the proceeding in some way, including having the option to end proceedings. It is also preferable for survivors to have the option to be a party to the case and, where an independent party prosecutes the charge, for the survivor to be meaningfully consulted throughout the process. It is also ideal for survivors to be able to seek some personal compensation out of the process in addition to consequences for the offender. Where possible, financial compensation should take into account the full costs of the sexual assault to the survivor and compensate her accordingly.

Where models require testimony, steps should be taken to reduce the trauma of aggressive cross-examination and intrusive disclosure requests. There should be testimonial aids available and clear limits on cross-examination and disclosure. In addition, survivors should have the opportunity to express what happened to them, and its impact, in their own terms. This may mean providing them with an opportunity to tell their story outside of the traditional examination and cross-examination context.

The civil standard of proof is more likely to facilitate survivors' justice interests, given the significant barrier of proving guilt beyond a reasonable doubt, particularly because these cases often turn on credibility. In addition, models that engage a nuanced analysis of sexual

relationships, and take into account power imbalances, are better able to recognize sexual abuse or exploitation, provide survivors with validation of this abuse, and rebuke offenders.

It is clear that some complainants will benefit from a model that directly engages the offender, while others benefit from a model in which they are not required to confront the offender directly. Both options should be maintained. Similarly, in some cases, it will be important for a complainant to see an offender punished, up to and including incarceration and public condemnation. In other cases, complainants' goals will be satisfied with a less public and/or less severe result, but with the offender having taken personal accountability for his actions. Again, it is important for both options to be available, at least to some complainants in some circumstances.

Regardless of the legal model, publicly funded legal representation renders the system significantly more likely to meet women's interests and to achieve the results they seek.

With these themes in mind, Part Two of this Report, *Alternatives Avenues to Justice for Sexual Assault Survivors*, examines three approaches that have been used in Canada and internationally to respond to sexual violence against women: specialized courts designed to respond specifically to violence against women; campus sexual assault policies and mechanisms; and alternative approaches to justice including restorative justice and transformative justice.