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Legal Representation for Complainants of Sexual Violence in the Criminal Justice System: A Proposal to Advance Women's Equality

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Law

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Abstract

Very few survivors of sexual violence choose to engage the Canadian criminal justice system despite the fact that we expect law to be an effective tool to combat sexual violence. Since the vast majority of sexual violence survivors are female, the criminal justice system is failing women. This failure is largely because of the harm it causes by re-victimizing sexual assault complainants. Much of that harm arises from misunderstandings about trauma and from the existence of rape myths and gender stereotypes.. I argue that the criminal justice system's treatment of female sexual violence complainants violates their section 7 and 15 Charter rights, and represents gender discrimination under the Canadian Human Rights Act. I further propose that one key remedy to remediate this harmful and discriminatory treatment is to provide state-funded trauma-informed legal representation for sexual violence complainants throughout their engagement with the criminal justice system.

I present my thesis in an integrated article format using three articles, and apply a doctrinal analysis to primary and secondary sources of law, jurisprudence, articles, and research. The analysis also draws on my many years of experience as a former Crown prosecutor, and as a lawyer currently in private practice, working directly with sexual assault victim-survivors.

The first article lays out my proposed model for legal representation for sexual violence survivors and reviews other international systems of victim representation. In the second, I argue the merits of a Charter challenge on behalf of sexual violence complainants, relying on Supreme Court jurisprudence to demonstrate that current practices and omissions in government policy result in adverse impact and systemic discrimination against sexual violence complainants. The third article provides an analysis of the policies that underpin the treatment of female sexual violence complainants, this time using the lens of the Canadian Human Rights Act, demonstrating that these inadequacies perpetuate systemic discrimination against women. All three articles conclude that an effective remedy for this discriminatory treatment is the provision of state-

funded trauma-informed legal counsel to complainants of sexual violence to protect their rights and to better facilitate equal access to justice.

Keywords

Sexual violence survivors, complainants' legal counsel, treatment of sexual violence complainants, systemic discrimination against women, adverse impact discrimination, re-victimization, state-funded legal counsel, criminal justice system, access to justice, protection of victims' rights, rape myths, gender stereotypes, misunderstandings about trauma.

Summary for Lay Audience

Very few survivors of sexual violence (about 5%) report to the police. This is a disturbing statistic because it means that about 95% of offenders bear no legal consequences for their actions. Since the majority of victims of sexual violence are female (about 87%), this means that women are provided very little legal protection from sexual violence. To add to that concern, women who do report to the police often experience revictimization from going through the criminal justice system. Much of the harm women experience by the criminal process arises from rape myths and stereotypes about how women are expected to behave, particularly when they are sexually violated, and from misunderstandings about the impacts of trauma. No one should have to be harmed in order to get access to justice.

To help address these problems, I propose that government funded trauma-informed legal representation for victims of sexual violence is necessary to address the violations to women's equality, security and right to be free from discrimination. In the first of three articles that comprise my thesis, the benefits of my proposed model of legal representation are described and international systems of victim representation are reviewed, along with studies that demonstrate their value. In the second article I argue that the lack of government policies to protect women from harm when they come forward as sexual violence complainants in the criminal justice system violates their rights to equal protection of the law and security of the person guaranteed under the *Charter of Rights and Freedoms*. In the third article I argue that their poor treatment of sexual violence victims during the criminal process is gender discriminatory under the *Canadian Human Rights Act*. In all three articles I conclude that my proposed model for legal representation for those who report sexual violence would be effective in reducing discrimination against women and helping to protect their rights to security and equal access to justice.

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Chapter 1 **INTRODUCTION**

1.1 THE PROBLEM TO BE ADDRESSED

In Canada women are more likely to be sexually assaulted than to receive a university education or receive wage parity, yet male perpetrators of sexual assault have a less than one percent chance of being punished.¹ These troubling statistics, together with the reality that only 5% of individuals sexually assaulted in Canada report their assaults to the police,² inspired me to research and write this thesis on legal reform. Legal reform is essential to improving the reporting rate of sexual violence. Society must address the reality that most survivors of sexual violence find the personal cost of engaging the criminal process to be too high to accept, and that many survivors who do engage the criminal process experience trauma and harm.³ Government policy must change to address the poor treatment of sexual violence complainants that causes this trauma and harm.

My central claim in this dissertation is that legal representation for sexual assault victims in criminal cases is necessary if we are to address their poor treatment and mitigate the harm they experience in the legal system. In support of that claim I argue that the poor treatment of female sexual violence survivors, who make up the vast majority of all sexual violence victims, results in violations of their s. 15 equality and s. 7

¹ Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 219.

² Conroy, S. and A. Cotter. 2017. "Self-reported sexual assault in Canada, 2014." *Juristat*. Statistics Canada Catalogue no. 85-002-X, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm> >

³*Supra* note 1 at 4.

security of the person rights under the Canadian *Charter of Rights and Freedoms*⁴ and their rights to freedom from discrimination based on gender under the *Canadian Human Rights Act*.⁵ A remedy for those violations would be a fully funded, confidential, and trauma-informed model of legal representation for survivors of sexual violence that would better protect their rights and facilitate equal access to justice in the criminal justice system.

In my dissertation I argue that all victims/complainants of sexual violence, regardless of their sex or gender, ought to be entitled to state-funded legal counsel at any stage of the criminal process. This means that they should be entitled to consult with and be represented by a lawyer prior to filing a complaint; during the investigative process; during a bail hearing; at trial; at sentencing; and beyond. My argument for that is centred on concerns that are specific to the way in which women experience the criminal justice system, concerns that are tied to the harms that women suffer and to the myths and stereotypes that plague women throughout the criminal process. As Justice Cory observed in *R v Osolin*:

[S]exual assault is very different from other assaults. It is true that it, like all other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.⁶

I argue that given the experience of female sexual violence complainants, and the fact that women are disproportionately the victims of sexual violence (87% of all sexual

⁴ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 [*Charter*].

⁵ RSC 1985, c H-6.

⁶ *R v Osolin*, [1999] 1 SCR 330 at para 28.

assault victims are female⁷), they are entitled, as a matter of justice, to state-funded legal representation and advice. It also follows, on grounds of equality and fairness, that such legal representation ought to be made available to all victims of sexual violence, regardless of gender.

1.1.1 International models

The value of legal counsel for sexual violence complainants is supported by evidence from systems of victim representation internationally, in the U.S. Military and in the International Criminal Court. Studies of these models demonstrate that they more meaningfully engage victims with the justice system than processes that do not provide legal counsel and mitigate harm in various ways.⁸ For example, after the U.S. Military implemented the Special Victims Counsel (SVC) model, complainants of sexual assault were interviewed about their experience and found to be “extremely satisfied” with their counsel’s effectiveness.⁹ More importantly, a study of the branch of the military first to use the model (the Air Force) showed that reporting rates for sex crimes increased dramatically.¹⁰ In 2014 the program became mandated to all U.S. Military branches, and

⁷ *Supra* note 2.

⁸ I Bacik, C Maunsell and S Gogan, *The Legal Process and Victims of Rape* (1998), online: Dublin Rape Crisis Centre < <http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>> at 51.

⁹ U.S. Dept of Defence, *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, Annex 98, online: < https://responsesystemspanel.whs.milpublic/docs/Reports/00_Final/RSP>.

¹⁰ Erin Gardner Schenk & David L Shakes, “Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military” (2016) 6 U Denver Crim L Rev 1 at 7, referring to R. CHUCK MASON, CONG. RESEARCH SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS 8 (2013) at 8.

in December 2020, due to the success of the program, it expanded the pool of clients to be served by SVCs to include victims of domestic violence offences.¹¹

1.1.2 Rape Myths and Gender Stereotypes

This and other examples support my contention that complainant’s legal counsel could ameliorate the poor treatment of sexual violence complainants by the criminal justice system. In my analysis that poor treatment violates women’s equality and security rights under the *Canadian Charter* and is discriminatory under the *Canadian Human Rights Act*. Supporting evidence can be found not only in the disproportionate impact of these processes on women, but also in the reality that these processes give rise to reliance on rape myths and gender stereotypes that are harmful to women. The former Ontario Human Rights Commissioner described the phenomenon as “systemic bias against women – which is a human rights issue.” She went on to describe the basis of her assertion regarding police investigation of sexual offences in the following way:

Like much of the systemic discrimination in the criminal-justice system, failure to properly investigate and prosecute sexual offences likely begins with an overreliance, whether consciously or unconsciously, on stereotypes. These stereotypes or rape myths are myriad and well documented: stereotypes about the types of women who get assaulted, how they should behave during an assault and how they should behave afterward.¹²

Current policies and practices inadequately protect survivors from myths and stereotypes that should play no role in a criminal prosecution and should not be permitted to cause

¹¹ Joseph Lacdan, “Arm to widen scope of legal counsel program for victims of sexual assault,” (December 18, 2020) Army News Services, online: https://www.army.mil/article/241926/army_to_widen_scope_of_legal_counsel_program_for_victims_of_sexual_assault.

¹² Renu Mandhane, “Unfounded sexual assault cases: A human-rights issue,” *Globe and Mail* (Feb 16, 2017), online: <https://www.theglobeandmail.com/opinion/unfounded-sexual-assault-cases-a-human-rights-issue/article34047721/>

additional harm to complainants. Providing legal counsel for complainants would be an effective means of providing better protection to sexual violence complainants.

1.1.3 The Problem of No Standing

Sexual violence victims in the criminal justice system have very little control over what happens in court or how they are treated. The fact they have no standing beyond their role as victim-witnesses is a fundamental part of this problem. This lack of agency allows complainants to be harmed or treated unfairly because they have no legal voice to oppose unfair and/or harmful practices. The legal standing that I envision would permit legal counsel to act on behalf of sexual violence complainants for legal matters arising at trial (or before) related to their privacy, dignity and security. A complainant's counsel could raise and address with the court issues of unfairness or harm to the complainant that would most likely otherwise be ignored. Counsel could better protect complainants' privacy, dignity and security through motions and objections requiring court rulings. This is important because sexual violence complainants are particularly vulnerable to harm due to the private nature of the crime and because rape myths and gender stereotypes often arise. Research shows that complainants in sexual assault proceedings continue to be traumatized and "[d]espite decades of reform to the rules of evidence and the substantive law of sexual assault, the trial process remains deeply harmful for many of those who allege sexual violation."¹³ The harms suffered by these complainants include secondary victimization, retraumatization and associated Post-Traumatic Stress

¹³ *Ibid* at 6 - 7.

Disorder.¹⁴ Consequently, as it stands, victims of sexual offences must risk psychological harm or re-victimization by the criminal justice system in order to seek justice.

This is not only unfair but, I argue, discriminatory under the *Canadian Human Rights Act* and constitute breaches of the right to equal access to justice and security of the person under ss. 15 and 7 of the *Charter*. What is more, the criminal justice system's approach to sexual offences also exacerbates systemic racism and ongoing colonialism that disproportionately impacts Indigenous women.¹⁵ Hence, there is an urgent need to reform the criminal justice system so that sexual violence survivors can access it without fear of re-victimization.

1.1 4 My Proposed Solutions

A legal model that provides state-funded legal representation for sexual violence survivors, and that also grants them standing in court for the purpose of protecting their privacy, integrity and personal security rights, would help to mitigate survivors' experiences of re-victimization and increase their reporting rate. Similar models already exist in a number of countries worldwide, including in the International Criminal Court, and those models have made meaningful improvements to complainants' experiences in those jurisdictions.¹⁶ In fact, some notable international studies have addressed the value

¹⁴ Margaret Garvin & Douglas Beloof, "Crime Victim Agency: Independent Lawyers of Sexual Assault Victims," (2015) 13.1 OSJCL 67 at 70; Lori Haskell & Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know" (2019) Justice Canada at 11, online: <<https://www.justice.gc.ca/eng/rp-pr/jr/trauma/index.html> >

¹⁵ "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls," June, 2019, online: <https://www.mmiwg-ffada.ca/final-report/>

¹⁶ *Supra* note 8 at 17-18.

of legal counsel to victims of sexual violence,¹⁷ and found that having one's own lawyer can improve a victims' confidence, reduce their stress, and give rise to better memory capacity and better quality of testimony.¹⁸ One frequently referenced study determined that:

A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.¹⁹

Regarding state funding of complainants' legal counsel, in *R v T.P.S.*²⁰ the Nova Scotia Supreme Court considered the issue in a criminal admissibility hearing in Nova Scotia. In determining that the province should provide the funding, Justice Lynch stated:

[24] I must consider whether the appointment of state-funded counsel for the complainant in a s. 276 application is needed to promote trial fairness, whether there is a strong public interest requiring such an order, whether it is just or equitable to make such an order. I must exercise the inherent jurisdiction with caution and not contravene any statutory authority.

[25] If the complainant does not have counsel, her interests will not be fully before the court. Crown counsel cannot substitute as counsel for the complainant, that is not the role of the Crown. The accused has counsel and his interests will be before the court. It would be an injustice to this complainant and to all complainants if they are unable to exercise their right to be represented by counsel to protect their privacy and personal dignity. It is fair and just that the complainant be represented by counsel to protect her privacy and equality interests and rights.

¹⁷ Fiona Raitt, "Independent Legal Representation for Complainers in Sexual Assault Trials" (2010) Rape Crisis Scotland, online:

<<https://www.rapecrisisscotland.org.uk/publications/IndLegalRepReport-2010.pdf>>.

¹⁸ Kerstin Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?" (2014) 25:3 Current Issues in Criminal Justice 819 at 825.

¹⁹ Bacik, Maunsell and Gogan "The Legal Process and Victims of Rape" (1998), Dublin Rape Crisis Centre, online: < <http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>

²⁰ 2019 NSSC 48.

In addition to state-funding, it is equally important that counsel, as the complainant's representative, be granted standing in the model I propose. Without standing counsel's role is limited to providing only legal information and advice. Standing is required so that counsel can protect complainants' privacy, dignity and equality rights, since without it counsel is not entitled to question witnesses, make objections or make submissions to the court.

Further, Canada has already embraced victim legal representation and victim standing as part of the legal landscape in multiple areas of the law. Examples can be found in administrative law regarding disciplinary hearings, in human rights law procedures, and even within the criminal law for specific admissibility and production hearings. Our country is therefore well positioned to adopt a model of state-funded victim representation in sexual assault cases, which includes standing for specific issues related to fairness to complainants, in the criminal process. These reforms will assist with removing existing barriers and limiting harms experienced by sexual violence victims while upholding the values of a free and democratic society.

1.1.5 Current Canadian models of Victim Representation

Two models already in place in the Canadian legal landscape that allow legal representation for victims and therefore suggests that the legal reform I am proposing for the criminal justice system is feasible. First, the *Criminal Code of Canada*²¹ authorizes legal representation and standing for victims of sexual offences in admissibility hearings regarding private records or sexual activity other than the alleged offences, under

²¹ RSC 1985, c C-4.

subsection 278.94. Second, complainants under the *Canadian Human Rights Act* have standing as parties with the Canadian Human Rights Tribunal even when the Canadian Human Rights Commission is a party to the claim.

Regarding the *Criminal Code* provisions, the Supreme Court of Canada has now confirmed the constitutionality of the regime under subsections 278.92 to 278.94 of the *Criminal Code* that allows legal representation for complainants of sexual offences during admissibility applications for private records or for evidence of sexual activity other than that included in the allegations. In *R v J.J.*,²² the majority found that the regime was justified for the purpose of:

- (1) protecting the dignity, equality, and privacy interests of complainants; (2) recognizing the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes.²³

The Court determined that complainants' participation is justified in these circumstances because they have a "direct and necessary interest in making representations,' and would be 'directly affected by a decision affecting the production of their private records'..."²⁴

While, the majority in *J.J.* is clear that this specific regime does not bestow participatory rights on the complainant in the trial itself, the Court leaves open the possibility that new legislation allowing for such participation may be found constitutional. Indeed, the Court's justification for the constitutionality of complainants' participation in the section 278 regime could be seen to support additional complainant participation in the trial itself. The Court held:

²² 2022 SCC 28.

²³ *Ibid* at para 139.

²⁴ *Ibid* at para 177.

An important justification for complainants' participation is that they have a unique perspective on the nature of the privacy interest at stake in their own records. Far from becoming a "second prosecutor", a complainant's contributions are valuable exactly because they are different from the Crown's. This may also strengthen the appearance of prosecutorial independence because the Crown no longer bears the burden of representing or conveying to the judge the complainant's perspective on whether the records should be admitted. This is especially significant where the complainant and Crown differ on the issue of admissibility.

There are other situations in which third parties are permitted to participate in criminal trials where they have interests at stake. For example, victims providing victim impact statements at sentencing hearings or media participants making submissions regarding publication bans both have participatory rights in the courtroom. These participatory rights do not distort the bipartite nature of the criminal proceeding.²⁵

Accordingly, the Supreme Court has not only endorsed a model of victim legal representation to protect complainants' privacy interests, but also has set parameters that may allow future legislation to authorize additional legal representation of complainants.

A second example involves human rights claims made under the *Canadian Human Rights Act (CHRA)*. Once a matter is referred to the Canadian Human Rights Tribunal (Tribunal) in some cases the Canadian Human Rights Commission (Commission) acts as a party in the proceeding. In such cases both the complainants and the Canadian Human Rights Commission (Commission) are parties advocating for the same side, that is, arguing that the Respondent has breached the *CHRA*. The Tribunal is permitted to hear from both the Commission and the complainant as parties since they are seen to represent different interests. The Commission represents the public interest in the claim and the complainant represents their personal interests. The Commission holds

²⁵ *Ibid* at paras 179 and 180.

itself out as a human rights watchdog on behalf of Canadians, working independently from the government. Its website indicates:

The Commission helps ensure that everyone in Canada is treated fairly, no matter who they are. We are responsible for representing the public interest and hold the Government of Canada to account on matters of human rights.²⁶

In this way, the Commission in some significant ways mirrors the Crown prosecutor's role in a criminal matter, in representing the public interest. The Commission's participation however does not render the complainant's role unnecessary. It follows, therefore, that allowing legal counsel to represent the complainant's interests in a sexual violence criminal matter would similarly not overlap or interfere with the role of the Crown prosecutor. It would simply permit the interests of the complainant to be more effectively addressed and protected.

The Human Rights Tribunal's recognition of the distinct but important interests of both the public and the individual complainant serves as a model for the criminal process. While the purpose of the human rights process is distinct from the criminal process, both systems place value on the fair treatment of those who engage the systems. And as pointed out in *J.J.*, trial fairness must include not only the interests of the accused, but also the interests of the complainant and the community:

As this Court affirmed in *Darrach*, an accused is not "entitled to have procedures crafted that take only [their] interests into account. Still less [are they] entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial" (para. 24). Nor is the broad principle of trial fairness assessed solely from the accused's perspective. Crucially, as this Court stated in *Mills*, fairness is also assessed from the point of view of the

²⁶ Canadian Human Rights Commission website, online at: <https://www.chrc-ccdp.gc.ca/en/about-us>.

complainant and community (para. 72, citing *R. v. E. (A.W.)*, [1993 CanLII 65 \(SCC\)](#), [1993] 3 S.C.R. 155, at p. 198).²⁷

Accordingly, the process used by the Canadian Human Rights Tribunal provides support for the argument that reform to polices to allow for victim representation in criminal sexual violence cases is not only feasible but also desirable as a process designed to instill more fairness, viewed from the perspective of complainants and the community.

1.2 THESIS OVERVIEW

1.2.1. Why is reform required?

The problem of high rates of sexual violence and low rates of reporting has gone unchanged for decades.²⁸ Significant criminal justice reform is required to instill trust in a system in which sexual violence victims lack confidence.²⁹ Elaine Craig aptly identifies the gravity of the social issue as follows:

When the overwhelming majority of women who are sexually assaulted do not report these experiences, sexual violence is more readily constructed as a series of personal and unspeakable events or isolated incidents, rather than a societal practice of systemic gender discrimination. The phenomenon of widespread, gender-based sexual harm is personalized rather than understood as a social problem, a symptom of severe societal dysfunction that demands systemic, public responses.³⁰

That is why research into the potential benefits that victim standing and legal representation could offer the criminal justice system is necessary. Such reform could boost trust and confidence in the system by reducing re-victimization and improving the overall experiences of sexual violence victims when accessing the justice system.

²⁷ *R v J.J.*, *supra* note 16 at para 125.

²⁸ Conroy, S. and A. Cotter. 2017. "Self-reported sexual assault in Canada, 2014." *Juristat*. Statistics Canada Catalogue no. 85-002-X.

²⁹ *Supra* note 1 at p 3.

³⁰ *Ibid* at p 21.

The time is ripe for legal reform in the current social and political context. The #metoo movement has signaled that survivors of sexual violence no longer accept the status quo that silences and shames victims and provides no adequate recourse in the legal system.³¹ More recently, demonstrations by Black and Indigenous groups seeking equality and justice, including in the criminal justice system, and the widespread political support that those movements have garnered, reveals the existing mood for reform by individuals and possibly also by government.³² The Canadian government's withdrawal of financial support to sport organizations such that are seen to be inadequately dealing with abuse allegations, such as Hockey Canada³³ and Gymnastics Canada,³⁴ also signals the government's sensitivity to the plight of survivors of abuse and the need for change.

1.2.2 Audience

This thesis is directed to an audience of legal academics, practitioners and others concerned about the poor treatment of female survivors of sexual violence. My work aspires to inspire advocacy on behalf of survivors of sexual violence to reform policies

³¹ Jane Manning, "Munk Debates: Debating the #Metoo Movement - We've still got a long way to go," National Post, July 16, 2020, online: <https://nationalpost.com/opinion/munk-debates-debating-the-metoo-movement>

³² Jane Gerster, "Trudeau's government has a plan to tackle racism in the RCMP. Experts say it won't work," Global News, June 23, 2020, online: <https://globalnews.ca/news/7079704/rcmp-canada-racism/>

³³ Joshua Clipperton, "Sports minister freezes Hockey Canada's government funding in wake of sexual assault settlement," *Canadian Press* (22 June 2022), online: <<https://www.cbc.ca/sports/hockey/sports-minister-freezing-hockey-canada-government-funding-1.6497543>>.

³⁴ Rachel Brady, "Federal government freezes Gymnastics Canada funding amid calls for investigation," *The Globe and Mail* (22 July 2022), online: <https://www.theglobeandmail.com/canada/article-federal-government-freezes-gymnastics-canada-funding-amid-calls-for/>.

regarding their treatment in the criminal justice system and to advance equality and fairness for them during the criminal process.

However, beyond survivors themselves, other stakeholders may benefit from the law reform proposed, such as law enforcement officers and professionals working in the administration of justice, including policy makers. A model for legal representation of sexual assault survivors that from the outset includes support from and information by legal counsel will have multiple benefits. For example, it may ease the work of law enforcement in conducting interviews and liaising with complainants by having a point person who can confidentially answer questions and explain the process. This extra support may result in improved investigations because investigators have better communication with and may get better information from the complainant through their legal counsel. Similarly, during the court process, assistance provided to complainants by their own counsel could reduce some of the responsibilities for crown counsel and victim assistance programs such as providing explanations and instructions. Moreover, complainants' counsel could provide extra preparation to complainants that may result in better complainant testimony and stronger cases. Even the judiciary may benefit by being assured that the victims' interests are not being overlooked and thereby enhancing trial fairness by having all interests represented.

But perhaps the most important potential benefactor of the reform my research seeks to produce is the broader Canadian society. If my proposed reform even marginally improves the reporting rates of sexual violence, society will be well served, since increased reporting could lead to increased convictions. And, if a would-be perpetrator

perceives a higher chance of being reported and convicted, that deterrent effect could help reduce the rate of sexual violence in Canadian society, particularly against women.

1.2.3 Format and Methodology

The format of this thesis will be an integrated article format. Three articles are organized into three Chapters with two sub-chapters that provide the logical connections between the articles.

The methodology for my research is a doctrinal analysis of primary and secondary sources of law, jurisprudence, scholarly articles, research studies and formal reports. My analysis applies an intersectional feminist lens.³⁵ By this I mean that I seek to expose patriarchal ideology and take into account the many forms of discrimination women experience including the impact of multiple forms of inequality that “often operate together and exacerbate each other.”³⁶ I also occasionally draw from anecdotal observations and experiences in my law practice as they relate to the topics discussed.

1.2.4 Scope

The scope of my doctoral research examines Canadian criminal law and also draws on other relevant Canadian legal processes. I review international research concerning countries whose criminal legal systems are comparable to Canada that allow

³⁵Carbado, D., Crenshaw, K., Mays, V., & Tomlinson, B., “INTERSECTIONALITY: Mapping the Movements of a Theory,” (2013) 10:2 Du Bois Review: Social Science Research on Race 303.

³⁶ Kimberlé Crenshaw as quoted in Katy Steinmetz, “She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What it Means to Her Today,” TIME, Feb 20, 2020, online: <https://time.com/5786710/kimberle-crenshaw-intersectionality/>.

for victim legal representation, including some European countries. My research includes examination of the approach to legal representation taken by the United States military and the process for allowing victims' counsel used in the International Criminal Court.

1.2.5 Addressing the Literature Gap

The literature is sparse regarding reform proposals that advocate standing and representation for complainants of sexual violence in Canada. No recent model exists detailing how the reform I am proposing could be achieved in Canada. In fact, the U.S. military model for victim legal representation is so recent that its applicability to Canadian criminal law has yet to be studied. In this way, my doctoral research makes a new and significant contribution to filling a gap in the field, both theoretical and practical.

In my view it is important to note that I have a unique perspective derived from my many years working as a Crown prosecutor and my current legal practitioner experience in criminal, administrative and human rights law. This extensive and practical professional experience as a lawyer is crucial to informing the feasibility of my proposed model of reform, since it often takes concrete experience with the operation of a legal system to fully understand its strengths and weaknesses. My scholarly research is in this way enhanced through my multifaceted legal experience.

Moreover, my argument that the treatment of sexual violence complainants in the criminal justice system violates their rights under the Canadian *Charter* and the *Canadian Human Rights Act* is unique. To my knowledge no scholar has previously provided a detailed analysis supporting those claims as I have in Chapter 3 and Chapter 4.

1.2.6 Limitations

That said, this research does not undertake a quantitative measure of the impact of legal representation and standing to sexual violence survivors from a psychological or sociological standpoint. That is a study that can build from this research, should my proposed model of legal representation for sexual assault victims be adopted.

My doctoral research is limited to critically analysing the current treatment of sexual violence complainants in the criminal justice system and proposing legal representation as a solution to mitigate the harmful consequences, and, more fundamentally to ensure the protection of constitutional and human rights. Further, while this research explores and addresses some anticipated criticisms of my arguments, there may be further criticisms that are not anticipated or addressed. Additionally, there is only a sampling of international models and studies rather than a comprehensive review of all countries that allow victims legal representation. Only materials available in English are reviewed.

1.3 OUTLINE

My doctoral research interrogates the underlying failings of the Canadian criminal justice system in its discriminatory, unequal and harmful treatment of women in relation to sexual offences. It also proposes that those failings could be mitigated by providing complainants of sexual violence with independent legal counsel to represent their interests. My thesis is presented in three integrated articles. In the first article “A Former

Crown’s Vision for Empowering Survivors of Sexual Violence,”³⁷ Chapter 2, the problems experienced by victims of sexual violence who engage the criminal justice system are briefly outlined, followed by an outline of the benefits of independent legal representation. I review some international and domestic models of independent legal representation for complainants of sexual violence and then propose a confidential, trauma-informed model for the Canadian criminal justice system. Next, the potential criticisms of my proposed model are addressed, followed by an examination of the ways in which my proposed model aims to enhance women’s equality rights.

Chapter 3 provides a bridge to the next article by arguing that to persuade the government that the suggested reform should be adopted, proof is required to demonstrate a critical need for policy reform that will improve the treatment of sexual violence complainant in the criminal justice system. One means of providing such proof is through a legal analysis that successfully argues that the current government policies governing that treatment violate the *Charter* rights of female sexual violence complainants.

In the second article “A *Charter* Challenge on behalf of Sexual Violence Complainants,” Chapter 4, I make a case that practices and policies dictating the current treatment of female sexual violence complainants during the criminal process violates their rights under sections 7 and 15 of the *Charter*. The absence of government policies to ensure equality in the application of the law and security of the person when female sexual violence complainants engage the criminal justice system, is the basis of my argument that women’s rights are violated. The argument is based on jurisprudence

³⁷(2020) 37 Windsor Y B Access Just 1.

regarding adverse impact discrimination and further posits that such discrimination is systemic. In applying the principles outlined in Supreme Court’s decision *Fraser v Canada*,³⁸ I demonstrate that the omission of adequate policies regarding the treatment of sexual violence complainants amounts to adverse effect sex discrimination and a violation of section 15. The Supreme Court’s ruling in *R v Morgantaler*,³⁹ and *Canada (Attorney General) v Bedford*⁴⁰ provide support that “state-imposed psychological stress”⁴¹ results in a violation of the right to security of the person under section 7. Further, the combined protection of section 15 and 7 as laid out in *New Brunswick (Minister of Health and Community Services) v G.(J.)*⁴² bolster my argument. A section 1 analysis concludes that the appropriate remedy for the impugned violations would be a direction to Parliament to draft new policies to better protect complainants from harm by the legal process. I conclude that one of the most effective approaches to achieving that objective would be to allow complainants state-funded legal representation.

Next, in Chapter 5, I connect the claim in Chapter 4 that the government treatment of female sexual violence complainants violates their *Charter* rights to the argument in Chapter 6 that the same treatment also discriminates against female survivors under the *CHRA*. By critiquing the policies that govern treatment of sexual violence complainants from this additional angle, the critical need for reform of these policies to alleviate systemic discrimination against women survivors of sexual violence is emphasized.

³⁸ 2020 SCC 28.

³⁹ [1998] 1 SCR 30.

⁴⁰ 2013 SCC 72.

⁴¹ *R v Morgantaler*, *supra* note 29 at para 56.

⁴² [1999] 3 SCR 46 at para 112.

The third article “Systemic Discrimination Against Female Sexual Violence Victims,” Chapter 6, makes the case that practices and policies dictating treatment of sexual violence complainants in the criminal justice system violates their human rights under the *CHRA*. The claim interrogates the government policies’ ability to inform, protect and allow participation for complainants of sexual violence and concludes that its failure results in adverse impact discrimination. Moreover, the current policies fail to protect against rape myths, gender stereotypes and misunderstandings about trauma, all of which harm female survivors. The article looks at the nature of the policies, how they require change and then uses an analogy comparing the government’s relationship to survivors to an employer’s relationship to its employees. It then establishes through reference to jurisprudence that a group of female sexual violence complainants could make out a *prima facie* case of discrimination against the government under the *CHRA*. Exceptions to liability under the *CHRA* are examined and I conclude that on a balance of probabilities no *bone fide* justification would succeed. Finally, systemic remedies for the alleged discrimination are considered, including the provision of state-funded legal counsel for sexual assault victims. I conclude that reform to the impugned policies is crucial to effect women’s equality.

In the concluding chapter, Chapter 7, the themes of the previous chapters are drawn together and the benefits and limitations of my proposal for state-funded legal representation for complainants of sexual violence are discussed. The impact that the provision of legal representation could have on Indigenous women and girls, who disproportionately experience sexual violence is also considered. I argue that reforming policies about the treatment of sexual violence complainants including allowing

representation by state-funded legal counsel could go a long way in improving the lives of all women and girls who have experienced sexual violence. Moreover, if improved treatment of victims results in more reporting of sexual violence, any potential decline in sexual offending would be to the benefit of all Canadians.

Chapter 2 A FORMER CROWN'S VISION FOR EMPOWERING SURVIVORS OF SEXUAL VIOLENCE

The time has come to make bold changes to the way we treat victims⁴³ of sexual violence in the criminal justice system. We must come to terms with the fact that our current method for combatting sexual violence in Canada is failing. Rates of sexual violence have not improved and only one in twenty victims of sexual abuse report it to the police.⁴⁴ Consequently, the majority of perpetrators act with impunity because the justice system is completely user-unfriendly and thereby cannot hold offenders accountable. The unwillingness of victims to utilize the justice system is highly problematic. Since victims generally want perpetrators to be held accountable, one must surmise that the cost (psychologically and emotionally) is so high that it is prohibitive. The cost of engaging the criminal justice system must be reduced so that it can be genuinely accessible. We cannot expect to see positive change if we continue to do the same thing over and over. The innovation I proposed is to provide all survivors of sexual violence with a right to legal counsel to protect their rights and to facilitate better and equal access to justice.⁴⁵

⁴³ In this article the word ‘victim’ is used interchangeably with the words ‘complainant’ and ‘survivor.’

⁴⁴ Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter (July 11, 2017), online: Juristat <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm> > [Statistics Canada, *Self-reported*].

⁴⁵ While Ontario has implemented a limited independent legal advice (ILA) pilot program, it is insufficient. It provides sexual assault victims with four hours of free legal advice. The criteria require that victims over 16 years old were sexually assaulted in Ontario and live in Toronto, Ottawa or Thunder Bay. As one of the lawyers on the panel of lawyers providing advice, I have found that clients highly value the advice provided but often have needs well beyond its scope. Ontario, Ministry of the Attorney General, “Ontario Victim Services” (last modified 2 April 2020), online: < <https://www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php> >.

My perspective is the product of more than two decades of conducting criminal prosecutions as Crown counsel, and from my post-Crown experience as a lawyer representing survivors of sexual violence in human rights cases, administrative cases and in designated hearings within criminal cases. The sum of my legal experience leads me to the unreserved opinion that survivors of sexual violence risk re-traumatization by engaging the criminal justice system. Indeed, the low reporting rate of sexual violence to police is clear evidence that survivors are reluctant to trust a system that has a reputation for harming them. Hence, it is essential that we make changes that radically improve the reporting rate and/or drastically reduces the incidence of sexual violence in Canada. If we fail to do so, maintaining the status quo will only enable perpetrators of sexual violence to continue their conduct with impunity, and the few victims that report will continue to be harmed by the process. In my view, the most effective way in which to empower survivors of sexual violence is to allow them fully funded legal counsel, who have been trained in trauma, to represent their interests as they engage with the criminal justice system. Rather than a non-lawyer, legal counsel is best positioned to effectively assert victims' rights and best situated to interact with other stakeholders in the criminal justice system.

This is not a revolutionary idea. Many other countries around the world allow legal representation for victims, including the International Criminal Court.⁴⁶ In this paper I demonstrate that other countries' experiences point to clear benefits in allowing such legal

Nova Scotia, Alberta, British Columbia also have ILA programs that provide only legal advice rather than legal representation.

⁴⁶ Office of Public Counsel for Victims, International Criminal Court, "Representing Victims Before the International Criminal Court: A manual for legal representatives," (2010), online: <<https://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF>>.

representation. I argue that legal representation provides survivors more control and agency in the aftermath of sexual violation, it enhances the level of respect and compassion shown to survivors, it improves attention to their needs, and more meaningfully engages them within the justice system. Most importantly, legal representation helps mitigate harm and re-traumatization experienced by survivors by providing them a legal voice, a representative who understands trauma and will stand up for their rights and advocate for their best interests.

In support of my proposal for legal representation for survivors, I consider the problems experienced by complainants of sexual violence who engage the criminal justice system and describe the benefits that legal representation provides. I outline structures that have been proposed internationally and delineate a model of legal representation recently implemented in the U.S military, before setting out the details of the confidential and trauma- informed model I suggest.

Finally, I show why the standard criticisms of this proposal from defence counsel are not warranted. I conclude with an analysis regarding equality rights under the *Charter*⁴⁷ that outline why our current process is discriminatory and undermines the equality of women and their access to justice. For these reasons I conclude that providing legal representation offers overwhelming value to survivors of sexual violence and improves their safety, security, equality and healing.

2.1 PROBLEMS EXPERIENCED BY VICTIMS OF SEXUAL VIOLENCE IN THE CRIMINAL JUSTICE SYSTEM

⁴⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 [*Charter*].

The Supreme Court of Canada has recognized the unique violation sustained by victims of sexual assault. In *R v Ewanchuk*⁴⁸ the court declared that:

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.⁴⁹

Moreover, in *R v Osolin*⁵⁰ Justice Cory observed that:

[S]exual assault is very different from other assaults. It is true that it, like all other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.⁵¹

Canadian statistics show the rate of charging, prosecuting and convicting for sexual assault is lower than for any other type of violent crime.⁵² Statistics from 2014 also show that of sexual assaults experienced by persons 15 years and older, only 5% were reported to the police.⁵³ Additionally, 43% of the cases reported resulted in charges laid, and only 43% of the charges laid ended with convictions.⁵⁴ The result is that less than 1% of those who experienced sexual assault saw the perpetrator convicted. These figures convey a discouraging reality - that victims of sexual assaults have very little chance of receiving justice through the court system. Indeed it seems that victims' lack of faith in the criminal justice system is borne out by their low reporting rates. One might even surmise that the

⁴⁸ [1999] 1 SCR 330.

⁴⁹ *Ibid* at para 28.

⁵⁰ [1993] 4 SCR 595.

⁵¹ *Ibid* at para 165.

⁵² Statistics Canada, *Self-reported*, *supra* note 1 at 3 (statistics from 2014).

⁵³ *Ibid*.

⁵⁴ *Ibid*.

#MeToo movement was a response to the lack of genuine access to justice through the criminal justice system - a societal bubbling-over resulting from the inadequacy of any other outlet.

While survivors' lack of confidence in the system is evident, the reasons warrant examination. A survey by Statistics Canada found that reasons for not reporting included fear of not being believed, shame and self-blame, uncertainty about the ability of the police to help, fear of the perpetrator, and fear of the criminal justice system.⁵⁵ Many of these fears stem from a criminal justice system that is insensitive to the needs of victims and lacks respect and compassion. Furthermore, the shame experienced by many survivors is aggravated and reinforced by their interactions with lawyers and judges whose treatment of survivors is shaped by gender stereotypes and employing rape myths.⁵⁶ The end result is that many complainants of sexual assault who engage the criminal justice system feel re-victimized by the process.

2.1.2 Re-Traumatization In The Criminal Justice System

Re-victimization is often a result of a negative experience in the justice system that causes new trauma in addition to pre-existing trauma. Examples of such negative experiences include making a report to police and feeling disbelieved, or undergoing aggressive and humiliating cross-examination in court. The notion of re-traumatization is validated by numerous studies that conclude that the impact of testifying in a sexual assault

⁵⁵ Statistics Canada, "Measuring Violence Against Women, Statistical Trends 2006," (last modified 17 October 2006), online: <<http://www.statcan.gc.ca/pub/85-570-x/2006001/findings-resultats/4144393-eng.htm>>.

⁵⁶ Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 9.

trial is harmful and traumatizing.⁵⁷ More specifically, Garvin and Beloof assert that failure to respect victims' autonomy and agency in sexual assault cases causes secondary victimization. This re-traumatization has been associated with many forms of distress for victims including post-traumatic stress disorder [PTSD].⁵⁸ A well-quoted passage by clinical psychiatrist Judith Herman explains, "if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law."⁵⁹

Melanie Randall and Lori Haskell posit that potential re-traumatization caused by engaging the criminal justice system necessitates a trauma-informed approach to processing criminal matters.⁶⁰ Such an approach requires justice officials to recognize and understand the complexities of trauma's impact and responses to it.⁶¹ They stress the importance of delivering services in a way that avoids inadvertent re-traumatization and harm to individuals accessing justice.⁶²

Understanding that "trauma is subjective"⁶³ is crucial to recognizing the different ways in which an individual may respond to an event that is frightening and out of one's control.

⁵⁷ *Ibid* at 4.

⁵⁸ Margaret Garvin & Douglas Beloof, "Crime Victim Agency: Independent Lawyers of Sexual Assault Victims" (2015) 13:1 Ohio St J Crim L 67 at 70.

⁵⁹ Judith Herman, "The Mental Health of Crime Victims: Impact of Legal Intervention" (2003) 16 J Traumatic Stress 159 at 160-61.

⁶⁰ Melanie Randall, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) Fall 2013 Dal LJ 501 at 518.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ Lori Haskell & Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know" (last modified 26 March 2019), online: Justice Canada <<https://www.justice.gc.ca/eng/rp-pr/jr/trauma/index.html> > at 11.

An individual's previous life experiences provide a critical lens through which a traumatic event is processed.⁶⁴ Consequently, those administering the criminal justice system that have never experienced sexual violence may unknowingly submit survivors to an environment that is highly traumatizing. While there is a clear need for education regarding trauma for all judges, lawyers, police officers, and other service providers in the justice system, a trauma-informed legal counsel would be well placed to advocate for survivors' protection from trauma throughout their legal experience.

It is important to understand the role of trauma in the justice system for a number of reasons. There are features of traumatic experiences that are beyond common knowledge, particularly regarding trauma's impact on the neurobiology of the brain. For example, in the face of a serious threat, the brain releases stress hormones that dramatically impair the functioning of the prefrontal cortex and reduce one's ability to reason, plan, think and even code the experience sequentially.⁶⁵ After experiencing a traumatic event, survivors may not be able to explain why they acted in the manner they did, thereby exacerbating their feelings of shame and self-blame.⁶⁶ Furthermore the stress hormones released may also cause survivors to experience a "freeze" response during a traumatic event, a reaction that can also lead to feelings of confusion and guilt.⁶⁷

Recall of traumatic events is also compromised because of neurobiology. The way the brain encodes traumatic events impacts the retrieval of those memories. Thus, it is important for justice officials conducting interviews of survivors to understand those

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 13.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 15.

implications and adjust their interview strategies. They must understand that sufficient time needs to have elapsed for memories to be properly consolidated after a traumatic event and even then, some memories may be fragmented or enhanced, such as “flashbulb memories.”⁶⁸ Interview techniques must be non-confrontational and focus on inquiries about sensory and emotional memories in order to elicit the most fulsome evidence possible.⁶⁹

Most importantly, interviewers must understand that the attitude and treatment of survivors, such that they are respected and believed, is paramount to the success of the investigation and the recovery of the survivor. This is particularly important when the abuse experienced by the survivor involved a power imbalance similar to the dynamic with the interviewer.⁷⁰ As Haskell and Randall point out, interviewers must comprehend that “[i]t is possible to be both neutral and impartial, and to be compassionate and empathetic.”⁷¹

The question is, who will hold the justice system accountable for implementing these best practices for a trauma-informed approach. In my view, properly trained legal counsel for survivors of sexual violence would be in the best position to ensure that appropriate standards are upheld and survivors are protected from re-traumatization.

There are numerous systemic barriers to participation for victims of sexual assault that could be lessened by the intervention of trauma-informed legal counsel. Marianna Carrera points to the intrusive and repetitive police investigations and rigorous cross-examinations,

⁶⁸ *Ibid* at 19.

⁶⁹ *Ibid* at 22.

⁷⁰ *Ibid* at 24 and 25.

⁷¹ *Ibid* at 27.

often concerning very personal issues such as mental health, substance abuse and relationship problems, as examples of a harmful process that can repel participants.⁷² This is echoed in the Holly Johnson's research findings that many survivors of sexual violence who report to police feel disbelieved and are thereby discouraged to proceed.⁷³ Furthermore, fewer than half of those in her study who reported to police felt they received an explanation of the process or had their questions fully answered.⁷⁴ Johnson questions the ability of police agencies on their own to change the current power structures that enable rape myths and poor treatment of sexual assault complainants to persist.⁷⁵

The problem of victims experiencing injury by engaging in the criminal justice system may be compounded by the potential harm their silence causes to the criminal justice system as a whole.⁷⁶ According to Garvin and Beloof, when disempowered victims lose confidence in the system and stop reporting their victimization, they become an excluded part of the community's identity and that weakens the fight against sexual violence.⁷⁷

2.2 THE BENEFITS OF INDEPENDENT LEGAL REPRESENTATION

International research has demonstrated the efficacy of providing independent counsel to sexual assault survivors as they make their way through the trial process. For example, the benefits of legal representation to victims of rape were considered in an Irish study

⁷² Marianna Carrera, "Moving Past Barriers in Reporting Crime, Considering the need for a national comprehensive policy framework for victims of sexual assault in Canada" (2015) 6:2 Public Pol'y & Governance Rev 5 at 6.

⁷³ Holly Johnson, "Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police," (2017) 29 CJWL 36 at 49.

⁷⁴ *Ibid* at 55.

⁷⁵ *Ibid* at 59.

⁷⁶ Garvin & Beloof, *supra* note 58 at 71.

⁷⁷ *Ibid*.

comparing the legal processes of 15 European states (the Irish Study).⁷⁸ It found that the trauma experienced by engaging the legal process and the consequent secondary victimization could be reduced by fully informing survivors about their cases and their role in the process, and by allowing them to participate in the proceedings as much as possible.⁷⁹ The report reviewed previous studies that found that it was necessary for victims to have an opportunity to be involved in the process and to voice their concerns, in order to experience satisfaction with the justice system and to experience psychological healing.⁸⁰

Another study reviewed by the report found that victims' participation in the criminal justice system enhanced their perception of how fairly they were treated by the authorities, which in turn increased their satisfaction with their experience of the justice system.⁸¹ Ultimately, this research indicated that the factor having the most impact on victims' satisfaction with the justice process was the level of dignity and respect they were accorded.⁸² The authors of the Irish study conclude that the factors required to improve rape victims' experiences in the justice system were the perception of being listened to, believed, guided, protected and offered services that met the women's needs.⁸³

⁷⁸ I Bacik, C Maunsell and S Gogan, *The Legal Process and Victims of Rape* (1998), online: Dublin Rape Crisis Centre <<http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>>

⁷⁹ *Ibid* at 50

⁸⁰ *Ibid* at 51, referring to E Erez, 'Victim participation in sentencing: rhetoric and reality' (1990) 18:1 J Crim Justice 19.

⁸¹ *Ibid* at 53, referring to J Wemmers, 'Victims in the Dutch Criminal Justice System: the effects of treatment on victims' attitudes and compliance' (1995) 3 Int'l Rev Victimology 323.

⁸² *Ibid*, referring to M Joutsen, 'Victim participation in proceedings and sentencing in Europe' (1994) 3 Int'l Rev Victimology 57.

⁸³ *Ibid* at 59.

A highlight of the Irish study was the conclusions the researchers drew after they compared the legal systems of 15 European states regarding their provisions of legal representation for victims of sexual crimes. The findings outlined in the following passage have been frequently referenced in the literature.

As Bacik et al note:

A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.

Participants also found it easier to obtain information on the investigation and trial process when they had a lawyer, but were less satisfied with the state prosecutor, perhaps because they had higher expectations of the prosecutor as a result of their positive experience with their own lawyer. Overall, the impact of the legal process on the family of the victim was also lessened where the victim was legally represented.

Where participants had a victim's lawyer, their lawyer was the main source of information concerning bail, trial process etc. Some problems were experienced in relation to state-funding of lawyers, since in some countries the qualification threshold for the means test is very high. Finally, the victim's lawyer was the legal officer with the highest satisfaction rating among the sample...⁸⁴

Hence, the study supported the notion that legal representation for victims of sexual assault significantly improves their experience of the criminal justice system.

2.3 MODELS OF INDEPENDENT LEGAL REPRESENTATION

2.3.1 Internationally

The findings of the Irish study have been met with enthusiasm. Scholar Fiona Raitt conducted a study in 2010 to explore the feasibility of introducing independent legal

⁸⁴ *Ibid* at 17-18.

representation for complainants of sexual offences in Scotland.⁸⁵ She cites data from previous Scottish research indicating that those who report sexual offences have been critical of police conduct, investigative medical procedures, poor collection and preservation of evidence, and the humiliating cross-examination techniques used by defence counsel.⁸⁶ These complainants were particularly offended by the culture of disbelief exhibited during the investigation and prosecutions of their cases.⁸⁷ Raitt observes that there appears to be a ‘disconnect’ between the ambitions of politicians and the reality of victims’ experiences in court.⁸⁸ She relies on the Irish Study to support her proposed model of legal representation, and argues that criticism that the study is not applicable to the adversarial style justice system is unwarranted, as many of the European countries in the study have legal systems containing elements of the adversarial style.

In Australia, a similar proposal for independent legal counsel has been made by Kersten Braun.⁸⁹ That country also seeks to improve the experience of testifying for victims of sexual assault, as one means to improve reporting and conviction rates.⁹⁰ Braun cites studies showing that law reforms to date have been unsuccessful in achieving those goals,⁹¹ and relies on the Irish Study to support the benefits to victims of allowing independent legal counsel.⁹² She suggests that legal representation could fill an existing gap in the

⁸⁵ Fiona Raitt, “Independent Legal Representation for Complainers in Sexual Offence Trials,” (2010), online: Research Report for Rape Crisis Scotland <<https://www.rapecrisisscotland.org.uk/publications/IndLegalRepReport-2010.pdf>>.

⁸⁶ *Ibid* at para 1.06.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 1.07.

⁸⁹ Kerstin Braun, “Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?” (2014) 25:3 *Current Issues in Criminal Justice* 819.

⁹⁰ *Ibid* at 819.

⁹¹ *Ibid* at 820.

⁹² *Ibid* at 822.

protection of sexual assault victims.⁹³ Further, it would enhance the courts' sensitivity and make the needs of victims more visible.⁹⁴

In the quest for the best model of independent legal representation for victims of sexual offences, some commentators have touted the merits of the Danish system. Senior researcher Dee Smythe sees it as a system offering meaningful reform options for South Africa.⁹⁵ She outlines the key factors of this state-funded legal representation that begins when a complaint is lodged with the police. Of note, is that in Denmark police are duty-bound to inform victims of their right to legal representation before they make even a statement.⁹⁶ The police also have the obligation to keep victims informed of the progress of the sexual assault investigation.⁹⁷ Additionally, the role of the victim's lawyer is very specific. Victim's counsel can be heard at trial, but only regarding matters that directly affect the victim, so they are only present while the victim testifies.⁹⁸ The lawyer does not have the right to cross-examine the accused or to call witnesses, but does have the right to object to questions put to the victim by either the defence or the prosecutor, and can apply for an *in camera* hearing.⁹⁹ Victims' counsel has more leeway at the sentencing hearing and can call witnesses, lead victim impact evidence and request compensation, but cannot make submissions on the sentence that should be imposed. Smythe concludes that the

⁹³ *Ibid* at 825.

⁹⁴ *Ibid* at 824.

⁹⁵ Dee Smythe, "Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences," (2005) 2 S African J Crim Justice 167.

⁹⁶ *Ibid* at 177.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

Danish system would be an ideal way to protect a victim's dignity and privacy rights in the South African criminal justice system.

Regarding the question of best models of legal representation for victims, there is limited data available on victim's experiences while being represented by counsel. However, a large 2014 to 2016 research study into victim's rights and services in European countries measured the satisfaction rate regarding each country's criminal justice system and showed that Denmark had the highest rating with 75% satisfaction.¹⁰⁰ The same study found that victims who report sexual crimes "have three procedural needs: respectful treatment, sufficient and understandable information, and a level and form of participation that is suited to their personal situation"¹⁰¹ Based on that study, one may surmise that Denmark's system of providing legal representation to victims of sexual assault provides a satisfactory level of respect, information and participation.

2.3.2 The International Criminal Court and Independent Legal Representation

An excellent example of a system that recognizes the importance of victims' access to justice is the International Criminal Court [ICC]. This court was set up to try the most serious crimes in the international community and implements a unique approach to ensuring access to justice for some of the world's most vulnerable victims. The Court's architects intended that victim recognition would enhance the Court's ability to pursue truth, peace and justice. Hence, the Court allows victims to present their views and

¹⁰⁰ Emanuela Biffi et al, *Project Ivor - Implementing victim-oriented reform of the criminal justice system in the European Union* (2016), online: <<https://www.apav.pt/ivor/images/ivor/PDFs/IVOR-Repot-WebVersion.pdf>> at 48.

¹⁰¹ *Ibid* at 49.

concerns where their personal interests are affected at any stage of the proceeding that the Court deems appropriate, as long as such presentation does not prejudice the rights of the accused and is consistent with a fair trial. Importantly, it also allows for legal representation of victims in order to present their views, where determined to be appropriate by the Court.

The significance of the role played by victims in the ICC is an important indication that victim participation in the criminal justice process does not have to result in interference with the accused's rights. A UN working paper in 1999 concludes that victim participation is not synonymous with compromising the rights of the accused. It states:

Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant's right to counsel. There is no zero-sum game between those two rights. The victim's right to be treated with respect seems to have little if any negative implications for the offender.¹⁰²

One of the positive outcomes resulting from victim participation in the ICC, then, is the broadening of the objectives achieved by the Court, from strictly retributive, in ending impunity for offenders, to including a restorative aspect, in providing heightened satisfaction to victims.¹⁰³

2.3.3 The United States Military and Independent Legal Representation

¹⁰² Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing, 2008) at 143.

¹⁰³ Giuseppe Zago, "The Role of Victims at the International Criminal Court: Legal Challenges from the Tension Between Restorative and Retributive Justice," (November 2014), online: *Diritto Penale Contemporaneo* <https://www.penalecontemporaneo.it/upload/1415744172ZAGO_2014.pdf> at 2

Closer to home, the U. S. Military’s new Special Victims Counsel model is a particularly compelling model worth emulating in Canada. The necessity for reform in the U.S. military came from a 2012 report showing unacceptable numbers of unreported sexual assault. It estimated that the actual number of sexual assaults to be 26,000, compared to the 3,374 cases that had been reported that year.¹⁰⁴ In response to that disparity, congress passed legal reforms to enhance the military justice process relating to victims’ rights. The goal, according to the Senator Claire McCaskill, was to “make [the] military the most victim-friendly justice system in the world.”¹⁰⁵ Her view was that providing legal counsel to victims of sexual assault in the military was the most important feature of their legal reform. In a Senate hearing regarding the bill proposing the reform she opined:

They are giving victims their own lawyers. They are ramping up the protection, information, and deference they give victims. That is the single most important factor, based on all of my experience, that will dictate whether a victim has the courage to come out of the shadows...¹⁰⁶

As of 2014, the *Victim Protection Act* now provides attorney-client privileged representation by Special Victims Counsel [SVC] for members of the military who have been sexually assaulted.¹⁰⁷ The military’s legal division provides lawyers to victims, independent of the prosecutor and without cost, for the purpose of advising them about the legal process and protecting their privacy interests.¹⁰⁸ The SVC’s primary duty is to

¹⁰⁴ Erin Heuring, “‘Til it Happens to You: Providing Victims of Sexual Assault their Own Legal Representative” (2017) 53 Idaho L Rev 689 at 712, referring to the Department of Defence’s Sexual Assault Prevention and Response Office’s report for fiscal year 2012.

¹⁰⁵ *Ibid* at 713.

¹⁰⁶ *Ibid*, referring to 159 Cong Rec S8303 (daily ed 20 November 2013).

¹⁰⁷ *Ibid* at 712 and Garvin & Beloof, *supra* note 58 at 73.

¹⁰⁸ Erin Gardner Schenk & David L Shakes, “Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the

represent their client's interests during the entire process leading up to and during the court-martial proceedings.¹⁰⁹ Additionally, these lawyers provide education about the military justice system and the resources available to their clients.¹¹⁰

The Air Force was the first branch of the military to put the program of legal representation for sexual assault survivors in place (initially as a pilot program) as well as to conduct a survey about its effectiveness. Their 2014 survey found that 92% of victims represented were "extremely satisfied" with the SVC's advice and support during the court process.¹¹¹ The survey showed even higher ratings for SVC's aid in understanding the process and for recommending the program to other victims.¹¹²

In another compelling report to the United States' President, reporting rates for sex crimes were shown to have dramatically increased after implementing the SVC program.¹¹³ The jump in the number of sexual assault reports from the year before the SVC implementation to the year after was 50%, and after a second year was 76%.¹¹⁴ These numbers have sparked hope that the availability of legal counsel for victims will not only cause the percentage of sexual assault reported to increase, but will also have a deterrent

Military" (2016) 6 U Denver Crim L Rev 1 at 5.

¹⁰⁹ Garvin & Beloof, *supra* note 58 at 73.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at 74, referring to U.S. Dept of Defence, *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, Annex 98, online: <https://responsesystemspanel.whs.milpublic/docs/Reports/00_Final/RSP>.

¹¹² *Ibid*

¹¹³ Schenk & Shakes, *supra* note 105 at 7

¹¹⁴ *Ibid*, referring to Provisional Metrics on Sexual Assault Fiscal Year 2014, Dept of Defence, *Report To The President Of The United States On Sexual Assault Prevention And Response*, 23, (2014), online: <[http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoDReport toPOTUSAppendix B.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoDReport%20toPOTUSAppendix%20B.pdf)>.

effect on sexual violence.¹¹⁵ This notion is supported by studies showing that an increased perceived probability of punishment corresponds to a decreased probability that an individual will behave in the punishable manner.¹¹⁶ Thus, the increased prospect of getting caught may be a deterrent.

This innovative approach to the problem of unreported sexual assault in the military has scholars and commentators advocating for its application to the civilian legal process.¹¹⁷ The U.S. military model has demonstrated that making legal counsel available to provide needed information and advice and to protect victims' rights is a very effective way to ensure that victims of sexual assault are treated with dignity and respect. Rather than engaging a legal process that strips the complainant of any sense of control or agency, allowing victims the right to legal representation in a limited application such as that of the SVC, provides them better access to justice and improved protection. This model is worth strong consideration as a template for legal reform to the Canadian criminal justice system.

2.3.4 Canada's Experience with Legal Representation for Sexual Assault Victims

The need to enhance the effectiveness of the criminal justice system was recognized by Prime Minister Justin Trudeau in 2015 when he called for its examination and review in a mandate letter to the Minister of Justice and Attorney General.¹¹⁸ A report prepared by the Office of the Federal Ombudsman for Victims of Crime agreed that the review was

¹¹⁵ *Ibid* at 7-8.

¹¹⁶ *Ibid* at 6.

¹¹⁷ Garvin and Beloof, *supra* note 58 at 77-85; Schenk & Shakes, *supra* note 105; and Heuring, *supra* note 104 at 728-737.

¹¹⁸ Canada, Office of the Prime Minister, "Minister of Justice and Attorney General of Canada Mandate Letter" (13 December 2019), online: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

necessary to address the public's shaken confidence in the criminal justice system.¹¹⁹ Consequently, after extensive public consultations, a 2017 report by the federal government set out principles to guide the reform of the criminal justice system, which includes "developing a system that shows compassion and respect for victims, meaningfully engages them, and responds to their needs."¹²⁰ Moreover, the report contains recommendations that the government create a position for 'victim navigators' to help victims navigate the criminal justice system and to prioritize the evaluation and monitoring of supports for victims.¹²¹ In my view, these guidelines would best be implemented by providing trauma-informed legal counsel to victims of sexual violence.

While these recommendations are a recent development, even earlier, in 2005 Canadian scholar Larry Wilson had already recognized the need for a legal response to the low reporting rates and the excruciating trial process for victims of sexual assault and proposed legal representation for victims as a solution.¹²² He considered prior developments in Canadian law, showing a trend toward the increased recognition of victims' rights, as an encouraging sign. He postulated that a model of legal representation for victims must respect the accused legal rights, the adversarial process and current service providers, but need not provide them with party status.¹²³ In this way he viewed victims' legal

¹¹⁹ Canada, Office of the Federal Ombudsman for Victims of Crime, "Getting Fair Outcomes for the Victims of Canada's Criminal Justice System" (November 2017), online: <<https://www.victimfirst.gc.ca/res/pub/GFO-ORE/CCJS.html>>.

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² Larry C Wilson, "Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services" (2005) 23 Windsor YB Access Just 249 at 250 and 312.

¹²³ *Ibid* at 285-6.

representation as augmenting the current process and contributing to improvements not only to individual victims, but also to the proper administration of justice.¹²⁴

I agree with Wilson's perception of the legal shift in the last few decades toward valuing the rights of victims, and indeed the trend has continued to the present. The case of *R v O'Connor*¹²⁵ is an example of the Supreme Court of Canada providing victims with formerly unacknowledged privacy rights in the third party records belonging to them. In that case the Court held that the *Charter of Rights and Freedoms*¹²⁶ protected victim's privacy rights and required that they be balanced against accused's right to full answer and defence.¹²⁷ A few years later in *R v Mills*,¹²⁸ the Court found that sexual assault complainants' equality rights under section 15 of the *Charter* ought to be recognized.¹²⁹

Enhanced victims' rights can also be seen in legislative amendments to the *Criminal Code*¹³⁰ which have been ongoing since the 1980s,¹³¹ as well as in Victims Bill of Rights legislation enacted in every province.¹³² Indeed, victims' rights have been deemed important enough to result in the enactment of the *Canadian Victims Bill of Rights*,¹³³ passed in 2015. The act sets out victims' rights under the headings: Information, Protection, Participation, and Restitution. It also provides new rights including the right to

¹²⁴ *Ibid.*

¹²⁵ [1995] 4 SCR 411.

¹²⁶ *Charter*, *supra* note 47 at s 7-8.

¹²⁷ *R v O'Connor* [1995] 4 SCR 411 at paras 128 - 130.

¹²⁸ [1999] 3 SCR 668.

¹²⁹ *Ibid* at para 94.

¹³⁰ *Criminal Code*, RSC 1985, c C-46.

¹³¹ Smythe, *supra* note 122 at 167-8. Smythe created a list of 23 legislative changes made in favour of victims' rights up to the date of the paper. Such changes have continued up to present day.

¹³² Wilson, *supra* note 122 at 271.

¹³³ SC 2015, c 13, s 2.

request testimonial aids when testifying, and to have their views considered by authorities regarding decisions that impact them.¹³⁴ However, despite their aspirational value, these pieces of human rights legislation lack enforcement provisions and have been criticized as toothless.¹³⁵

Perhaps the most significant recent legal development regarding the recognition of victims' rights was the enactment of Bill C-51.¹³⁶ This act amends provisions of the *Criminal Code*¹³⁷ to allow legal representation for complainants of sexual offences in admissibility applications regarding their sexual activities other than the alleged offence.¹³⁸ As a result, survivors of sexual offences are now entitled to representation by independent legal counsel for two types of motions within a criminal trial - applications to admit other sexual activities, and applications to admit third party personal records.¹³⁹ This legal representative is fully funded by several provincial governments,¹⁴⁰ but in my view should be state-funded countrywide. The court in *R v T.P.S.*¹⁴¹ understood the importance of state funding when ruling that the province of Nova Scotia is obliged to fund the complainant's legal counsel. Justice Lynch explained as follows:

It would be an injustice to this complainant and to all complainants if they are unable to exercise their right to be represented by counsel to protect their privacy and personal dignity. It is fair and just that the complainant be

¹³⁴ *Ibid* at s 13.

¹³⁵ Wilson, *supra* note 122 at 278.

¹³⁶ Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, (as passed by the House of Commons 13 December 2018).

¹³⁷ *Criminal Code*, *supra* note 130.

¹³⁸ Bill C-51 enacted section 278.93 - 278.97 and repealed sections 276.1 - 276.5.

¹³⁹ Victims of sexual offences have been entitled to independent legal counsel for third party record applications pursuant to section 278 of the *Criminal Code* since 1997.

¹⁴⁰ Ontario, Nova Scotia and British Columbia fund victim's counsel.

¹⁴¹ *R v TPS*, 2019 NSSC 48.

represented by counsel to protect her privacy and equality interests and rights.¹⁴²

From my personal experience acting as counsel in these applications, the opportunity to have legal representation is highly valued by survivors.

The courts have interpreted this new legislation to permit complainant's counsel the right to receive disclosure of the applications and the right to cross-examine the accused on their affidavit.¹⁴³ These rights have been deemed necessary to give meaning to words of the legislation that allow counsel for the complainant to “appear and make submissions.”¹⁴⁴

That said, unfortunately the legislative changes enacted by Bill C-51 are in the process of being Constitutionally challenged around the country, based on violations of accused's *Charter* rights. One of the grounds argued is that the role of legal counsel, with standing for complainants in these applications, violates the accused's right to a fair trial under section 7 of the *Charter*. More specifically, objection has been raised regarding the requirement that defense counsel reveal their defence not only to the Crown but to the complainant as well, in order to establish an evidentiary foundation for the relevance of the other sexual activity or a record's sexual content.¹⁴⁵ The constitutionality of this requirement for defence disclosure is still unsettled in Canada. It has been found to be

¹⁴² *Ibid* at para 25.

¹⁴³ *R v FA*, 2019 ONCJ 391 at para 65; *R v Boyle* 2019 ONCJ 253 at 5; *R v Boyle* [2019] OJ No 155 at para 42.

¹⁴⁴ *R v Boyle* 2019 ONCJ 253 at para 6.

¹⁴⁵ See e.g. *R v FA*, 2019 ONCJ 391 at para 65.

justified and causing no substantial prejudice to the accused in several cases,¹⁴⁶ but also has been found to breach the accused's *Charter* rights in other cases.¹⁴⁷

However, the defence argument that the complainant's standing in these admissibility hearings gives rise to the appearance of unfairness has generally not met with success.¹⁴⁸

For example in *R v R.S.*¹⁴⁹ Justice Breen reasoned:

A sexual assault complainant's privacy is acutely impacted by testifying at a criminal trial. Historically the law has discriminated against such witnesses, who are most frequently women or children. This mistreatment has resulted in a loss of confidence in the legal system and a widespread reluctance on the part of victims to seek the protection of the law. Affording complainants standing and a right to counsel will improve the quality of justice by ensuring that courts fully appreciate the impact of evidentiary rulings on the privacy interests of witnesses. Extending natural justice to complainants enhances the confidence of complainants and the public in the administration of justice.¹⁵⁰

Based on the courts general agreement that standing for complainants in admissibility hearings does not compromise trial fairness for the accused, my proposal seeks to extend the concept beyond admissibility hearings.

2.3.5 My Proposal - A Confidential, Trauma-Informed Model of Victim Representation

¹⁴⁶ *Ibid* at para 67-68; *R v AC*, 2019 ONSC 4270 at para 43; *R v CC*, 2019 ONSC 6449; *R v Whitehouse* 2020 NSSC 87.

¹⁴⁷ *R v AM* 2019 SKPC 46; *R v DLB*, 2020 YKTC 8 at para 78; *R v Anderson* 2019 SKQB 304; In *R v RS*, 2019 ONCJ 645, Justice Breen found that requiring the Accused to provide disclosure prior to the complainant's cross-examination would cause the Accused's rights to be violated. However, he qualified his ruling that as long as the application is made during the complainant's cross-examination, rather than prior, the process does not prejudice the Accused and is therefore valid.

¹⁴⁸ *R v DLB*, *supra* note 147 at para 83; *R v RS* *supra* note 147 at para 81; *R v FA* *supra* note 145 at para 69.

¹⁴⁹ *Supra* note 147.

¹⁵⁰ *Ibid* at para 81.

The model I propose would not require a restructuring of the current criminal justice system but would provide augmentation similar to a number of other models. An important aspect of legal representation for survivors in this model is the confidentiality that arises from a solicitor-client relationship. Currently, no such relationship exists between survivors and any official with whom they interact in the criminal justice system. In fact, all of their relationships are subject to the opposite of confidentiality. Any information provided by victims requires full disclosure to the other side. This lack of confidentiality for survivors with anyone within the criminal justice system is not consistent with a supportive environment and is potentially a source of significant anguish.

The inability of Crown counsel to provide confidentiality to survivors is also a substantial impediment to victims' fulsome preparation for court. If a Crown receives new information during a witness's preparation, or during any conversation, that information will have to be disclosed to defense counsel. In such a situation the Crown becomes a potential witness and could be disqualified from conducting the prosecution. This risk causes Crowns to minimize the time they spend speaking with witnesses about their evidence and handcuffs their ability to dive into details in a way that would best prepare victims to testify in court. While Crown counsel still maintain a duty to prepare their witnesses¹⁵¹ and should continue in that role, in my experience the ability to have a confidential conversation with a survivor is essential to building trust and providing

¹⁵¹ Alice Woolley, "What Ought Crown Counsel do in Prosecuting Sexual Assault Charges? Some Post-Ghomeshi Reflections" (29 March 2016), online (blog): *ABlawg.ca* <<https://ablawg.ca/2016/03/29/what-ought-crown-counsel-to-do-in-prosecuting-sexual-assault-charges-some-post-ghomeshi-reflections/>>

support. In this way, the solicitor- client relationship is essential to mitigate re-traumatization of survivors throughout the criminal process.

There are five stages in the criminal justice process where legal representation would assist victims in accessing justice: when reporting to the police, during the police investigation, after charges are laid prior to trial, during the trial, and post-trial.¹⁵² At some of these stages the primary role of the lawyer would be to provide information and advice to the victim, for instance at the reporting and investigation stages. Additionally, during the police investigation the victim's representative would be a valuable liaison between the victim and the police regarding important information that could assist the investigation. Counsel could also advocate for the use of trauma-informed interview strategies and best practices (such as delaying the detailed interview to allow for consolidation of memories). The victim's counsel could also convey helpful information for a bail hearing to the prosecutor, such as information about the inappropriateness of a proposed residence or surety. In the case of a plea negotiation, the victim's counsel could allow for the victims' participation by representing their interests and advocating for a resolution that accords with their wishes.

During a trial, the victim's counsel would have the responsibility of ensuring that the victim is properly supported and their rights and interest are protected, particularly regarding any aspect of the process that could lead to re-traumatization. Stipulations similar to those in other jurisdictions could be made allowing for counsel's attendance during the victim's testimony only, and permitting objections to questions by either Crown counsel or defence counsel. Following the trial, upon a conviction, the representative could

¹⁵² Raitt, *supra* note 85.

be involved in presenting victim impact evidence and assisting the victim with compensation/reparation applications. In the case of a not guilty verdict, counsel could assist the victim with options available to them such as a civil claim, or if appropriate advocate for an appeal to the prosecutor.

As shown by some of the studies referred to above, the benefits of legal counsel for survivors of sexual violence are extensive. Legal representation would provide a single contact point for complainants and could result in reducing time restraints experienced by prosecutors and the police. By providing victims with information and preparing them to testify, counsel could lessen the workload for prosecutors and police and ensure that the complainants are properly supported and prepared. Importantly, it could help reduce the trauma experienced by victims throughout their time participating in the criminal process. It could reduce their stress and improve their confidence, thus giving rise to better memory capacity and better quality of testimony.¹⁵³ Better testimony could lead to more convictions, and that together with a more positive experience in the justice system could lead to more reporting of sexual violence.

Providing satisfaction to victims and ensuring that their voice is heard should be an objective of the criminal justice system. This is supported by a resolution adopted by the UN General Assembly regarding the “Intensification of efforts to eliminate all forms of violence against women and girls.”¹⁵⁴ It urges states to develop sustained approaches and

¹⁵³ Braun, *supra* note 89 at 825.

¹⁵⁴ Resolution adopted by the General Assembly 18 December 2014 69/147 Intensification of efforts to eliminate all forms of violence against women and girls, A/69/481 (5 February 2015).

national strategies to eliminate violence against women including empowering women and girls, and gives *inter alia* the following example:

Encouraging the removal of all barriers to women's access to justice and ensuring that they all have access to effective legal assistance so that they can make informed decisions regarding, *inter alia*, legal proceedings and issues relating to family law, and also ensuring that they have access to just and effective remedies for the harm they have suffered, including through the adoption of national legislation where necessary.¹⁵⁵ (emphasis added)

Providing effective legal assistance has been clearly identified as a step that countries should take to eliminate barriers to access to justice for women who have been victimized.

2.4 ANTICIPATING AND RESPONDING TO CRITICISMS OF INDEPENDENT LEGAL REPRESENTATION

Notwithstanding international encouragement, advancing a system for legal representation of sexual violence victims will undoubtedly be met with opposition. The most common objections relate to the cost involved and the lengthening of the proceeding that may result. However the most strenuously expressed concern is that allowing a victims' participation in this way would violate accused individuals' due process rights and compromise their right to a fair trial.

Additional criticisms have been raised by Sarah Moynihan, who argues that injecting the victim's voice into the adversarial system will result in a loss of objectivity in the criminal process.¹⁵⁶ Moynihan disagrees with the validity of balancing the rights of the

¹⁵⁵ *Ibid* at para 20(w).

¹⁵⁶ Sarah Moynihan, "The Voiceless Victim: A critical analysis of the impact of enhanced victim participation in the criminal justice process," (2015) 3 IALS Student Law Rev 25 at 27.

accused with the rights of the victim because the outcome of injustice is different, referring to the risk of incarceration falling only on the accused.¹⁵⁷ She also takes the position that a victim's lawyer representing the victim's interests would introduce a third party into the process and undermine the equality of arms principle, that is, the accused would be required to face a 'double onslaught' by both the Crown and victim's counsel.¹⁵⁸

A response to these objections can be found in the writings of Jonathan Doak.¹⁵⁹ He describes the bi-partisan adversarial system as a confrontational and competitive environment where witnesses are turned into weapons.¹⁶⁰ He points out that the manipulation and control exercised on witnesses is not conducive to genuine listening, understanding or healing of the conflict in issue.¹⁶¹ This justice goal is a valid one.

He explains that historically victims were responsible for prosecuting offenders privately, but in more recent times that responsibility shifted to the state as a form of public law. These two areas of law, private law for disputes between individuals, and public criminal law to protect public interests and impose punishment, are now seen as a strict dichotomy, yet their separation is not necessarily justified.¹⁶² The purist view of criminal law only values the collective interest of society in preventing harm and punishing, and requires all subjectivity to be eliminated, viewing objectivity as essential for the consistency and legitimacy of the justice system.¹⁶³ Doak argues that distinguishing criminal public

¹⁵⁷ *Ibid* at 27-28.

¹⁵⁸ *Ibid* at 29.

¹⁵⁹ Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 *JL & Soc'y* 294.

¹⁶⁰ *Ibid* at 297.

¹⁶¹ *Ibid*.

¹⁶² *Ibid* at 299.

¹⁶³ *Ibid* at 300.

objectives from private interests is artificial.¹⁶⁴ He points out that civil and criminal liability share overlapping concepts of fault, and “public and private wrongs may be conceived as variations along the same continuum of fault.”¹⁶⁵ Thus, he sees the criminal justice system moving toward a more interactive relationship between individual rights of victims and collective interests.¹⁶⁶ In fact, victim restitution orders and restorative justice initiatives are examples of that interaction.

Further, he argues that the principle of equality of arms should apply to a complainant being allowed the protection of legal counsel in the same way as an accused person.¹⁶⁷ He points to the harm sustained to a victim undergoing cross-examination and character attacks in a sexual assault trial and calls it “one of the most significant factors in secondary victimization.”¹⁶⁸ It is at that point where a prosecutor’s duties do not extend to protection of the victim’s well-being, and objections will only be made if strategy dictates. This lack of protection and response to character attacks, harms not only the victim’s sense of dignity and emotional well-being, but also the truth seeking ability of the process, if relevant responses are never heard.¹⁶⁹ Hence, equality of arms should extend to victims through provision of their own legal counsel, to allow them the protection they currently lack.

Finally, in response to concerns about ‘due process,’ Doak agrees that the central focus of criminal trials should always be the determination of guilt regarding the accused, but submits that it does not have to be to the exclusion of other objectives and interests.¹⁷⁰ He

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid* at 301.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid* at 302.

¹⁶⁸ *Ibid* at 306.

¹⁶⁹ *Ibid* at 307.

¹⁷⁰ *Ibid* at 316.

concludes that providing victims of crime an atmosphere of fairness and respect will not detract from trial fairness or the central focus of a criminal trial, and can serve to both protect victims' interests and bolster the integrity of the justice system.¹⁷¹

In my view, the needs of victims can be accommodated without compromising the rights of accused individuals. Defendants lose nothing when victims are spared re-traumatization. Victim representation would not hamper defense counsels' ability to cross-examine complainants regarding relevant trial issues, nor impair their ability to mount a defence. Requiring fairness to one participant in the proceeding does not require that fairness be detracted from another participant. To the contrary, the entire trial process becomes more fair. Moreover, when the criminal justice system fails to address sexual assaults that have gone unreported, key justice goals, such as protection of the public, holding perpetrators accountable and crime reduction, are not being met.¹⁷² Consequently, allowing legal representation to survivors of sexual violence is an effective means of upholding victims' rights in an inherently harmful adversarial process.¹⁷³

2.5 EQUALITY RIGHTS ARE ENHANCED BY THE PROVISION OF LEGAL REPRESENTATION

The importance of victims' rights is particularly significant in the context of sexual assault because of the gendered nature of the crime and its disproportionate impact on women. Internationally violence against women has been clearly linked to gender

¹⁷¹ *Ibid.*

¹⁷² Carrera, *supra* note 72 at 8.

¹⁷³ *Ibid* at 13.

inequality and patriarchal societal norms. In fact the preamble to the United Nations (UN) Declaration of Elimination of Violence against Women states:

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women...¹⁷⁴

Consequently, a failure to report sexual violence contributes to its tolerance and thereby sustains the power imbalance that gives rise to it. In this way gender inequality is both a cause and an effect of sexual violence.

In Canada, the Supreme Court has repeatedly recognized the overwhelming impact of sexual violence on women. In *R v Seaboyer* Madam Justice L'Heureux-Dubé explained:

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man...Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society.¹⁷⁵

While that case dates back to 1991, little has changed according to Canadian statistics, including that 92% of victims of police-reported sexual assault are women.¹⁷⁶ The effect of this is that women do not experience Canadian life on an equal footing to men because they must make adaptations to protect themselves from various forms of sexual violence.

¹⁷⁴ United Nations General Assembly Resolution 48/104, (20 December 1993).

¹⁷⁵ *R v Seaboyer*, [1991] 2 SCR 577.

¹⁷⁶ Statistics Canada, "Measuring violence against women: Statistical trends" by Marie Sinha (last modified 11 November 2015), online: *Juristat* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11766/11766-1-eng.htm#a15>>.

And if such violence does occur, they are obstructed from genuine access to justice because of the significant risk of further harm.

What is more, sexual violence is a form of gender inequality that is often compounded by intersectional forms of discrimination such as by race, indigeneity, religion, class, sexual orientation and gender expression.¹⁷⁷ These inequalities persist despite the protections of our *Canadian Charter of Rights and Freedoms (Charter)*, which addresses equality and prohibits discrimination. Under section 15(1):

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This reference to equal benefit of the law must be applied to women victimized by sexual violence to enable them to engage the criminal justice system without having to risk their own harm. Without equal protection of the law women will be unable to achieve equality.

Furthermore, there is an argument to be made that section 7 of the *Charter*, the right to security of the person, is violated when unrepresented victims of sexual violence are put at risk of re-victimization or re-traumatization by the criminal justice system. In other words, the current criminal trial process in sexual assault proceedings violates victims' *Charter* right to be secure against harm by the State. Since the risk is unavoidable for complainants of sexual violence, yet foreseeable and capable of being reduced by the State, this violation would be unjustified in a free and democratic society and require an immediate remedy.

¹⁷⁷ Women's Legal Education and Action Fund, "IAAW and LEAF Continue to Seek Justice for Cindy Gladue" (2019), online: *LEAF* <<https://www.leaf.ca/iaaw-and-leaf-continue-to-seek-justice-for-cindy-gladue/?fbclid=IwAR0ofMd6MzfoqxyzQmMWqUxC5uGklQaBaHCPR1SL-buwNSCbnZs0YrqVIA8>>.

The most logical remedy would be the provision of legal representation to guard against the risk of re-victimization. Hence, victims' counsel would allow for the values entrenched in the *Charter* to be more fully realized.

2.6 CONCLUSION

If all members of society are to receive equal benefit from the law as our *Charter* promises, then survivors of sexual violence, the majority of whom are women, should be able to access the law without fearing the harmful impact of additional trauma. Unfortunately, the current cost of seeking justice for sexual violence is higher than most survivors are willing to pay. Integrity and dignity should not be features reserved for just one party within the criminal process. The justice system should provide respect, compassion and engagement for victims and respond to their particular needs. Furthermore, the need for strict separation between the public's interests and individual interests serves no discernable purpose. In fact, our societal concern about victims' rights is an indication that their well-being is part of the public interest. If we demand that victims be treated with dignity when engaged in the criminal process, then providing a legal representative whose sole purpose is the protection of their rights and interests is a logical means to that end.

As a society we must do better for survivors of sexual violence and for Canadians at risk of becoming future victims. By refusing to make legal reforms that address sexual violence, we perpetuate a system that undoubtedly will put more women and men in harms way. The evidence of our system's failure to protect women from sexual violence and from re-traumatization by the criminal justice process is unequivocal. Providing a legal voice to survivors signals systemic reform that values all victims. Once survivors

determine that they can access justice without further harm, reporting rates may rise and offending with impunity may decline. These are important justice goals. The ensuing deterrence of sexual violence made possible by such reform would positively change the lives of untold numbers of Canadians. This hope must motivate us. We owe it to those not yet touched by sexual violence to do all we can to protect them.

2.7 CONNECTING MY PROPOSED MODEL TO A *CHARTER* CHALLENGE

Since publication of this article, the Supreme Court of Canada confirmed the constitutionality of section 278.94 of the *Criminal Code* allowing for legal representation of sexual assault complainants during admissibility hearings for private records.¹⁷⁸ The Court's reasons are compelling and applicable to my argument that legal representation should be available for sexual violence complainants throughout the criminal process.

In *R v J.J.*¹⁷⁹ the appellants were unsuccessful in their argument that allowing standing and legal counsel for sexual assault complainants violates the accused's section 7 and 11(d) rights to a fair trial and full answer and defence. The Court ruled that considerations regarding trial fairness must include perspectives from the community and the complainant's standpoint, and must take into account the highly invasive nature of public trials for complainants:

[121] Accordingly, our analysis of the principles of fundamental justice under s. 7 adopts the balancing process that was applied in *Mills* and *Darrach*. Like s. 11(d), the right to make full answer and defence and the right to a fair trial are considered from the perspectives of the accused, the complainant, the community and the criminal justice system at large (*O'Connor*, at paras. 193-94, per McLachlin J., as she then was). In this manner, ss. 7 and 11(d) are complementary.

¹⁷⁸ *R v J.J.* 2022 SCC 28.

¹⁷⁹ *Ibid.*

As previously mentioned, the framework for analyzing multiple *Charter* breaches is context- and fact-specific. The Court recently demonstrated the highly context-specific nature of this assessment in *R. v. Brown*, [2022 SCC 18](#), at para. [70](#). In these appeals, the correct approach to “balancing” under s. 7 is similar to *Mills* and *Darrach*, due to the nature of the alleged *Charter* infringements and the highly invasive privacy consequences for complainants that follow directly from their participation in a trial for a sexual offence in open court.¹⁸⁰

The Court also found that the right to full answer and defence does not guarantee “the most favourable procedures imaginable.”¹⁸¹

The Court emphasizes the legislative purpose in upholding the constitutionality of the provisions allowing complainant representation during section 278.94 hearings. It recognizes that sexual assault complainants are subject to many myths and stereotypes that are harmful,¹⁸² and finds that the legislative purpose is rationally connected to the means by which the provisions pursue those objectives. The Court finds:

...we conclude that Parliament enacted this regime with a view to (1) protecting the dignity, equality, and privacy interests of complainants; (2) recognizing the prevalence of sexual violence in order to promote society’s interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes. Section 278.92 is not overbroad relative to this legislative purpose because it does not go further than is reasonably necessary to achieve these three goals (*Safarzadeh-Markhali*, at para. [50](#)).¹⁸³

These same objectives could be used to justify the legal reform suggested in the model I propose. I argue that provision of trauma-informed, state-funded counsel for sexual violence complainants would serve to protect complainants’ dignity, equality and

¹⁸⁰ *Ibid* at para 121.

¹⁸¹ *Ibid* at para 125.

¹⁸² *Ibid* at para 132.

¹⁸³ *Ibid* at para 139.

privacy, could encourage victims of sexual violence to come forward ,and would reduce reliance on prejudicial myths and stereotypes.

In my next article I take this a step further and argue that if legislation to improve treatment for sexual violence complainants, such as providing access to state-funded counsel, is not enacted, such failure constitutes *Charter* violations under sections 7 and 15 for female sexual violence complainants. In Chapter 3 I look at the treatment of female sexual violence complainants by the criminal justice system and argue that the practices and policies that govern that treatment violates their *Charter* rights.

Chapter 3
A CHARTER CHALLENGE ON BEHALF OF SEXUAL VIOLENCE
COMPLAINANTS

It is disheartening to acknowledge that women have failed to achieve equal status to men in Canadian society, notwithstanding human rights law and constitutional guarantees that deem all persons equal. One of the most obvious indicators of inequality is the prevalence and unrelenting frequency of violence by men against women, particularly sexual violence, demonstrating both a cause and an effect of inequality. Moreover, despite some of the best sexual assault laws in the world, Canadian rates of sexual assault by men against women continue to worsen.¹⁸⁴ Considering that only 5% of sexual assault victims engage the system and report to the police, the criminal justice system cannot be viewed as an effective institution in providing justice to sexual violence survivors (the vast majority of whom are women).¹⁸⁵ Logic dictates that perhaps substantive laws, which have been the focus of legal reform to date, are not the source of the problem with low reporting rates and unrelenting sexual violence.¹⁸⁶

Instead, it seems that the treatment of complainants who engage in the criminal system requires reform. A federal Standing Senate Committee advised the federal government to improve treatment of victims in 2017, urging them to adopt a more victim

¹⁸⁴ Canada, Department of Justice, “Just Facts, Sexual Assault,” Online: <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html>.

¹⁸⁵ Shana Conroy and Adam Cotter, “Self-reported sexual assault in Canada, 2014 (July 11, 2017) Juristat Online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>.

¹⁸⁶ Canadian surveys show that fear and distrust of the criminal justice process is one of the main reasons for not reporting sexual violence. See Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 3.

centred approach in order to address the harm that victims experience when they engage the criminal justice system. Moreover, studies show that the harm experienced by engaging the criminal justice system is magnified for complainants of sexual violence because of the deeply personal subject matter in issue and the high level of psychological trauma those topics evoke. Indeed, it is the process and absence of adequate policies regarding the treatment of complainants of sexual violence that not only hampers the law's effectiveness, but also violates women's rights under the *Canadian Charter of Rights and Freedoms*.¹⁸⁷ I postulate that reform of practices and enactment of new policies for better treatment of survivors of sexual violence by the criminal justice system, particularly better protection from re-victimization and increased participation, would result in more women engaging the justice system when they have been sexually assaulted. Further, by improving the ability of female sexual violence survivors to access the criminal justice system without experiencing the harm of secondary victimization, the law's protective function and benefits would be enhanced to advance women's equality.

In this paper I argue that Canada's practices and absence of policies regarding the treatment of female sexual violence victims in the criminal process violates their rights under the *Charter*. Specifically, current practices and omissions within policies of the federal and provincial governments result in adverse impacts to female complainants of sexual violence, in violation of their section 7 rights to 'security of the person' and their section 15 rights to 'equal protection and equal benefit of the law.' Further I argue that these violations amount to systemic discrimination, are not justified under section 1 and

¹⁸⁷ Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (*Charter*).

should be declared void as unconstitutional. Consequently, Parliament should draft new policies to amend criminal justice system practices to provide greater protection and increased participation of sexual violence complainants. I demonstrate that these *Charter* violations are clearly visible in the experiences of many survivors of sexual violence who have engaged the criminal justice system including a client in my law practice (named Jane for these purposes) who has agreed to share her story. I also find support for my arguments in *Fraser v Canada*, a recent Supreme Court of Canada judgment regarding section 15 of the *Charter*, and the first successful adverse effects claim for sexual discrimination under that provision.

3.1 ONE WOMAN'S JOURNEY THROUGH THE CRIMINAL JUSTICE SYSTEM

I start with Jane's story. Jane is a client in my law practice who provided her permission to share her anonymized story. Although the adverse impacts of poor treatment of sexual violence complainants are a systemic problem, Jane's story provides a tangible example of the harm experienced by a woman engaging the criminal justice system. Jane was abused by a family friend over a period of eight years, ending when she was twelve years old. Jane, like so many, did not report the abuse, keeping it a secret for decades. However, one day when Jane was in her 50s she saw a photo of her abuser in the newspaper. She had thought he was dead. In that moment she found the courage and strength to report her childhood abuse to the police. The investigation took several months but ended with the accused being charged with four sexual offence crimes.

Jane knew that the criminal process was not easy but expected that she would be treated fairly. That was not to be. In total her case spanned eight years before the charges

were withdrawn because the accused had passed away. Over those eight years, sixteen different dates for hearings were set and adjourned. On four of those occasions Jane was required to travel lengthy distances to attend court proceedings, only to have them adjourned. She repeatedly had to make efforts to obtain information about the status of her case and why it was being delayed. She was never given an opportunity to provide input when adjournments were requested, nor was she advised whether or not any investigation was conducted to verify the basis of the defence adjournment requests.

The experience left Jane feeling invisible, voiceless, hopeless and harmed. She experienced mental and emotional anguish that manifested itself in physical illness. She became depressed and found it difficult to keep up with her employment obligations and consequently suffered financial loss. Perhaps most significantly, despite doing everything that was asked of her, Jane was denied justice. Instead Jane experienced eight years of having her hopes built up only to be repeatedly dashed. The same lack of agency she experienced when she was abused as a child replayed itself during the criminal process. The disempowerment she experienced during the criminal process was similar to her experience of disempowerment at the hands of her abuser. The law was not the source of the problem for Jane. It was the procedural practices and dearth of policies to dictate how she was to be treated that caused her re-victimization.

3.2 THE NEED TO REFORM PRACTICES REGARDING THE TREATMENT OF SEXUAL VIOLENCE COMPLAINANTS

Jane's experience of harm is far from unique. This has been recognized in Canada for some time as evidenced in a 2017 report by the federal Standing Senate Committee about delays in the justice system entitled "*Justice Requires That We Support*

Victims.” In that report the Committee acknowledges that “Canada’s criminal justice system is not victim-centred,”¹⁸⁸ and that victims’ interests are often not even considered.¹⁸⁹ The report calls for a “shift in thinking” about the impacts on victims at all stages of the criminal process, so that their role and needs are at the forefront and not just an afterthought.¹⁹⁰ It cites case after case where court delays have caused victims to be denied justice.¹⁹¹ The Committee highlights the even more severe impact of lengthy court delays on children, causing “problems in school, isolation, depression, substance abuse and addiction issues, and an inability to heal in therapy when they cannot erase traumatic memories.”¹⁹² The report also raised the impact of poor treatment of victims on the justice system:

A very worrisome concern raised by witnesses about the impacts of delays is how the experiences of victims in the justice system are having an impact on the willingness of others to step forward to report crime. Ms. Illingworth said this is especially true in cases of sexual assault. The impression created by witnesses during the committee’s hearings is discouraging. “For anybody to get involved in the future in the court process.” Said Jennifer Lopes from the British Columbia Crown Counsel Association, “it is a huge barrier because people think, why would I? This didn’t work last time. I am just going to give up.”¹⁹³

These observations are echoed internationally in a report by the Scottish Centre for Crime on delay in trials. That report notes that the loss of control experienced during

¹⁸⁸Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)*, June 2017 at 64.

¹⁸⁹ *Ibid* at 65.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid* at 68 fn 163.

¹⁹² *Ibid* at 68 - quoting Frank Tremblay from Victimes D’agressions sexuelles au masculine (VASAM).

¹⁹³ *Ibid* at 69.

sexual abuse is often replicated during the criminal justice process.¹⁹⁴ The authors point to the lengthy process, the intimate nature of complainants' testimony, and the lack of ability to influence the court proceedings as contributing factors to the cumulative negative impact of the criminal process.¹⁹⁵ The report relies on research establishing that survivors of rape are susceptible to secondary victimization.¹⁹⁶ It also points to the requirement for international standards and protocols in Europe to ensure measures are in place to protect complainants from re-traumatization and recommends not only streamlining the prosecution of sexual offences but also giving weight to victims' interests "that are fundamental to their self-governance and well-being."¹⁹⁷

Recommendations for reform regarding the treatment of sexual violence survivors, such as those seen in Europe, continue to be made by Canadian government bodies. The Canadian Office of the Federal Ombudsman for Victims of Crime released a progress report on the *Canadian Victims Bill of Rights (CVBR)* in November 2020 indicating:

The most recent review of Canada's criminal justice system by the Department of Justice acknowledges that victims often feel "revictimized" under the current system, and argues that major changes are needed to support the rights of victim, survivors and their families.¹⁹⁸

¹⁹⁴ The Scottish Centre for Crime & Research, "Delays in Trials: the implications for victim-survivors of rape and serious sexual assault," July 2020, at 2. Online: <https://www.sccjr.ac.uk/publications/delays-in-trials-the-implications-for-victim-survivors-of-rape-and-serious-sexual-assault/>.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid* at 2 and 6.

¹⁹⁸ Office of the Federal Ombudsman for Victims of Crime, "Progress Report: The Canadian Victims Bill of Rights," November 2020 at 2. Online: https://www.victimfirst.gc.ca/res/pub/prcvbr-reccd/40-061B%20FOVC%20Progress%20Report_EN_web.pdf.

The Ombudsman acknowledges that the current process asks a great deal of victims of crime, including to “relive their traumas over and over again as they tell their truths,” yet they are left unsupported. She believes that failing to treat victims as full partners makes the criminal justice system less effective.¹⁹⁹ The report is highly critical of the *CVBR*’s lack of enforceability and recommends numerous reforms to the treatment of victims as they proceed through the criminal justice process, particularly regarding their rights to information, protection, participation and restitution.²⁰⁰

While it is important that all victims of crime receive improved treatment, the impacts of poor treatment are considerably magnified for survivors of sexual violence. Sexual violence is a deeply personal crime that results in some of the worst psychological trauma that can arise from a crime.²⁰¹ It is also a gendered crime that is subject to persistent societal myths and stereotypes about women’s behaviour that influence justice players and elicit self-blame, shame and a reluctance to disclose by survivors.²⁰² It is a crime that can lead to extensive list of psychological and physical impacts including:

- shock and anger,
- fear and anxiety,
- hyper-alertness and hypervigilance,
- irritability and anger,
- disrupted sleep, nightmares,

¹⁹⁹ *Ibid* at 4.

²⁰⁰ *Ibid* at 5.

²⁰¹ Lori Haskell, Melanie Randall, “The Impact of Trauma on Sexual Assault Victims - Report submitted to Justice Canada,” (2019) at 9.

²⁰² Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 9.

- rumination and other reliving responses,
- increased need for control,
- tendency to minimize or deny the experience as a way of coping,
- tendency to isolate oneself,
- feelings of detachment,
- emotional constriction,
- feelings of betrayal, and
- a sense of shame.²⁰³

Moreover, the reactions and behaviours exhibited by victims of sexual violence are often not understood and subject to stereotypical expectations of how victims should react.

The failure to understand the impact of trauma on a sexual violence complainant and the unrealistic expectations placed upon them regarding how they should behave post-offence are held not only by the participants in the justice system but also by victims themselves. These factors likely all come into play when survivors of sexual violence make decisions not to engage with the criminal justice system. In fact, fear of the criminal justice system has been identified as a central reason that survivors of sexual violence do not report.²⁰⁴

These added aggravating aspects of sexual crimes heighten the need to protect survivors from the harm flowing from the justice process. Moreover, when an institution such as the criminal justice system harms sexual violence survivors, it denies those

²⁰³ Haskell and Randall, *supra* note 201 at 9.

²⁰⁴ Craig, *supra* note 202 at 3.

women their right to security of the person and to equal benefit and equal protection of the law, rights protected by sections 7 and 15 of the *Charter* respectively.

3.3 EQUALITY UNDER SECTION 15 OF THE *CHARTER*

It is important to recognize the deeply rooted historical context of violence by men against women. Our current laws and social norms have evolved from law that entitled a man to beat his wife with a stick “no thicker than his thumb.”²⁰⁵ It is therefore not surprising that the law has been able to institutionalize privilege and power in society²⁰⁶ and has played a role in reinforcing gender-based power imbalance.²⁰⁷ Yet, at the same time, we must recognize the transformative force the law holds as a tool to confront and remedy these inequities.²⁰⁸ Of these legal tools, the *Charter* has significant potential to further social change. Decisions by courts regarding *Charter* rights have forced elected officials to make changes to the law that have impacted individuals’ human rights.²⁰⁹ Many feminists see that there is potential in the *Charter* to expose women’s subordination and seek redress.²¹⁰ However, the provision of the *Charter* that

²⁰⁵ *R v Lavallee* [1990] 1 SCR 842

²⁰⁶ Fay Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada,” (2020) Osgoode Digital Commons at 17.

²⁰⁷ Sheila Martin, “Some Constitutional Considerations of Sexual Violence Against Women” (1994) 32 Alberta L. Rev. 535 at 539.

²⁰⁸ Melanie Randall, “Equity Rights and the *Charter*: Reconceptualizing State Accountability for Ending Domestic Violence” in *Making Equality Rights Real*, Fay Faraday, Margaret Denike & M Kate Stephenson eds, (Irwin Law Inc., 2009) at 285.

²⁰⁹ Diana Majury, “The *Charter*, Equality Rights and Women: Equivocation and Celebration,” (2002) 40 Osgoode LJ 297 at 300. Examples of such cases are *R v Seaboyer*, [1991] 2 SCR 577 and *Canada (Attorney General) v Bedford*, *infra* note 66.

²¹⁰ *Ibid* at 303.

was meant to uphold equality, section 15, on its own has had very limited success in doing so.²¹¹

Section 15(1) reads as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The purpose of this provision, as set out in *Andrews v Law Society (British Columbia)*,²¹² the Supreme Court of Canada's first decision under s. 15, is: "to ensure equality in the formulation and application of the law."²¹³ The section was interpreted to grant four equality rights - equality before the law, equality under the law, equal protection of the law and equal benefit of the law.²¹⁴ Chief Justice Beverley McLachlin viewed the construction of the provision as guaranteeing equality in four separate ways and giving the courts a clear directive that "[t]his is a guarantee of equality. Take it seriously. Don't cut it down. Interpret it in a meaningful and expansive way."²¹⁵ However, she also acknowledged the challenge of interpreting the provision in a way that is neither too formalistic nor too broad. She points to the Supreme Court's struggle with the lack of a precise definition of the right to equality and its application, stating:

The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1)

²¹¹ Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from the Canadian equality Jurisprudence," (2018) 38 NJCL 89 at 91.

²¹²[1989] 1 SCR 143 (*Andrews*).

²¹³ *Ibid* at para 34.

²¹⁴ *R v Swain*, [1991] 1 SCR 933 at para 80; Chief Justice Beverley McLachlin, "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17 at 17.

²¹⁵ *Ibid*.

of the Charter is to transform these ideals and aspirations in to practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.²¹⁶

That evolving aspiration regarding how equality should be manifested in society can spur litigators to challenge legal practices that no longer seem fair. While violence by men against women has long been recognized as a social problem requiring government intervention, it has principally been addressed by reform of substantive law rather than reform of procedure. The state has accepted public responsibility for private violence, however, it has not addressed the harm to women caused by the justice system itself. Notably, international human rights treaties require states to bear responsibility for institutional violence.²¹⁷ A 2013 report by the Special Rapporteur on Violence Against Women asserts that states have a duty to not only ensure access to justice to victims of gender-based violence, but also an obligation to combat structural and systemic causes of gender-based violence.²¹⁸ Therefore, in order for the government to address institutional violence, it must scrutinize its own criminal justice policies for a source of harm. A good frame of reference for applying scrutiny to the criminal justice system in relation to sexual violence complainants is section 15 of the *Charter*, which requires an analysis of government policies, practices and procedures for their compliance with women's rights to receive equal benefit and equal protection of the law.

²¹⁶ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 507.

²¹⁷ Randall, *supra* note 208 at 303 -306.

²¹⁸ Special Rapporteur on Violence against Women, 2013 *Annual Report*, "State responsibility for eliminating violence against women" (14 May 2013) A/HRC/23/49 at para 20.

Section 15 allows scrutiny of state accountability for any failure to equally protect women from harm caused by individuals as well as harm caused by its institutions. It must be recognized that sexual violence is not experienced equally among men and women, with women making up 92% of all victims.²¹⁹ Additionally, women's negative experience in the criminal justice system regarding sexual crimes is exacerbated by the existence of gender myths and stereotypes that permeate society, whether consciously or unconsciously.²²⁰ Accordingly, this combination of factors makes women more susceptible to poor treatment by the criminal justice system. Just as the state would not be able to justify laws that only benefit men, it should not be able to justify practices and policies (or the absence thereof) that overwhelmingly harm women. Moreover, government practices and policies governing the treatment of sexual violence complainants in the criminal justice process, serve as an invisible structure that limit complainants' equality. It is only by uncovering the harmful nature of the structure on women, that advancements towards equality can be achieved.

In seeking equality for women, it is important to distinguish the commitment to substantive equality rather than formal equality. Substantive equality recognizes the need for a response to socially and historically based differences, and looks at the effect of a law or policy. It incorporates the understanding that in order to provide equality to dominant and subordinate groups, there may have to be differences in the treatment in some contexts. Formal equality, on the other hand, focuses on laws and procedures that

²¹⁹ Statistics Canada, "Gender Differences in Police-Reported Violent Crime in Canada," by Roxan Vaillancourt, in *Canadian Centre for Justice Statistics Profile Series*, Catalogue No. 85Foo33M (Ottawa: Statistics Canada, May 2010).

²²⁰ Craig, *supra* note 202 at 9 - 10.

provide equal opportunity,²²¹ with the idea that identical treatment equates to equal treatment. The Supreme Court in *Andrews* adopted substantive equality as the operative model to be applied to law explaining:

It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality....
... To approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned.²²²

The Court in *Andrews* also pointed out the twin goals or dual purpose of s. 15, those being both the “prevention of legal denials of equality and the promotion of equality.”²²³ Both of these goals are important in addressing the criminal justice system’s treatment of sexual violence survivors, however the Supreme Court has overwhelmingly focused on addressing denials of equality rather than positive duties of the state.²²⁴ Nonetheless, both aspects of s. 15 can be harnessed to challenge the government’s practices and absence of policies regarding sexual violence survivor treatment. This opportunity was recognized by Dr. Melanie Randall, who assessed that:

The state’s demonstrated failure to protect in too many cases - in other words, the state’s failure to deliver equal benefit of and protection of the law to assaulted women - is an avenue warranting legal innovation and effort, not only for its symbolic, public, and educative value, but also in order to marshal state resources and power towards meaningful social solutions to the problem of men’s violence against women.²²⁵

²²¹ Majury, *supra* note 209 at 305.

²²² *Andrews*, *supra* note 212 at para 26.

²²³ Randall, *supra* note 208 at 300.

²²⁴ *Ibid* at 291.

²²⁵ *Ibid*.

In fact, current Supreme Court Justice Sheilah Martin, in her earlier writing, has interpreted the *Andrews* decision as imposing a positive obligation on the government, suggesting that “because of women’s unequal and disproportionate burden of sexual victimization, the state response should correspond to the demonstrated need.”²²⁶ This view is in line with the argument that the *Charter* requires the government to ensure that women have equal protection of the law by establishing policies and practices that allow them to engage the justice system without harm.

In this vein I suggest that new policies regarding process ought to be enacted to mandate that complainants of sexual violence be kept informed about their case by court officials and be allowed to participate in the criminal process. Specifically, complainants should be allowed to participate in any court appearance involving an adjournment of a hearing, or involving a significant delay in setting a hearing date. They should also be allowed to have access to a victim’s legal advocate to assist in their protection from harm at all phases of the criminal process including during the following stages:

- Before and during their police interview;
- when bail conditions for the accused are determined;
- regarding plea negotiations;
- during motions for admissibility of evidence relating to them;
- during cross-examination; and
- regarding sentencing and appeals.

Without the enactment of such policies concerning treatment of sexual violence complainants, women will continue to experience fear of the criminal justice system.

²²⁶ Martin, *supra* note 207 at 537.

This fear acts as a barrier which denies them access to justice. Hence the absence of the necessary policies for proper treatment of sexual violence complainants surely violate women's rights to equal benefit of the law and equal protection of the law under s. 15.

3.4 SYSTEMIC DISCRIMINATION

In defining equality, the Supreme Court has recognized that discrimination could be systemic or “built into the foundations of existing practice, even if there is no intention to create or continue disadvantage.”²²⁷ Systemic discrimination refers to the power dynamics within society where traits such as gender result in the unequal distribution of social, political and economic rights.²²⁸ The phenomenon is described well in *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin)*²²⁹ where the Supreme Court observed that systemic discrimination allows for

imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves “normal” to continue to construct institutions and relations in their image...²³⁰

In this way, claims of systemic discrimination attempt to target practices that have been normalized over time because of this unequal power distribution.²³¹

The Court specifically dealt with sexual discrimination in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé des services*

²²⁷ *Ibid* at 548 referring to *Andrews*.

²²⁸ Faraday, *supra* note 206 at 19.

²²⁹ [1999] 3 SCR 3.

²³⁰ *Ibid* at para 41.

²³¹ Faraday, *supra* note 206 at 19.

sociaux,²³² the first successful Supreme Court of Canada appeal under s15 of the *Charter* based on sexual discrimination against women.²³³ Justice Abella’s majority decision described how systemic discrimination operates as an ongoing pattern of behavior that creates and sustains a gender pay gap disadvantaging women.²³⁴ This focus on systemic discrimination by the Court is an important shift when the Court considers the impugned legislation’s impact on women. As Fay Faraday observes, “[t]he majority reasons, . . . mark an advance because the reality of systemic discrimination is not merely observed once in passing but the system lens remains at the forefront, shaping the entire section 15 analysis.”²³⁵

3.5 ADVERSE EFFECT DISCRIMINATION

The *Alliance* case also incorporates adverse effect discrimination into the test for violations of section 15. The Court looks at both the impugned law on its face and considers the disproportionate negative impact it has on women.²³⁶ Prior to this the only successful adverse effects discrimination cases at the Supreme Court were *Eldridge v British Columbia (Attorney General)*,²³⁷ regarding the provision of health services to deaf people, and *Vriend v Alberta*,²³⁸ regarding the impacts of omitting sexual orientation as a ground for a claim under provincial human rights legislation. Importantly, in both of those cases the Court recognized discrimination under section 15 arising from the

²³² 2018 SCC 17 (*Alliance*).

²³³ Faraday, *supra* note 206 at 2.

²³⁴ *Ibid* at 20.

²³⁵ Faraday, *supra* note 206 at 22.

²³⁶ *Alliance*, *supra* note 232 at para 29.

²³⁷ [1997] 3 SCR 624.

²³⁸ [1998] 1 SCR 493.

omission of government policy to accommodate a disadvantaged group.²³⁹ The Court's recognition of adverse effect discrimination in identifying a breach under section 15 appeared again in the recently decided *Fraser v Canada (Attorney General)*,²⁴⁰ this time as the basis of addressing discrimination based on gender.

3.6 FRASER V CANADA

The recent Supreme Court decision of *Fraser v Canada*²⁴¹ is an important case regarding women's equality rights because it is the first successful Supreme Court claim where adverse effect sex discrimination was the sole basis of a section 15 violation. The case is a persuasive precedent to support the claim that criminal justice practices regarding treatment of sexual violence complainants that result in adverse effect sex discrimination should be found in violation of women's section 15 and section 7 *Charter* rights.

The facts of the *Fraser* case involved a claim by three female RCMP employees who job-shared and were subject to the RCMP Superannuation Act. The Act did not allow purchase of full-time pension credit to persons who job-shared, but did allow such purchase to persons on leave without pay. The claim was made under section 15 because the Act had a disproportionate adverse impact on women, who filled the majority of the job-share positions due to childcare responsibilities.

The Court set out the test to prove a *prima facie* violation under section 15(1) as follows:

²³⁹ *Eldridge*, *supra* note 54 at para 78; and *Vriend*, *ibid* at para 61.

²⁴⁰ 2020 SCC 28 (*Fraser*).

²⁴¹ *Ibid*.

- [A] claimant must demonstrate that the impugned law or state action on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.²⁴²

Regarding the first step, the claimants in this case did not suggest that the legislation directly discriminated against women, but that its application had an adverse impact on women with children.²⁴³ In response, the Court confirmed that the *Charter* provides protection not only from direct discrimination but also from adverse effect discrimination.²⁴⁴ Justice Abella, writing for the majority, clarified:

There is no doubt, therefore, that adverse impact discrimination “violate[s] the norm of substantive equality” which underpins this Court’s equality jurisprudence (*Withler*, at para. 2). At the heart of substantive equality is the recognition that identical or facially neutral treatment may “frequently produce serious inequality” (*Andrews*, at p. 164). This is precisely what happens when “neutral” laws ignore the “true characteristics of [a] group which act as headwinds to the enjoyment of society’s benefits” (*Eaton v. Brant County Board of Education*, [1997 CanLII 366 \(SCC\)](#), [1997] 1 S.C.R. 241, at para. 67; *Eldridge*, at para. 65).²⁴⁵

Justice Abella went on to point out that the legal test for indirect discrimination is no different than the test for direct discrimination.²⁴⁶ She set it out as follows:

To prove discrimination under [s. 15\(1\)](#), claimants must show that a law or policy creates a distinction based on a protected ground, and that the law perpetuates, reinforces or exacerbates disadvantage. These requirements do not require revision in adverse effects cases. What is needed, however, is a clear account of how to identify adverse effects discrimination, because the impugned law will not, on its face, include any distinctions based on prohibited grounds (*Withler*, at para. 64). Any such distinctions must be discerned by examining the *impact* of the law (*Alliance*, at para. 25).²⁴⁷

²⁴² *Ibid* at para 27.

²⁴³ *Ibid* at para 28.

²⁴⁴ *Ibid* at para 45.

²⁴⁵ *Ibid* at para 47.

²⁴⁶ *Ibid* at para 49.

²⁴⁷ *Ibid* at para 50.

She elaborates that discrimination based on the disadvantages disproportionately experienced by the group can also be the result of the law's lack of accommodations for the group.²⁴⁸ Moreover,

disproportionate impact can be established if members of protected groups are denied benefits or forced to take on burdens more frequently than others. A difference in "quality" of treatment as in *Eldridge* may strengthen a claim of disproportionate impact, but it is not a necessary element.²⁴⁹

The judgment then goes on to describe two types of evidence that can be used at the first stage of the section 15 test, to establish differential treatment based on protected grounds, and specifically a disproportionate impact on a group. The first relates to the "situation of the claimant group," which can include evidence about barriers experienced by the group such as social, cultural or physical barriers and may be elicited from experts, the claimant or through judicial notice.²⁵⁰ This evidence should establish that membership in the group in question is associated with disadvantage because of certain characteristics.

The second type of evidence should establish the outcomes of the impugned law or policy, and can include statistics that show a pattern of harm or exclusion that is more than a result of chance.²⁵¹ The Court advises that ideally both types of evidence should support adverse effects discrimination claims.²⁵² However, in some situations both types

²⁴⁸ *Ibid* at para 54.

²⁴⁹ *Ibid* at para 55.

²⁵⁰ *Ibid* at paras 56 -57.

²⁵¹ *Ibid* at para 58 - 59.

²⁵² *Ibid* at para 60.

of evidence will not be necessary particularly when an association of traits, such as gender and pregnancy, is strong and apparent.²⁵³

Importantly, the Court finds that there is no requirement for the claimant group to explain the reason for the impact of the law,²⁵⁴ nor to establish that the legislature intended the disparate impact.²⁵⁵ Further, there is no necessity for claimants to establish causation between their protected characteristic and the disproportionate impact,²⁵⁶ or even that the law is responsible for creating the disadvantageous barriers.²⁵⁷ Finally, it is not necessary to demonstrate that all members of the affected group are impacted in the same way. The Court explains that “[t]he fact that discrimination is only partial does not convert it into non-discrimination,”²⁵⁸ and used the example that denying benefits to pregnant women is still discrimination against women even though not all women are affected by pregnancy.²⁵⁹

The second step of the section 15 test requires the claimant to establish that “the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”²⁶⁰ In doing so the Court emphasizes the importance of showing the impact of the harm to the claimant group. The Court provides examples of types of harm such as “[e]conomic exclusion or disadvantage, [s]ocial exclusion...[p]sychological harms...[p]hysical harms...[or] [p]olitical exclusion,’ and [that it] must be viewed in light of any systemic or

²⁵³ *Ibid* at para 61.

²⁵⁴ *Ibid* at para 63.

²⁵⁵ *Ibid* at para 69.

²⁵⁶ *Ibid* at para 70.

²⁵⁷ *Ibid* at para 71.

²⁵⁸ *Ibid* at para 72.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* at para 76.

historical disadvantages faced by the claimant group.”²⁶¹ The Court explains that the significance of this step is to recognize that “certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed.”²⁶² However, there is no additional requirement that the claimant prove that a discriminatory attitude exists, only that there is a discriminatory impact.²⁶³ Notably the Court affirmed its previous position that attempting to use a mirror comparator should be avoided, since it is unhelpful when taking a substantive rather than formal approach to equality.²⁶⁴

The Court also emphasizes that determining whether or not the distinction is justified is not part of the section 15(1) analysis but should be left to section 1,²⁶⁵ as should the issue of the possible arbitrariness of the law. The claimant is not required to prove the law is arbitrary as part of the claim, it is up to the government to show that the legislation is justified and not arbitrary under section 1.²⁶⁶ The Court also clarifies that under section 15(2), a law’s ameliorative purpose does not “shield it from s15(1) scrutiny.”²⁶⁷

The Court’s reasons regarding section 1 were brief. Upon applying the *R v Oakes*²⁶⁸ test, it held that the government failed to provide a pressing and substantial objective to justify the law’s limitation on the claimants. In fact, the law’s restrictions

²⁶¹ *Ibid.*

²⁶² *Ibid* at para 77.

²⁶³ *Ibid* at para 78.

²⁶⁴ *Ibid* at paras 93 - 94.

²⁶⁵ *Ibid* at para 79.

²⁶⁶ *Ibid* at para 80.

²⁶⁷ *Ibid* at para 69.

²⁶⁸ [1986] 1 SCR 103.

were found to be “entirely detached from the purposes of the job-sharing scheme and the buy-back provisions, which were intended to ameliorate the position of female RCMP members who take leave to care for their children.”²⁶⁹ In finding no substantial objective and no rational connection to an objective, the Court ruled that the breach of section 15 could not be justified under section 1.

3.7 APPLICATION OF *FRASER* TO PRACTICES AFFECTING SEXUAL VIOLENCE COMPLAINANTS

Applying the section 15 test set out in *Fraser* to the claim that criminal justice practices regarding sexual violence complainants violate women’s rights to equal protection and equal benefit of the law, the first step requires proof that the impugned practices on their face or by their impact create a distinction based on sex. The proffered argument does not suggest that these practices are not facially neutral. The claim is based on the adverse impact of these practices on women.

The first type of evidence suggested by the Court is evidence establishing that women are associated with disadvantage because of certain characteristics. I argue that rape myths and gender stereotypes about women are in large part responsible for the disadvantages women survivors of sexual violence experience in the justice system. Moreover, extensive evidence is available from numerous research studies concerning the extra burden women carry and social and cultural barriers they experience when engaging the criminal justice system. This topic also has been the subject of judicial notice by the Supreme Court of Canada.

²⁶⁹ *Fraser*, *supra* note 240 at para 126.

In experiencing sexual violence, research studies show that female victims are more than twice as likely to develop Post-traumatic Stress Disorder (PTSD) than men, with symptoms lasting up to four times longer.²⁷⁰ Studies also show that women survivors have higher levels of social numbing and psychological reaction to traumatic stimuli.²⁷¹ These characteristics, in addition to gender stereotypes, may make women more vulnerable to harmful practices.

Further, studies show that complainants testifying in sexual assault trials, the majority of whom are female, experience harmful and re-traumatizing impacts.²⁷² Elaine Craig relies on “qualitative and quantitative social science research” to conclude that complainants of sexual violence experience harm by going through the trial process.²⁷³ Moreover, she points to the role gender plays in exacerbating the harm experienced by female sexual assault survivors engaged in the criminal process. She explains:

The relationship between sexual assault, gender hierarchy, and shame is further aggravated by the continued acceptance of, or reliance on, problematic assumptions about sexuality and sexual violence in Canadian courtrooms. Again, these assumptions include discriminatory notions about women’s sexual availability, and their own degree of culpability (blameworthiness) in causing the sexual violence experience. One consequence of this continued reliance on outdated and sexist stereotypes is the reality that women who allege sexual assault will often be questioned about things such as why they failed to fight back, why

²⁷⁰ Haskell and Randall, *supra* note 201 at 10 referencing Blain, Galovski & Robinson (2010) Gender Differences in Recovery from Posttraumatic Stress Disorder. A Critical Review. *Aggression and Violent Behavior*. 15(6), 463-474.

²⁷¹ *Ibid* at 11 citing Litz, Orsillo, Kaloupek, & Weathers (2000). Emotional processing in posttraumatic stress disorder. *Journal of Abnormal Psychology*, 109: 26–39.

²⁷² Craig, *supra* note 19 at 4, citing *inter alia* Regehr, Alaggia, Lambert and Saini, “Victims of Sexual Violence in the Canadian Criminal Courts,” *Victims & Offenders* 3 (2008): 99 (studies by numerous researchers showing negative impacts); Ross “Restoring Rape Survivors: Justice, Advocacy, and a Call to Action,” *Annals of the New York Academy of Sciences* 1087 (2006): 206 at 218 -22 (Canadian and international research revealing sexual assault victims’ experiences of re-traumatization from participation in the criminal justice process).

²⁷³ *Ibid* at 6 - 7.

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. When sexual assault complainants are forced to respond to these stereotype-infused questions in the context of alleging sexual violation, the social dynamics of shame and self-blame are reinforced.²⁷⁴

Craig focuses on the role the legal profession can play in reducing the harm that the justice system inflicts on sexual violence complainants. I argue that government practices regarding the treatment of complainants have an equally important role to play.

Evidence of judicial notice recognizing the role of women's subordination in sexual assault proceedings can be found by the Supreme Court in such cases as *R v Osolin*,²⁷⁵ *R v McCraw*,²⁷⁶ and *R v Mills*.²⁷⁷ In *R v Mills* the Court highlighted the importance of considering equality when balancing the privacy interests of a sexual assault complainant (regarding her private records) with the accused's right to full answer and defence. The Court cited with approval a prior decision that made the following acknowledgement:

A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which [s. 15](#) of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress...²⁷⁸

²⁷⁴ *Ibid* at 9.

²⁷⁵ [1993] 4 SCR 595 at paras 165-66.

²⁷⁶ [1991] 3 SCR 72 at para 29.

²⁷⁷ [1999] 3 SCR 668

²⁷⁸ *M. (A.) v. Ryan* [1997] 1 S.C.R. 157 at para 30 referenced in *R v Mills* at para 91.

It should be noted that disadvantages experienced by female victims of sexual assault also can be perpetuated by other legal practices (beyond production of private records) that fail to protect women's well being. Such practices relate to the treatment of complainants of sexual violence by their exclusion from participation in parts of the criminal process such as requests for delay of hearings, setting bail conditions, plea negotiations, sentencing and appeals. Other practices that fail to provide protection from harm include complainants' treatment during their police interview, during their cross-examination, and during motions for the admissibility of evidence relating to them.

Another example of the Supreme Court's judicial notice of women's subordination in the law can be found in *R v Lavallee*²⁷⁹, where the Supreme Court noted the connection between the law's treatment of women and the social norms of the day. In addressing the issue of domestic violence against women Justice Wilson remarks that:

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.²⁸⁰

In this vein, government practices restricting sexual violence complainants from meaningful participation in the criminal process can be viewed as remnants of attitudes aligned with gender stereotypes that substantive law reform has sought to stamp out.

²⁷⁹ [1990] 1 SCR 842.

²⁸⁰ *Ibid* at

Continuing with the first step of the section 15 test, the Court allows for a second type of evidence, that which shows the outcome of the practices in question. I argue that there is plenty of evidence to demonstrate negative outcomes of the current criminal justice practices. Studies cited by Elaine Craig above demonstrate that complainants of sexual violence who engage the criminal justice system experience high rates of re-victimization. Other evidence of negative outcomes can be found in the 2017 report of the Senate Standing Committee²⁸¹ revealing that many victims were denied justice due to court delays. Additionally, the 2020 Progress Report released by the Canadian Office of the Federal Ombudsman for Victims of Crime²⁸² found that lack of support to victims negatively impacted the effectiveness of the justice system. Cumulatively these studies and reports provide substantial compelling evidence regarding the negative impacts of government practices on the treatment of female sexual violence complainants. However, one could even point to the statistics demonstrating the low rate of reporting sexual violence to police,²⁸³ and the disproportionate rate of women experiencing sexual assault in Canada²⁸⁴ as other negative outcomes of government practices regarding treatment of sexual violence complainants.

The second step under section 15 requires evidence that the impugned policies or practices reinforce, perpetuate or exacerbate disadvantage by showing the harm experienced by the claimants. This would be established primarily through evidence of

²⁸¹ Senate Standing Committee, *supra* note 188.

²⁸² Canadian Office of the Federal Ombudsman for Victims of Crime, *supra* note 15.

²⁸³ Conroy & Cotter, *supra* note 185 indicating 5% of all victims of sexual violence report it to the police. See also *supra* note 186, indicating that fear of the criminal justice system is one of the main reasons for not reporting.

²⁸⁴ Statistics Canada, *supra* note 219 indicating 92% of all sexual assaults are women.

the psychological harms experienced by sexual violence complainants who engage in the criminal justice system, some of which has already been proffered above.

Additional evidence of psychological harm can be found in the research studies of Campbell and Raja, which reveal that sexual violence complainants experience secondary victimization when they engage the criminal justice system due to victim-blaming attitudes and acceptance of rape-myths by police, prosecutors judges and doctors in the public system. The study also shows that when sexual violence victims' voices were not heard due to denials of assistance or ineffective assistance, they experienced secondary victimization.²⁸⁵ Further, a Scottish study regarding the adverse consequences of lengthy court delays, predicted negative outcomes for sexual violence survivors that include interference with close relationships and the ability to work, and "mental and physical health problems, including anxiety, night terrors, confusion, suicidal thoughts, depression, and trauma."²⁸⁶

The psychological outcomes for complainants of sexual violence clearly perpetuate and exacerbate women's disadvantage. When women experience psychological harm from engaging the criminal justice system they receive a clear message that discourages their future engagement with the system. Other women also receive that message, as demonstrated by low reporting rates, and hence women's vulnerability to violence is perpetuated.

²⁸⁵ Rebecca Campbell, Sheela Raja, "Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence," (1999) *Violence and Victims*, 14, pp. 261-275.

²⁸⁶ The Scottish Centre for Crime & Research, *supra* note 194 at 4.

In sum, I argue that the cumulative effect of the evidence referenced above substantiate the claim that current government practices violate the section 15 rights of women who are complainants of sexual violence.

3.8 SECTION 7

In addition to a section 15 breach, I also argue that government practices regarding treatment of sexual violence complainants violates section 7 of the *Charter*. The right to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”²⁸⁷ under section 7 has been asserted in a number of Supreme Court appeals regarding the rights of women.

In *R v Morgentaler*²⁸⁸ state imposed restrictions on women’s ability to obtain abortions were found to violate section 7 because “state’s interference with women’s bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person.”²⁸⁹ The Court goes on to consider whether the impugned law comported with the principles of fundamental justice and finds that the system regulating therapeutic abortions was manifestly unfair and therefore violated the principles of fundamental justice.²⁹⁰ The outcome of this decision is celebrated as progress for women’s right to personal autonomy, but disappointingly the Court did not address women’s equality rights. However, Justice Wilson, standing alone in her judgement, raises the gendered nature of abortion and discusses the importance of

²⁸⁷ *Charter*, *supra* note 187, section 7

²⁸⁸ [1988] 1 SCR 30.

²⁸⁹ *Ibid* at 56.

²⁹⁰ *Ibid* at 72.

defining women's human rights regarding their special place in society. She points out that the right to decide whether or not to reproduce is "an integral part of modern woman's struggle to assert her dignity and worth as a human."²⁹¹ Although section 15 was not discussed in the decision, according to Diana Majury, Justice Wilson's judgement is "one of the best and strongest articulations of a substantive equality analysis that we have heard from the Court to date. It is contextual, focused on inequality, and premised on women's experiences."²⁹² Viewed in that way, the case can be used to support the argument that government practices that cause psychological harm violate women's right to security of the person.

In *Canada (Attorney General) v Bedford*²⁹³ the Supreme Court again uses section 7 to protect the rights of women, specifically regarding women's health and bodily integrity. In that case the Court finds that criminal prohibitions on bawdy houses impose dangerous conditions on prostitution that prevent sex workers from protecting themselves from risks.²⁹⁴ The Court rejects the argument that individuals engaged in prostitution chose to assume the risk but instead finds that the causal source of the harm they face is the law.²⁹⁵ The standard of causation is articulated as requiring "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]."²⁹⁶ Importantly, the Court in *Bedford* finds that the principles of fundamental

²⁹¹ *Ibid* at 172.

²⁹² Majury, *supra* note 209 at 320 - note that while the article was written in 2002, the point still stands, with only a few cases adding to the jurisprudence on the topic.

²⁹³ 2013 SCC 72.

²⁹⁴ *Ibid* at para 60.

²⁹⁵ *Ibid* at para 73

²⁹⁶ *Ibid* at para 75 referenced by Jennifer Koshan, "Teaching Bedford, Reflections on the Supreme Court's Most Recent Charter Decision," posted December 24, 2012. Online:

justice do not justify the impugned law, meaning that the “means by which the state seeks to attain its objective is fundamentally flawed.”²⁹⁷ This analysis could also apply to practices regarding the treatment of sexual violence complainants, as a fundamentally flawed means to prosecute sexual violence that is not justified.

The connection between women’s rights and section 7 is articulated well by Justice L’Heueux-Dubé in *New Brunswick (Minister of Health and Community Services) v G.(J.)*²⁹⁸ In that case the Court finds that denial of legal aid to a woman involved in a custody proceeding is a violation of her section 7 right to security of the person. The majority considers the psychological stress and stigma for a parent facing the removal of a child from her care and the importance of her identity as a parent, as factors giving rise to the violation of the appellant’s security of the person. Additionally, Justice L’Heueux-Dubé writing for Justices Gonthier, McLachlin and herself asserts that the case also raises gender equality issues, because women, particularly single mothers of low economic means, are disproportionately affected by child protection proceedings. She describes the influence of section 15 on the scope of the protected rights under section 7, stating:

These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter*... All *Charter* rights strengthen and support each other... and s.15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s.

<https://ablawg.ca/2013/12/24/teaching-bedford-reflections-on-the-supreme-courts-most-recent-charter-decision/>.

²⁹⁷ *Bedford*, *supra* note 293 at para 105.

²⁹⁸ [1999] 3 SCR 46.

[15](#) and [s. 28](#), are a significant influence on interpreting the scope of protection offered by [s. 7](#).²⁹⁹

3.9 THE COMBINED PROTECTIONS OF SECTION 15 AND SECTION 7

As Justice L-Heureux-Dubé opined, combining the complimentary provisions of security of the person under section 7 and equality under section 15 provides useful analytical approach to interpreting *Charter* rights. The approach can be applied to the government practices regarding the treatment of sexual violence complainants by recognizing that their harmful impact causes the violation of both women’s section 7 right to ‘security of the person’ and women’s section 15 right to ‘equal protection and equal benefit of the law.’ These criminal justice practices violate women’s right to security of the person because they harm women through re-victimization, and they fail to protect women from sexual violence and fail to provide them equal benefit of the law because they impose barriers for women to access the criminal justice system.

*Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*³⁰⁰ is an example of a case where the court finds violations of both section 7 and section 15. In that case the *Charter* violations underpinned the proven negligence of a state institution. The Toronto Police were found to be negligent in failing to warn the female Plaintiff about a serial rapist, despite knowing that she was at risk of being harmed by him. The court concludes that the police investigation was marred by rape myths and sexist stereotypes, including believing that if women were warned about a rapist in their neighbourhood they would become hysterical. Accordingly, the court finds that the

²⁹⁹ *Ibid* at para 112.

³⁰⁰ (1998) 39 OR (3d) 487 (ONSC).

Plaintiff was denied equal benefit and equal protection of the law and was denied her right to security of the person. Further, because the police exercised their discretion negligently during the investigation, the police conduct was also found to be contrary to the principles of fundamental justice.

This combined private law and constitutional case demonstrates the potential for claimants to hold institutions accountable for sex discrimination using both sections 7 and 15 of the *Charter*. The judgment also supports the argument that criminal justice practices that result in harm to women are susceptible to a combined sections 7 and 15 *Charter* scrutiny.

3.10 SECTION 1

Section 1 of the *Charter* imposes reasonable limits on the rights and freedoms set out in the *Charter* so that violations are only tolerated if they are “prescribed by law” and are “demonstrably justified in a free and democratic society.” An important additional component to be incorporated into the section 1 analysis is a gendered lens into the assessment of what is demonstrably justified. Fay Faraday points out that if such a lens is not applied, discriminatory norms and practices that violate equality rights will be rehabilitated and tolerated.³⁰¹

This gendered lens is applied to the section 1 analysis in *Alliance*, where Justice Abella rules that leaving in place unfair pay for women would result in the perpetuation of systemic sex discrimination. She finds that accepting the government’s justification for this discrimination would result in perpetuating the disadvantage experienced by

³⁰¹ Faraday, *supra* note 206 at 25.

women in the workplace and “makes women ‘the economy’s ordained shock absorbers.’”³⁰² She concludes that any benefit of an approach that lowers pay equity obligations for employers in the hope of encouraging compliance is outweighed by the harmful impact on the very group that pay equity was designed to assist. In this way the application of a gendered lens to the section 1 analysis led to the Court’s refusal to accept norms that perpetuate discrimination as a justification for the section 15 *Charter* violations.

In my view, applying a section 1 analysis with a gendered lens to the criminal justice practices regarding treatment of sexual violence complainants in breach of section 7 and 15, would likely result in the government being unable to justifying the violations. As I argue below, it would be very difficult for the government to identify any policy objective that would over-ride the impact of the policies in perpetuating women’s disadvantage and causing them harm. Further, as in the *Fraser* case, the government could not likely establish a rational connection to, or minimal impairment of women’s rights, regarding their existing practices.³⁰³

The government practices and policy omissions regarding the treatment of sexual violence complainants suffer from the same difficulty as the impugned act in *Fraser*. The objective of the practices do not justify the limitation on the claimant’s rights. While there may be some desire within the criminal justice process to treat complainants with respect and compassion, the government practices simply fall short. They suffer from significant omissions and lack of accommodations that render them inadequate measures

³⁰² *Alliance*, *supra* note 232 at para 8.

³⁰³ *Fraser*, *supra* note 240.

to ensure the claimant's equality and protection of the law. Further, there is no proportional connection between the rational objective of treating complainants with respect and compassion and the effect of causing them added harm. Moreover, applying a gendered lens to the section 1 analysis requires a refusal to accept norms that perpetuate discrimination, and a refusal to tolerate practices that violate equality rights. Accordingly, it is unlikely that the government could demonstrate that the impugned practices could be justified in a free and democratic society.

3.11 REMEDY

Having established that the practices and absence of policies regarding treatment of sexual violence complainants violate the claimant's *Charter* rights, and that the violations cannot be justified under section 1, the next step requires the practices to be declared of no force and effect to the extent that they are inconsistent with the Constitution, under section 52 of the *Constitution Act, 1982*.³⁰⁴ ³⁰⁵ Further, as clarified by the Court in *Ontario (Attorney General) v G.*,³⁰⁶ "remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of the practices are preserved."³⁰⁷ It should then be up to Parliament to draft new policies regarding practices that provide a new approach to the treatment of sexual violence complainants that minimally impairs their sections 15 and 7 *Charter* rights to equal benefit and protection of the law and security of the person.

³⁰⁴ Schedule B to the *Canada Act, 1982*, (UK), 1982, c11.

³⁰⁵ *Ontario (Attorney General) v G.* 2020 SCC 38.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid* at para 116.

While the Court cannot dictate to Parliament what specifics should be contained in policies regarding treatment of sexual violence complainants, the Court could signal to the government that a greater emphasis on complainants' participation in the process and measures to protect complainants from the harmful aspects of the process are necessary in order to reduce complainants' fear of engaging the criminal justice system. In fact, international studies have shown that allowing sexual violence complainants as much participation in the process as possible reduces the trauma they experience in engaging the justice process.³⁰⁸ A number of studies have also concluded that victims need an opportunity to voice their concerns and be involved in the process in order to experience psychological healing and feel satisfaction with justice system.³⁰⁹

In my view the most effective means to provide sexual violence complainants with meaningful participation in and protection from the legal process is to allow them state-funded legal representation.³¹⁰ The same international studies referenced above support the value of legal representation for sexual violence complainants to improve their experience of engaging the criminal process.³¹¹

Regardless of what measures Parliament chooses to put in place to address the impugned practices, policy omissions and failures to accommodate sexual violence complainants, it is important for the Court to communicate to governments that practices

³⁰⁸ I Bacik, C Maunsell and S Gogan, *The Legal Process and Victims of Rape* (1998) at p 50, online: Dublin Rape Crisis Centre <
<http://www.drcc.ie/wpcontent/uploads/2011/03/rapevic.pdf>>

³⁰⁹ *Ibid* at 51, referring to E Erez, 'Victim participation in sentencing: rhetoric and reality' (1990) 18:1 J Crim Justice 19.

³¹⁰ Karen Bellehumeur "A Former Crown's Vision for Empowering Survivors of Sexual Violence," (2020) 37 Windsor Y B Access Just 1.

³¹¹ *Ibid* at 17 - 18.

or policies require amendments to comply with the *Charter*. This sentiment was expressed well in *Vriend v Alberta*³¹² where Justice Iacobucci stated:

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under [s. 33](#) of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.³¹³

3.12 APPLICATION OF THE LAW TO JANE

Coming back to Jane’s story, a successful outcome of her claim would include a court-imposed remedy requiring the government to reform current practices and policies regarding the treatment of sexual violence complainants. However, in my view, Jane’s personal loss also should be addressed under section 24(1) of the *Charter*. Damages under section 24(1) can be awarded to claimants in addition to a declaration of unconstitutionality under section 52 of the Constitution. According to the Court in *Ontario (Attorney General) v G.*, when determining whether a remedy under section 24(1) is “appropriate and just,” a court should consider that:

[A]n effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant’s experience and address the circumstances of the rights violation, and will not be “smothered” in procedural delays and difficulties... The court’s approach to [s. 24\(1\)](#) remedies must stay flexible and responsive to the needs of a given case.³¹⁴

³¹² *Vriend, supra* note 55.

³¹³ *Ibid* at para 139.

³¹⁴ *Ontario (Attorney General) v G.*, 2020 SCC 38 *v G.*, at 144.

It follows that when making an award of damages a court should consider all of the experiences Jane endured as a result of her *Charter* rights being violated. Consideration should be given to the psychological harm she endured and the consequent health ailments and loss of employment income she experienced because of her repeatedly required court appearances that always ended in adjournments. Moreover, it is essential that a damage award fully address the fact that Jane's case went on for eight years with little consideration for the delay's impact on her, and no opportunity for her to voice her objection. A fair remedy must acknowledge that the government policies caused harm to Jane and that she is entitled to compensation.

3.13 CONCLUSION

If we wish to combat sexual violence and improve the rate at which survivors report it, we must scrutinize how the criminal justice system treats survivors. The *Charter* is a tool at our disposal to protect women's equality and security, so it is imperative that we use it to challenge the systemic discrimination experienced by female survivors of sexual violence. While the lack of standing afforded to complainants in criminal courts presents a barrier to advancing this challenge in criminal courts, resort can be made to civil processes, if the high legal costs involved can be surmounted. Importantly, such *Charter* challenges must be applied to legal practices, and the policies governing them, rather than to substantive law alone. The unabated rates of sexual violence by men against women in Canadian society, despite successful *Charter* challenges to substantive criminal law, is proof positive that scrutiny of the justice system beyond substantive law is warranted.

While there is no doubt that cultural and social norms drive the perpetuation of sexual violence against women, the law has a powerful role to play in pushing back against this scourge that sabotages women's hopes for equality. The government clearly has an obligation to administer the criminal justice process in a manner that does not reproduce harm for sexual violence complainants by re-victimizing them. At the very least citizens expect state institutions to administer justice in a manner that does not harm those it seeks to help. If the government fails in this regard, it must be held to account by the courts, and by the Constitution. Indeed, when we critique the justice system's treatment of survivors of sexual violence and hold it to the standards set out in the *Charter*, we take important steps toward insisting that our ideals for gender equality be achieved.

3.14 CONNECTING THE *CHARTER* CHALLENGE TO SYSTEMIC DISCRIMINATION UNDER THE *CANADIAN HUMAN RIGHTS ACT*

Women's pursuit of equality requires holding the government to account for the failure of its criminal justice institution to be accessed by 95% of sexual violence survivors. As I have shown in the preceding chapter, the application of the *Charter* points to the ways in which the criminal justice system fails women and calls for legal reform. Another effective legal tool to hold the Canadian government accountable is the *Canadian Human Rights Act (CHRA)*. This act is well suited for the purpose, in that it was designed to challenge discrimination in government institutions, including systemic discrimination based on gender.

In Chapter 4, I argue that a claim under the *CHRA*, initiated by a group of female complainants of sexual violence who have engaged the criminal justice system and experienced harm would be successful in proving adverse impact discrimination.

Moreover, I demonstrate that the discrimination is systemic because government policies and practices fail to protect women survivors from rape myths, gender stereotypes and misunderstandings about trauma. I argue that the appropriate remedy for this systemic discrimination is reform to government policies or practices to mitigate the harmful treatment of female sexual violence complainants. I advocate for the provision of state-funded trauma-informed legal counsel to sexual violence complainants who wish to engage the criminal justice process as a systemic remedy that would improve treatment of those survivors.

Chapter 4

SYSTEMIC DISCRIMINATION AGAINST FEMALE SEXUAL VIOLENCE COMPLAINANTS

4.1 INTRODUCTION

The Canadian criminal justice system's treatment of female survivors of sexual violence - and the policies and practices dictating that treatment - violate women's human rights under the *Canadian Human Rights Act [CHRA]*.³¹⁵ While this argument is novel, it is nonetheless crucial to advancing effective reforms that could reduce sexual violence against women. I argue that a claim for discrimination under the *CHRA* filed by a group of female former sexual assault complainants would succeed. The claim would point to the lack of adequate policies governing the way in which sexual violence victims are informed, protected and participate in the criminal process, and then demonstrate how this results in adverse impact discrimination against women. Further, it would show that the consequence of this dearth of policy is a lack of protection against rape myths and gender stereotypes, and a misunderstanding about trauma, all of which are harmful to female complainants. It is essential to women's equality that this problem be addressed since widespread knowledge of the harmful treatment women experience when engaging the criminal justice system discourages women from reporting sexual violence.

In fact, it is alarming to learn that only 5% of sexual violence victims report to the police.³¹⁶ However, it is unsurprising that many female sexual violence victims do not

³¹⁵ *Canadian Human Rights Act*, RSC 1985, c H-6.

³¹⁶ Shana Conroy and Adam Cotter, "Self-reported sexual assault in Canada, 2014 (July 11, 2017) Juristat Online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>

want to engage with a process that is known to be harmful and re-victimizing.³¹⁷ The cause of the harm experienced by sexual violence victims is indisputably tied to the way in which they are treated during the criminal justice process. Moreover, it is the lack of adequate policies dictating how sexual violence victims are treated during the criminal process that underpin the harm victims experience. These practices and policies have not been sufficiently challenged or reformed, and without change we cannot really expect improvement in women's willingness to engage the criminal justice system. Importantly, without accountability through the criminal justice system, perpetrators will continue to offend with impunity. Hence without reform to the process, we should expect that women will continue to experience sexual violence by mostly male offenders. The status quo will result in the continued perpetuation of systemic discrimination against women.

In addition to arguing that lack of government policies results in adverse impact discrimination to women, this article also provides a legal analogy between the Canadian government and an employer owing a duty to its employees. It then sets out a *prima facie* case of discrimination using the elements required under the *CHRA*, followed by a response to potential defenses available to the government. Finally, it argues that systemic remedies are viable responses to discriminatory policies and practices, and among the most important recommended specific reforms is the provision of state-funded legal counsel to sexual violence victims.

4.2 MAKING A HUMAN RIGHTS CLAIM AGAINST THE FEDERAL GOVERNMENT

³¹⁷ Lori Haskell and Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims," 2019, Canada Department of Justice Website, Online: <https://www.justice.gc.ca/eng/tp-pr/jr/trauma/index.html> at 5

The argument that criminal justice practices and lack of policies violate the human rights of women can best be advanced by making a claim to the Canadian Human Rights Commission. I propose filing a human rights claim against the federal government on behalf of a group of female sexual violence victims who have each engaged in the criminal justice system and been harmed by the process itself. There are plenty of potential candidates for such a group and plenty of examples of harmful treatment.

Since part of my law practice involves representing sexual violence survivors in criminal cases, I have witnessed first-hand the damage done by the criminal justice process to complainants. Unsurprisingly, it all begins with a complainant's first contact with the police. Most complainants have no access to legal resources to prepare them for police questioning and interviews. The result can be an incomplete account of the allegation, or even inaccurate information due to the stress of talking about their experience with the police on the complainant, particularly if the interview is not conducted using trauma-informed techniques.³¹⁸ Complainants can also over-disclose to police, since they are unfamiliar with the kind of information that is or is not relevant, and over-disclosure can unnecessarily violate their privacy. In this way, poor police interviews can result in ample ammunition for cross-examination when complainants testify in court.

After the interview, if no criminal charges are laid, complainants have no recourse and no way of assessing whether police discretion was exercised appropriately. If

³¹⁸ *Ibid* at 25 - 26.

charges are laid, complainants often find themselves in the dark, with long waiting periods and little input regarding bail conditions.

When criminal charges proceed, complainants' continue to experience harmful treatment, much of which mirrors the power imbalance they experienced during their abuse. For example, no policy compels a Crown to obtain and consider complainants' input about potential resolution deals before making agreements with defence counsel. Also, Crown counsel only has a limited ability to prepare complainants for testifying because of their duty to disclose any new information provided by the complainant³¹⁹ and the absence of confidentiality between the crown and the complainant. This lack of in-depth preparation often leaves complainants defenseless to withstand the frequently aggressive and even humiliating cross-examination that ensues. Moreover, complainants often feel frustrated regarding the lack of protection they feel while testifying in court. It is apparent to them that the Crown is under no obligation to object to harsh or unfair treatment of complainants, including defence counsel's use of stereotypical reasoning about expected behaviour from sexual violence victims.

The poor treatment sexual violence complainants experience when engaging the criminal justice system in some cases causes more psychological harm than the criminal act itself.³²⁰ This adverse impact is so significant that it may discourage women from engaging the criminal justice system in the future. Legislators have accepted that premise, making a connection between the impact of complainants' experiences in court on the willingness of future sexual violence victims to report to the police. New

³¹⁹ Resulting from Crown disclosure obligations pursuant to *R v Stinchcomb* [1991] 3 SCR 326.

³²⁰ *Supra* note 317 at 26.

amendments to the *Criminal Code* regarding the admissibility of complainants' private records in sexual assault cases, now require courts to take into account "society's interest in encouraging the reporting of sexual assault offence"³²¹. In *R v Green*³²² the court interprets the purpose of the new subsections and the factors to be taken into account in determining admissibility of private records, and finds that respecting complainants' privacy is one means of improving conditions for sexual violence complainants and encouraging more reporting:

[37] On their face, these factors indicate that the purpose of s. 278.92 is not merely to avoid myths and stereotypes about individuals who allege that they have been sexually victimized, but to create conditions in which such victims will more often report such crimes....

[38] The inclusion of the factors cited above at ss. 278.92(3)(b), (c), (g) and (h) show that the new statutory scheme is likewise motivated by the purpose of preserving a complainant's privacy and equality rights to the maximum extent possible, and promoting the reporting of sexual offences.³²³

However, this recent legislation change regarding private records is far from enough to address the adverse impact experienced by female sexual violence complainants. A human rights claim could bring to light the many ways in which current practices and lack of policies cause harm to women. If successful, it could also lead to a mandate that systemic remedies be implemented.

This type of grassroots strategic litigation could be a powerful tool to effect systemic change and provide legal empowerment to women. This legal empowerment

³²¹ Section 278.92(3) *Criminal Code*.

³²² *R v Green* 2021 ONSC 2826.

³²³ *Ibid* at paras 37 and 38.

could strengthen women’s capacity to ensure that the law prohibiting sexual violence is meaningful and accessible.³²⁴

Further, raising this claim with the Canadian Human Rights Commission (CHRC) and seeking a hearing at the Canadian Human Rights Tribunal (CHRT) would be a more accessible process for sexual violence survivors than commencing a constitutional challenge under section 15 of the *Charter of Rights and Freedoms*.³²⁵ The CHRC considers itself the Canadian people’s human rights watchdog. Their self-described mandate is well suited to holding the Canadian government to account for the harm experienced by female sexual violence victims. Their website states:

We work for the people of Canada and operate independently from the Government. The Commission helps ensure that everyone in Canada is treated fairly, no matter who they are. We are responsible for representing the public interest and holding the Government of Canada to account on matters related to human rights.

Moreover, while the administration of criminal law is within the jurisdiction of provinces and territories, procedural aspects of the criminal law are the jurisdiction of the federal government, with many procedural provisions being contained in the *Criminal Code*.³²⁶ For example sections 486.1 to 486.3 of the *Code* outlines procedures for witnesses to be granted support persons, to testify outside of the courtroom, or to require an appointed lawyer to conduct the cross-examination (for witnesses under 18 years).

³²⁴TAP Network, “Pursuing Law Reforms, Strategic Litigation and Legal Empowerment,” SDG Accountability Handbook, online: <https://www.sdgaccountability.org/working-with-formal-processes/pursuing-law-reforms-strategic-litigation-and-legal-empowerment/>

³²⁵*Part I of the Constitution Act, 1982 being Schedule B of the Canada Act 1982 (UK), 1982, c 11 (Charter).*

³²⁶Criminal Code of Canada, RSC 1985, c C-45; particularly Parts XIV and XV.

Further, sections 486.4 and 486.5 provides a procedure for restricting the publication of a witness's name. Many other procedural processes are contained in Part XV of the *Code* which is entitled “Special Procedure and Powers.” Hence, the most logical venue for a human rights claim is at the federal level, where systemic remedies for all Canadian women could be sought, including possible recommendations for amending the *Criminal Code*.

4.3 POLICIES AND PRACTICES REGARDING TREATMENT OF SEXUAL VIOLENCE COMPLAINANTS

While the substantive law regarding sexual assault in Canada has undergone positive reform over the last 30 plus years in favour of women’s equality, it is the practical processing of these crimes that gives rise to a discriminatory effect on women. Current policies and practices allowing harmful treatment of female sexual violence complainants, perpetuate systemic discrimination. The government has failed to implement policies that provide complainants with protection, information, and participation, regarding the criminal process. These missing policies could help prevent retraumatizing experiences, guard against harmful applications of gender stereotypes and rape myths, and accommodate psychological trauma. However, the government’s failure to implement these crucial policies has resulted in a criminal process that is harmful to female sexual violence victims, which make up 86% of all victims of sexual offences.³²⁷ This failure amounts to adverse impact discrimination against women.

³²⁷ Holly Johnson “Limits of a Criminal Justice Process: Trends in Police and Court Processing of Sexual Assault” in Elizabeth Sheehy, ed, *Sexual Assault in Canada, , Law Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 613.

Former Supreme Court of Canada Justice Claire L’Heureux- Dubé writes about the justice system’s poor treatment of female sexual violence victims in an article entitled “Still Punished for Being Female,” where she explains that:

[T]here is still a need for the judicial system to examine the way it deals with crimes of violence against women....Change is crucial in order to ensure that such crimes will be reported, that the system is fair for both accused and complainant, that the psychological trauma suffered by victims of male violence is recognized and taken into account by our legal responses to sexual assault....Only when all actors in the judicial process recognize the need to revamp attitudes and practices will legislative reform efforts produce the kind of justice for victims of violence against women that international convention and national legislation have mandated.³²⁸

Similarly, former Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane, writes about systemic discrimination in the criminal justice system, in light of the Globe and Mail’s Unfounded investigation. She reasons that police services are either not fit or averse to investigating sexual assault cases, and this problem is in part due to “systemic bias against women - which is a human-rights issue.”³²⁹ She continues that:

Like much of the systemic discrimination in the criminal-justice system, failure to properly investigate and prosecute sexual offences likely begins with an overreliance, whether consciously or unconsciously, on stereotypes. These stereotypes or rape myths are myriad and well documented: stereotypes about the types of women who get assaulted, how they should behave during an assault and how they should behave afterward.³³⁰

³²⁸ Claire L’Heureux-Dubé, “Still Punished for Being Female,” *Sexual Assault in Canada, Law Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 1 at 4.

³²⁹ Renu Mandhane, “Unfounded sexual assault cases: A human-rights issue,” *Globe and Mail* (Feb 16, 2017), online: <https://www.theglobeandmail.com/opinion/unfounded-sexual-assault-cases-a-human-rights-issue/article34047721/>.

³³⁰ *Ibid.*

She concludes with recommendations that police services enact policies and procedures to address this concealed systemic discrimination. She provides examples such as eliminating the exercise of police discretion when laying sexual assault charges, and requiring independent monitoring of police practices.³³¹

The Chief Commissioner’s assessment regarding police charging in sexual assault cases is equally applicable at every stage of the criminal justice process. Systemic bias against women is alive and well throughout the legal process.

Furthermore, discriminatory policies and practices regarding the treatment of sexual violence victims may do more than harm complainants; they may also serve to impair the functioning of the criminal justice system.³³² Garvin and Beloof suggest “disempowered victims may lose confidence in and respect for the system, may not report their victimization, or may disengage part way through the process.”³³³ In this way they argue that complainants of sexual violence may consider themselves to be excluded from those who can seek the protection of the law and its processes, which thereby significantly impairs society’s ability to fight against sexual violence.

4.4 POLICIES THAT REQUIRE CHANGE

When it comes to the nature of policy changes required for the full engagement of sexual violence complainants, it is necessary to drill down into the nature of the harm women currently experience, and how it is experienced. The way in which harm is

³³¹ *Ibid.*

³³² Margaret Garvin & Douglas Beloof, “Crime Victim Agency: Independent Lawyers of Sexual Assault Victims, (2015) Online: https://kb.osu.edu/bitstream/handle/1811/75400/OSJCL_V13N1_067.pdf at 71.

³³³ *Ibid.*

experienced by complainants can be divided into two categories: their treatment by the justice system (service), and their agency in the process (participation).³³⁴ Reform to policies and practices in these categories is crucial in order to improve complainants' experiences and encourage engagement with the criminal justice system.

On the surface it appears as though Canada protects the treatment of victims in the criminal justice process. For instance, the federal government enacted the Canadian Victims' Bill of Rights,³³⁵ but in reality, the bill provides very little to address the needs of sexual assault victims.³³⁶ After Canada became a signatory to the *United Nations' Declaration of Basic Principles of Justice for Victims of Crime*,³³⁷ the federal government and most provinces and territories enacted various victims' rights instruments to fulfill Canada's international obligations. The rationale behind the United Nations Declaration was that "victims were ignored and excluded from the criminal justice process for too long and, as a result suffered secondary victimization and failed to collaborate with the system."³³⁸ These various federal and provincial enactments were meant to frame victim-related guidelines and principles that respond to the concerns identified.³³⁹

The newest version of that legislation is the *Canadian Victim Bill of Rights (CVBR)*³⁴⁰, which in a limited way addresses victims' treatment regarding both services

³³⁴ Marie Manikis, "Imagining the Future of Victims Rights in Canada: A Comparative Perspective" (2015) 13:1 Ohio State J of Crim L 163 at 164.

³³⁵ S.C 2015, c12, s2 (Can.).

³³⁶ *Supra* note 334 at 173.

³³⁷ Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. GAOR, 96th Sess., Supp. No. 53, at 214, U.N. Doc A/40/53 (Nov. 29, 1985) [hereinafter United Nations Declaration].

³³⁸ *Supra* note 334 at 164.

³³⁹ *Ibid* at 165.

³⁴⁰ SC 2015, c 13, s 2.

provided and participation permitted by the justice system. However, the Bill's deficiencies render its helpfulness to victims negligible. For example, sections 6, 7 and 8 provide victims with rights to information, but the Bill does not specify which agency is obliged to provide which type of information at which stage of the process. Further, there is no enforcement mechanism. This lack of specificity and detail results in empty rights, that in turn lead to further disappointment and aggravation experienced by complainants. Indeed, research shows that one of the most important needs identified by victims of crime is to be kept informed about the process at all stages of the proceeding.³⁴¹ Moreover, when victims are left uninformed about developments in their cases, the result is often secondary victimization, arising from the experience of stress levels similar to the offense itself.³⁴²

The findings of "Progress Report: *The Canadian Victims Bill of Rights*," released by the Canadian Office of the Federal Ombudsman for Victims of Crime in 2020, confirm the significant shortcomings of this legislation. The report examines the treatment of victims in the justice system and how well victims' rights under the CVBR have been upheld. Overall the report finds that the "objectives set out in the Act have not been met,"³⁴³ and that "the situation of victims of crime has not fundamentally changed

³⁴¹ *Supra* note 334 at 166 referring to Jo-Anne Wemmers, "Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims' Attitudes and Compliance" (1995) 3 INT'L REV. VICTIMOLOGY 323 at 338.

³⁴² *Supra* note 334 at 167 referencing Helen Fenwick, "Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice 60 Process?" (1997) MOD. L. REV. 317 at 321.

³⁴³ Government of Canada Office of the Federal Ombudsman for Victims of Crime, "Progress Report: *The Canadian Victims Bill of Rights*," (November 2020) Online: https://victimsfirst.gc.ca/res/pub/prcvbr-reccd/40-061B%20FOVC%20Progress%20Report_EN_web.pdf at 2.

since it was passed.”³⁴⁴ It goes on to point out that in order for the Act to be effective, the roles and responsibilities of criminal justice official must be spelled out, particularly who has the obligation to inform victims of their rights.³⁴⁵ It also calls for the Act to be amended to provide a legal remedy for a violation, thereby becoming enforceable.³⁴⁶ It further recommends that the “federal government should work with provincial and territorial authorities to improve how victims are treated throughout the criminal justice system.”³⁴⁷ Consequently, there can be no doubt that the treatment of victims of crime falls squarely within Canada’s federal jurisdiction. Moreover, the report is a source for potential systemic remedies, should the proposed human rights claim against the federal government succeed.

In other countries a clear division of duties has been established that identify which agency is responsible for providing specific types of information to victims. Examples are found in the U.S. state of Arizona and in the *Code of Practice for Victims of Crime in England and Wales*.³⁴⁸ Manitoba’s *Victims’ Bill of Rights*³⁴⁹ is the only Canadian statute that divides informational duties between agencies at each stage of the process. This specificity allows victims to understand how to obtain the information they seek and holds the responsible agencies accountable. Policy reform is necessary for all Canadian victims of crime, and especially victims of sexual violence, to enable them to be kept informed about the process in which they have engaged.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid at 4.*

³⁴⁸ *Supra* note 334 at p 172

³⁴⁹ *Victims’ Bill of Rights*, C.C.S.M. 1998, c V55 (Can. Man.).

Victims of sexual violence also require some means of asserting influence in the criminal justice process. The *CVBR* includes a ‘Participation’ section but provides no instructions regarding the process to be followed to convey their views and have them considered. Similarly the ‘Protection’ section of the *CVBR* lacks any detail as to how victims can go about having their security or privacy interests protected, nor which agencies are responsible for doing so.

Outside of the *CVBR*, under the *Criminal Code*³⁵⁰, complainants in sexual violence cases are provided participation rights by way of standing in **two** types of defense applications: applications for records containing complainants’ personal information in which they have a reasonable expectation of privacy under section 278 of the *Criminal Code*, and applications for the admissibility of evidence of complainants’ other sexual activity under section 276. If defense counsel wishes to obtain or proffer private records relating to the complainant or wishes to proffer evidence of sexual activity by the complainant other than the subject matter of the charge, the complainant is entitled to legal representation limited to the four corners of those hearings. While victim participation in those applications is a very necessary and positive legal development,³⁵¹ given the highly private nature of the subject matter, there is still a need for much more policy reform to allow victims to be empowered throughout the balance of the criminal process.

For instance, complainants in sexual assault cases have no right to confer with prosecutors regarding the accused’s bail conditions, regarding defense requests to delay

³⁵⁰ *Criminal Code of Canada*, RSC 1985, c C-46.

³⁵¹ Based on my own legal experience representing many complainants in these hearings.

trial dates, regarding negotiation of guilty pleas, or even regarding whether the prosecutions should continue. Prosecutorial discretion in decision-making is “one of the least transparent and unfettered powers in Canadian criminal law.”³⁵² Establishing policies requiring prosecutors to communicate with complainants about specified topics would improve transparency and help victims understand the reasons for decisions regarding their cases.

In England and Wales victims now have a role in ensuring prosecutorial decisions are explained to them. Additionally, in 2011 the Court of Appeal made a finding that recognized victims’ rights to seek review of a decision not to prosecute. As a result, the Crown Prosecution Service has released the *Victims Right to Review Scheme* comprising formal guidelines for victims to exercise that right.³⁵³ Canada has no policy or procedure to review any prosecutorial decision. In sexual assault cases, if a prosecutor assesses that the case is not strong enough to proceed, the victim not only cannot appeal that decision, but they also cannot even assert a right that requires an explanation.³⁵⁴

However, of all the highlighted flaws regarding Canadian policy omissions, the most flagrant is the complete unenforceability of victims’ rights legislation in Canada. The issue was raised and determined in *Vanscoy v Ontario*.³⁵⁵ In that case the claimants had not been provided with informational rights contained in the Ontario *Victims’ Bill of*

³⁵² *Supra* note 334 at 177.

³⁵³ *Ibid* at 177.

³⁵⁴ As a victim’s counsel I have had several experiences of trying to assist clients in obtaining explanations for discontinued sexual assault prosecutions. The answers provided by prosecutors were shrouded in secrecy and not particularly helpful to the victims.

³⁵⁵ *Vanscoy v Ontario* [1999] OJ No 1661.

*Rights*³⁵⁶, however the court dismissed the claim ruling that no remedy was available under the act. The court interpreted the Bill to contain only a “statement of principle and social policy beguilingly clothed in the language of legislation...”³⁵⁷ Consequently, the decision has been applied across the country and victims’ rights bills across Canada are now considered to be legally unenforceable, containing only principles of good practice that are recommendations but not mandatory.³⁵⁸

This is not the case in other common law jurisdictions. The *Code of Practice for Victims of Crime in England and Wales* sets out a procedure for victims to lay a complaint to the Parliamentary Ombudsman. Under this process, breaches of victims’ rights can result in a range of remedies including apologies and compensatory payments.³⁵⁹ A number of U.S. states also have enforceable court-based processes allowing victims to receive remedies for breaches of their rights.³⁶⁰ Indeed, a comparative study found that U.S states possessing strong statutory protection of victims’ rights were more likely to provide victims with their rights than states without such protection.³⁶¹ The study confirms the notion that consequences for non-compliance are required in order for obligations by the state to be taken seriously, and further that enforcement of state duties may actually promote compliance.

It is not unreasonable that victims expect that a government espousing rights for victims will ensure that those rights can be actualized. A false expectation may be worse

³⁵⁶ *Victims’ Bill of Rights*, 1995 S.O 1995, c. 6.

³⁵⁷ *Supra* note 355 at para 22.

³⁵⁸ *Supra* note 334 at 180.

³⁵⁹ *Ibid* at 183.

³⁶⁰ *Ibid* at at 183.

³⁶¹ *Ibid* at at 184 referencing National Victim Center, Comparison of White and Non-white Crime Victim Responses Regarding Victims' Rights (June 5, 1997).

than no expectation at all. As Marie Manikis emphasizes, “the creation of false hopes and expectations coupled with the absence of a redress mechanism to respond to breaches likely create a form of secondary victimization.”³⁶² The *Canadian Victim Bill of Rights* and most of its provincial counterparts appear to do no more than set up false hopes for victims of sexual violence. This policy failure has a higher impact on sexual violence complainants compared to other victims’ because of the intensely private and highly traumatic nature of sexual crimes, coupled with the stigma and stereotypes that encompass it. Consequently, the dearth of policies and practices that ensure sexual assault victims are informed, protected, and participate in the criminal process, result in adverse impact discrimination against women.

4.5 THE GOVERNMENT IS ANALOGOUS TO AN EMPLOYER

Since adverse impact discrimination is a well-developed area of the law in employment settings, it is worth comparing the role of employers to the role of the government. Both are authoritative positions, and when we consider government policies concerning the treatment of sexual assault complainants, they can be viewed as similar to the policies established by employers regarding the work environment of their employees. In *Robichaud v Canada*³⁶³ the Supreme Court expanded the concept of employer liability to include sexual harassment of an employee by another employee.³⁶⁴ Liability was based on the fact that only employers are capable of providing their

³⁶² *Supra* note 334 at 181.

³⁶³ *Robichaud v Canada* [1987] 2 SCR 84.

³⁶⁴ The Supreme Court affirmed that sexual harassment was a form of discrimination based on sex in *Janzen v Platy enterprises Ltd.* [1989] 1 SCR 1252.

employees with a healthy work environment and of rectifying discriminatory practices. The court considered the central purpose of human rights legislation to be remedial and “to eradicate anti-social conditions without regard to the motives or intention of those who cause them.”³⁶⁵ Hence the court found that only by making remedies available against employers could the remedial objectives of human rights legislation be fulfilled in workplace sexual harassment cases.

Similarly, the government must be held accountable for providing sexual assault complainants with a safe environment in which to access justice. If the environment is unhealthy or harmful, it should be up to the government to provide a remedy.

Continuing with the analogy of government as employers, courts have held that the absence of proactive policies to avoid adverse effect discrimination can deem an employer liable. A good example of this is found in *Canadian National Railway Co. v Canada (Canadian Human Rights Commission) [Action Travail des Femmes]*³⁶⁶. In that case the Court found that CN Rail allowed discrimination against female employees by employing practices that resulted in a failure to hire women in blue-collar positions. The evidence at the hearing included numerous examples of female employees enduring sexual harassment by their male colleagues. From the female employee’s description of this sexual harassment, it appeared to have been used to discourage and intimidate women from seeking out blue-collar positions.³⁶⁷ Hence, indirectly, the employer’s

³⁶⁵ *Supra* note 363 at para 11.

³⁶⁶ *Canadian National Railway Co. v Canada (Canadian Human Rights Commission) [Action Travail des Femmes]* [1987] 1 SCR 1114.

³⁶⁷ Colleen Sheppard, “Developing a Systemic Approach: Experiential Knowledge and Sexual Harassment,” *Inclusive Equality, The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queens University Press, 2010) at 89.

failure to protect female employees from sexual harassment resulted in its liability for low female hiring rates and a finding of discrimination. Ultimately the Supreme Court held that the imposition of an affirmative action plan was an appropriate method by which to correct the employer's discriminatory practices.

Applying the same principles to government practices and policies concerning sexual assault complainants, the government should be subject to a positive duty to protect victims from a harmful environment during the criminal justice process. Moreover, knowledge of practices that discourage or intimidate women from engaging the justice process and not rectifying those practices should draw even clearer liability for discrimination based on sex.

Colleen Sheppard's systemic approaches to address workplace sexual harassment are equally apt to address mistreatment of sexual violence complainants in the criminal process. She suggests that structural inequalities exist in institutional environments where women are more vulnerable to discrimination. In order to prevent the sexual discrimination, the structural conditions must change.³⁶⁸ Also, understanding the ways in which organizational structures, practices and workplace norms institutionalize sexual discrimination is important in order to effectively respond to it.³⁶⁹

A positive example of an institutional policy response to systemic discrimination is found in the settlements of two class actions against the Royal Canadian Military Police.³⁷⁰ A class of female members of the RCMP alleged that their employer failed to

³⁶⁸ *Ibid* at 81.

³⁶⁹ *Ibid* at 85-6.

³⁷⁰ Merlo/Davidson Settlement, October 6, 2016, Online: https://complexlaw.ca/pdf/1-Merlo-Davidson-Settlement-Agreement-FINAL_3.pdf

ensure a work environment free of discrimination, intimidation and harassment. The agreement between the plaintiffs, the RCMP and the Government of Canada resulted in an acknowledgement that discrimination bullying, and harassment have no place in the RCMP.³⁷¹ The RCMP agreement included to adopt measures to change the organizational culture of the force and committed to “a holistic approach to culture change and an RCMP free of violence, harassment and discrimination.”³⁷² These changes to institutional policies in an effort to combat systemic discrimination within a law enforcement organization are encouraging first steps for policy reform within the criminal justice system.

4.6 ESTABLISHING A *PRIMA FACIE* CASE OF DISCRIMINATION

In order to prove a claim of discrimination under the *Canadian Human Rights Act (CHRA)*³⁷³ a claimant, such as a group of female complainants, must establish a *prima facie* case that the respondent has been involved in a discriminatory practice.

Section 5 of the *CHRA* describes prohibited discriminatory practices as follows:

- 5** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
 - (b) to differentiate adversely in relation to any individual,
- on a prohibited ground of discrimination.

³⁷¹ *Ibid* at para B.

³⁷² “Final Report on the Implementation of the Merlo Davidson Settlement Agreement”(2021) Government of Canada Website, online: <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20210325/035/index-en.aspx>

³⁷³ *Supra* note 315.

In order for female sexual violence complainants as a group to show that the criminal justice process involves policies and practices that are systemically discriminatory, they must establish that: 1) they have a characteristic protected from discrimination; 2) they have been denied services, or adversely impacted by the provision of services by the government; and 3) the protected characteristic is a factor in the adverse impact or denial.³⁷⁴

4.6.1 Prohibited ground of discrimination

Because the relevant policies and practices adversely impact women, the protected ground upon which discrimination is based is sex. This is established through consistent statistical evidence that women are disproportionately and overwhelmingly the victims of sexual violence, perpetrated by men.³⁷⁵ Sexual assault has been called “the most gendered of crimes,”³⁷⁶ and has been repeatedly recognized by the Supreme Court of Canada as disproportionately affecting women.³⁷⁷ For example, the Court in *R. v. Osolin*, wrote:

³⁷⁴ *First Nations Child and Family Caring Society of Canada v Attorney General (for the Minister of Indian and Northern Affairs Canada)*[*FN Caring Society*] 2016 CHRT 2 at para 22 referencing *Moore v British Columbia (Ministry of Education)* 2012 SCC 61 at para 33.

³⁷⁵ *Supra* note 316 at 613, referencing Statistic Canada’s Uniform Crime Reporting Survey (incorporating data by all Canadian police departments annually since 1962).

³⁷⁶ *Ibid.*

³⁷⁷ One example is by Madam Justice L’Heureux-Dubé in *R. v. Seaboyer*, [1991] 2 SCR 577.

Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrates that 99% of the offenders in sexual assault cases are men and 90% of the victims are women.³⁷⁸

Furthermore, the government of Canada has recognized that sexual offences disproportionately harm women. The preamble to Bill C-46, amending the *Criminal Code* regarding the production of private records in sexual offence cases, reads:

Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children...[and] the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the Canadian Charter of Rights and Freedoms.³⁷⁹

Moreover, a department of the federal government, the Status of Women Canada, issued a brief entitled “Sexual Violence Against Women in Canada,” which begins with the sentence: “One of the most pressing human rights issues facing Canadians today is the high rate of sexual violence against women.”³⁸⁰

Accordingly, there is strong support for the assertion that sexual assault complainants are discriminated against based on their sex, because the majority of victims are women. Hence, policies and practices in the criminal justice system that harm victims of sexual violence disproportionately harm women.

³⁷⁸ *R v Osolin*, [1993] 4 SCR 595, 86 CCC (3d) 481 at 521.

³⁷⁹ Bill C- 46, *An Act to Amend the Criminal Code (Production of Records in Sexual Offence S.C. Proceedings)*, 2d Session, 35th Parliament, 1997, Preamble (assented to 25 April 1997), 1997, c. 30.

³⁸⁰ Cecillia Benoit, Leah Shumka, Rachel Phillips, Mary Clare Kennedy, Lynne Belle-Isle, “Issue Brief: Sexual Violence Against Women in Canada,” (December 2015), online: <https://cfc-swc.gc.ca/svawc-vcsfc/index-en.html>

4.6.2 Provision of a ‘service’

The next element required to prove discrimination is that access to a government service has been denied or adversely impacted. In order to prove that the government conduct in question meets the definition of a government ‘service... customarily available to the public’ it must be determined if the government is holding out a “benefit” or “assistance.”³⁸¹ Further, a public relationship must exist between the service user and the service provider.³⁸²

It would be difficult to dispute that sexual assault victims receive a benefit by being able to access criminal justice. Without justice society would be lawless. Furthermore, the policies and practices dictating how victims are treated during the criminal process amounts to a form of assistance in navigating the criminal system. All Canadians are entitled to the protection of the law, and the federal and provincial governments are responsible for laws, policies and processes that provide that protection. Therefore, policies that govern the treatment of crime complainants provide both a benefit and assistance to those members of the public. Additionally, a public relationship exists between the government and victims of any crime including victims of sexual violence.

Support can be found in comparable cases resulting in rulings that governments provided a ‘service customarily available to the public.’ For example: In *R v Moore*,³⁸³

³⁸¹ *Supra* note 374 at para 30, relying on *Dreaver v Pankiw* 2010 FC 555 at para 11.

³⁸² *Ibid* at para 31, relying on *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

³⁸³ *Moore v British Columbia (Ministry of Education)* 2012 SCC 61.

the provision of education was deemed to be a service; In *XY v Ontario (Government and Consumer Services)*,³⁸⁴ the provision of birth certificates was a government service. In *First Nations Child and Family Caring Society of Canada v Attorney General (for the Minister of Indian and Northern Affairs Canada,)[FN Caring Society]*³⁸⁵ government funding of welfare services for children was identified as a ‘service.’

More particularly, in *Crockford v British Columbia (Attorney General)*³⁸⁶ the British Columbia Court of Appeal distinguished which activities performed by the Attorney General and Crown were subject to review as ‘services’ and which were protected by crown immunity. The court made reference to *Krieger v Law Society (Alberta)*³⁸⁷ [Krieger] that discussed the nature of crown immunity for prosecutorial discretion. In finding that crown immunity does not apply to policy matters, the court held:

The definition of prosecutorial discretion in *Krieger* does not encompass the role of the Attorney General and Crown counsel in the creation of policy. *Krieger* does not preclude a review of a policy created in the public interest. While a policy that guides Crown counsel in deciding whether to prosecute will ultimately touch on the Crown's core functions related to prosecutorial discretion, such as the Policy in this case, creating the policy is not part of the actual exercise of discretion in any particular case.³⁸⁸

The court went on to find that “The appellant's complaint of systemic discrimination arising from the creation and implementation of the Policy by the Crown is not immune from review under the principles in *Krieger*.”³⁸⁹ Hence, that case goes a long way to

³⁸⁴ *XY v Ontario (Government and Consumer Services)* 2012 HRTO 726.

³⁸⁵ *Supra* note 374.

³⁸⁶ *Crockford v British Columbia (Attorney General)* 2006 BCCA 360.

³⁸⁷ *Kreiger v Law Society (Alberta)* 2002 SCC 65

³⁸⁸ *Supra* note 386 at para 69.

³⁸⁹ *Ibid* at para 82.

support the notion that policies regarding the treatment of victims of sexual violence can be considered a ‘service customarily available to the public’ for the purpose of a systemic discrimination claim.

Indeed, courts have suggested that when analyzing a *CHRA* claim, a broad purposive approach should be applied, that takes into account “the full social, political and legal context of the claim.”³⁹⁰ In applying that lens to the policies in question, it is important to look not only to the potential harm that sexual assault victims suffer during the criminal process, but also on the way in which the process discourages victims from engaging the criminal justice system, denying them access to justice. As such, the tribunal’s comments in *Eldridge v British Columbia (Attorney General)*,³⁹¹ a case ruling that the denial of medical services to a deaf person is discriminatory, are very apt to the discrimination in question: “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public.”

4.6.3 Adverse Impact

Next, it must be demonstrated that sexual violence complainants have been adversely impacted by the provision of government services. Expert evidence is often provided to establish this point, as was done in *FN Caring Society*. In that case four expert witnesses were called to demonstrate the adverse effects of inadequate funding for

³⁹⁰ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 30.

³⁹¹ *Eldridge v British Columbia (Attorney General)*[1997] 3 SCR 624 at para 78.

First Nation children on reserves and showed that the effects perpetuated historical disadvantage of indigenous peoples.³⁹²

For the proposed claim, there are various components about which expert evidence could be called. An expert witness could be called to provide a statistical analysis of Canadian sexual assault data. For example Holly Johnson has studied statistical trends in data found in reports of sexual assault in Canada. Using police statistics and victimization surveys, she has estimated the prevalence of sexual assault over a number of decades in Canada.³⁹³ Her research reveals trends showing a sharp rise in reported rape cases after the implementation of sexual assault law reform in 1983, followed by a drop in reported cases after 1993.³⁹⁴ Johnson comments that the rise in reported cases might be attributed to an increased willingness by female victims to report their sexual assaults to police due to the many positive social changes at the time, including sexual assault law reform.³⁹⁵ She goes on to opine:

If improvements to the justice system response to sexual assault were indeed associated with the rise in reported sexual assaults prior to 1993, it is feasible that negative experiences with the legal process since that time may have reduced women's confidence that they will be treated with dignity, fairness, and compassion, resulting in a decline in willingness to engage with the criminal justice system.³⁹⁶

Furthermore, the 2014 General Social Survey on Canadians' Safety (Victimization), reveals that only 5% of incidents of sexual assault are reported to police. The survey

³⁹² Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62d:2 McGill LJ 285 at 320, *Supra* note 44 at para 404.

³⁹³ *Supra* note 327 at 616.

³⁹⁴ *Ibid* at 617.

³⁹⁵ *Ibid*.

³⁹⁶ *Ibid*.

indicates that some of the reasons given for not reporting include victims not wanting the hassle of dealing with the police, or not wanting to go through the court process, believing that if they did, there would not be a conviction due to a lack of evidence.³⁹⁷ When interviewed about the survey, Johnson commented: “The reporting rate just keeps dropping and it can’t drop much lower, and the prevalence stays the same. So we’re not making any progress here.”³⁹⁸

Johnson’s research has also revealed that negative biases and stereotypes about sexual assault complainants often impact the processes of police laying charges, prosecutors making decisions, and jurors deliberating.³⁹⁹ She referenced Claire L’Heureux-Dubé, former justice of the Supreme Court of Canada, who identified many myths and stereotypes that have “skewed the law’s treatment of sexual assault claimants,” citing the following:

- The rapist is a stranger
- Women are less reliable and credible as witnesses if they have had prior sexual relations
- Women are more likely to have consented to sexual advances if they have had prior sexual relations
- Women will always struggle to defend their honour
- Women are “more emotional” than men so unless they become “hysterical,” nothing must have happened
- Women mean “yes” even when they say “no”
- Women who are raped deserve it because of their conduct, dress and demeanour

³⁹⁷ Leslie Young, “Statistics Canada report finds self-reported sexual assault rates steady over 10 years,” (July 11, 2017) Global news website, Online: <https://globalnews.ca/news/3590345/statistics-canada-report-finds-self-reported-sexual-assault-rates-steady-over-10-years/>

Referencing Shana Conroy and Adam Cotter, “Self-reported sexual assault in Canada, 2014 (July 11, 2017) Juristat Online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>

³⁹⁸ *Ibid.*

³⁹⁹ *Supra* note 327 at 624.

- Women fantasize about rape and thereafter fabricate reports of sexual activity even though nothing happened⁴⁰⁰

Former Supreme Court Justice L’Heureux-Dubé has also been adamant in her views that more must be done to remove stereotypes and myths about women who have been sexually assaulted.⁴⁰¹ She suggests, “there is still a need for the judicial system to examine the way it deals with crimes of violence against women.”⁴⁰² Moreover, she provides an excellent summary of the changes required to address the various adverse impacts experienced by complainants of sexual violence as follows:

Change is crucial in order to ensure that such crimes will be reported, that the system is fair to both accused and complainant, that complainants are treated with respect at all stages of the process, and that the psychological trauma suffered by victims of male violence is recognized and taken into account by our legal responses to sexual assault.⁴⁰³

Elaine Craig echoes those concerns about the treatment of sexual assault complainants by the justice system. In her book *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession*, Craig conducts research into the harm associated with testifying in court and the role played by legal counsel and the judiciary regarding that harm. She finds that:

Research on sexual assault complainants who engage with the criminal justice system suggests that the damaging experiences articulated by these women are not anomalous. Numerous studies have concluded that despite progressive law reforms aimed at protecting witnesses in sexual assault cases, for many the impact of testifying as a sexual assault complainant remains traumatizing and harmful.⁴⁰⁴

⁴⁰⁰ *Ibid* at 624-5 referencing Claire L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality and Justice,” (2001) 10 J Social Distress & Homeless 89.

⁴⁰¹ *Supra* note 328 at 3.

⁴⁰² *Ibid* at 4.

⁴⁰³ *Ibid*.

⁴⁰⁴ Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 4.

Melanie Randall and Lori Haskell have also cited research demonstrating that complainants of sexual assault often experience harm and re-traumatization by engaging the criminal justice system.⁴⁰⁵ They attribute some of that harm to society's lack of understanding of trauma and the way in which sexual violence victims react to it. Randall and Haskell also describe how those misunderstandings contribute to deficiencies in the treatment of sexual assault complainants during the criminal process.⁴⁰⁶

4.6.4 Connection between protected characteristic and adverse impact

The final element requires proof that the protected characteristic is a factor connected to the adverse impact suffered. The connection between the prohibited ground, in this case sex, and the adverse impact experienced by sexual violence complainants, need not be causal, nor the sole reason for the adverse impact.⁴⁰⁷

An example is found in the recently decided *Fraser v Canada*,⁴⁰⁸ where the Supreme Court holds that a law's disproportionate adverse impact on women is a violation of their right to be free from discrimination under section 15 of the *Charter*.⁴⁰⁹ In that case, the negative pension consequences of job-sharing RCMP positions disproportionately impacted women because women filled the majority of part-time positions, due to childcare responsibilities. The Court found that disproportionate impact

⁴⁰⁵ *Supra* note 317 at 6 referencing Lonsway & Archambault, 2012; Temkin & Krahé, 2008

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *FN Caring Society*, *supra* note 374 at para 25.

⁴⁰⁸ 2020 SCC 28.

⁴⁰⁹ *Supra* note 325.

can be proven by demonstrating that a protected group receives a different quality of treatment or must “take on burdens more frequently than others.”⁴¹⁰

The Court clearly articulated that discrimination is equally harmful to equality whether it is intentional and direct or due to its disproportionate negative impacts on a protected group.⁴¹¹ The Court further elaborated that:

At the heart of substantive equality is the recognition that identical or facially neutral treatment may “frequently produce serious inequality” (Andrews, at p. 164). This is precisely what happens when “neutral” laws ignore the “true characteristics of [a] group which act as headwinds to the enjoyment of society’s benefits” (Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, at para. 67; Eldridge, at para. 65).⁴¹²

The Court also confirms that the approach taken by courts in section 15 *Charter* challenges, is not different than that in the human rights context.⁴¹³

Consequently, Fraser helps establish that a connection can be made out between sexual assault, described as “the most gendered of crimes,”⁴¹⁴ and complainants’ poor treatment by the justice process through evidence of their exposure to gender myths, stereotypes and re-traumatization. Put more simply, being female is a relevant factor to sexual violence complainants’ treatment by the criminal process. Myths and stereotypes at every stage of the criminal process about how women behave before, during, and after being sexually assaulted, cause such harm that in some cases it is responsible for discouraging women’s engagement with the criminal process entirely.

⁴¹⁰ *Supra* note 408 at para 55.

⁴¹¹ *Ibid* at paras 45- 46.

⁴¹² *Ibid* at para 47.

⁴¹³ *Ibid* at para 49.

⁴¹⁴ *Supra* note 327 at 613 with women and girls comprising 86% of those victimized according to Statistics Canada’s Uniform Reporting Survey 2007.

4.6.5 Comparator groups

While section 5b) of the *CHRA* references adverse differentiation in relation to any individual, the courts have now been clear that comparator groups are not required in order to prove discrimination. In *Moore v British Columbia (Ministry of Education)*⁴¹⁵ the Supreme Court rejected the necessity for a comparator group analysis, used in section 15 *Charter* challenges, even though that case involved a government service and could have attracted *Charter* scrutiny.⁴¹⁶ Instead the court identified the harmful effects of the failure to accommodate a disability regardless of whether or not any other group received the same accommodation.⁴¹⁷ The Federal Court of Appeal in *First Nations Child and Family Caring Society of Canada v Attorney General (for the Minister of Indian and Northern Affairs Canada)* provided a helpful review of the current state of the law regarding comparator groups:

In *Moore v. British Columbia (Ministry of Education)*... the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] Code is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).⁴¹⁸

⁴¹⁵ [2012 SCC 61](#).

⁴¹⁶ Joanna Birenbaum & Kelly Gallagher-Mackay, "From Equal Access to Individual Exit: The Invisibility of Systemic Discrimination in Moore" (2013) 10 *JL & Equality* 93 at 93.

⁴¹⁷ Gwen Brodsky, "Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong" (2013) 10 *JL & Equality* 85 at 85.

⁴¹⁸ *Supra* note 374 at para 60.

It would be very challenging to find a mirror comparator group with which to distinguish the adverse treatment of female sexual assault complainants. Male sexual assault complainants are not subject to application of female gender stereotypes, but they suffer the impact of other stereotypes as well as a lack of rights to service and participation. Victims of crime other than domestic or gendered violence are not subject to the same harm by participating in the criminal justice process, because the subject matter is not tied as closely to their personal privacy, dignity and integrity. Hence, female sexual assault complainants occupy a unique space in the justice system that is not easily subject to comparison. Such a situation was anticipated by the Supreme Court in *Withler v Canada (Attorney General)* where it reasoned that:

[F]inding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison.⁴¹⁹

The focus of a claim of adverse effect discrimination should lay with the context of the discrimination, which in this case includes the legacy of oppression and inequality as manifestations of societal patriarchy and misogyny.

Consequently, applying the *prima facie* test to the policies and practices governing the treatment of female sexual assault complainants in the criminal justice system results in a finding of systemic discrimination. However, statutory exceptions under sections 15g) and 16 of the *CHRA* are available to the Canadian government. I now turn to whether those defences could be successfully deployed to avoid liability.

⁴¹⁹ *Withler v Canada (Attorney General)* 2011 SCC 12 at para 59.

4.7 EXCEPTIONS TO LIABILITY

Starting with section 16, the *CHRA* specifies that it does not fall within the meaning of a ‘discriminatory practice’ to carry out ‘special programs’ designed to improve opportunities for members of groups who suffer disadvantages related to prohibited grounds. That provision is not applicable to the policies and practices regarding the treatment of complainants of sexual violence in the criminal justice system so nothing further need be said about it.

However, section 15(g) provides an exception that the Canadian government may try to assert. It stipulates that it is not a discriminatory practice if there is a *bona fide* justification for the denial of a service or adverse differentiation. The meaning of that stipulation is expanded upon in section 15 (2) stating:

...to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Since no party’s health or safety could not reasonably be implicated by reforming the policies for treatment of sexual violence complainants, this exception to liability comes down to whether the cost of doing so is prohibitive.

To understand the meaning of “*bona fide* justification” we can look to the Supreme Court in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*.⁴²⁰ There the Court held, “[i]f a reasonable alternative exists to burdening members of a group with any given rule, that rule will not be *bona fide*.”⁴²¹ Further, the Supreme Court expanded on the meaning of “undue hardship” in *British Columbia (Superintendent of*

⁴²⁰ *Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489

⁴²¹ *Ibid* at 518.

Motor Vehicles) v. *British Columbia (Council of Human Rights)*[*Grismer*]⁴²² indicating that “impressionistic evidence of increased expense will not generally suffice.”⁴²³

Consequently, it is not available for the Canadian government to argue that it has a *bona fide* justification for not reforming its policies and practices because reasonable alternatives are available; for instance improving the content and enforceability of the *Canadian Victims Bill of Rights* and improving victim participation in the criminal process. Furthermore, an argument that policy reform would be too costly will not likely meet with success given the *Grismer* ruling.

The foregoing analysis demonstrates that a tribunal could, on a balance of probabilities, make a finding of systemic discrimination under the *CHRA* regarding Canadian policies and practices governing the treatment of female sexual violence complainants in the criminal justice system. Once such finding is made, the crucial next step is the imposition of systemic remedies.

4.8 SYSTEMIC REMEDIES

Canadian human rights legislation reflects Parliament’s intention to support and encourage measures that ensure respectful and inclusive environments in which Canadians can live free from the restrictions, barriers and harm of discrimination.⁴²⁴ The stated purpose of the *CHRA* is to

“give effect ...to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives they are able and

⁴²² *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[1993] 3 SCR 868.

⁴²³ *Ibid* at para 4.1.

⁴²⁴ Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6 Can J of Human Rights 1at 7.

wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices...”⁴²⁵

The act was designed to identify and rectify discrimination through preventative measures rather than through punishment.

Systemic remedies can be a means of reversing the change-resistant patterns of discrimination found in governmental, institutional and societal structures.⁴²⁶ Many of these forms of discrimination are the result of historic practices, attitudes and stereotypes that have become entrenched and normalized within the institution in question. These practices are not necessarily the product of overt intention to discriminate, but individual remedies can no longer correct them. “Systemic problems require systemic remedies.”⁴²⁷ Hence, it is crucial that the Canadian Human Rights Tribunal have systemic remedies available as a tool to achieve its legislative purpose, to overcome institutional barriers and to achieve its transformative goals.

Subsections 53(2)(a) and (b) of the *CHRA* provide the statutory authority for the tribunal to impose systemic remedies. The following terms may be ordered against the person found to have engaged in discriminatory practices:

- (a) ... cease the discriminatory practice and take measures...to redress the practice or to prevent the same or similar practice from occurring in future...
- (b) ...make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice..

⁴²⁵ *CHRA* section 2.

⁴²⁶ *Supra* note 424 at 4.

⁴²⁷ *Ibid.*

In *Action Travail des Femmes and Canadian Human Rights Commission v Canadian National Railway Co*, the Supreme Court of Canada indicated that in order to combat systemic discrimination, a purposive approach should be taken when imposing remedies.⁴²⁸ The court explained that: “[s]ystemic remedies must be built upon the experience of the past so as to prevent discrimination in the future.”⁴²⁹

These remedies are also important to Canada’s international human rights obligations, which include the duty to respect, protect and fulfill human rights.⁴³⁰ As explained by the United Nations High Commissioner on Human Rights:

The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.⁴³¹

In order to create remedies that are effective in protecting and fulfilling human rights, it is necessary for tribunals to have a tool that can direct governments to take positive action. Systemic remedies are tool to ensure effective remedies for systemic discrimination.

In relation to discrimination against women, particularly involving violence against women, the United Nations provides guidance regarding the nature of systemic remedies required. The United Nations Special Rapporteur on violence against women states:

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation ... reparations should aspire, to the extent possible, to

⁴²⁸ *Action Travail des Femmes and Canadian Human Rights Commission v Canadian National Railway Co*. [1987] 1 SCR 1114 at 1138.

⁴²⁹ *Ibid* at 1145.

⁴³⁰ International Human Rights Law", Office of the High Commissioner for Human Rights (2017), online:

<www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

⁴³¹ *Ibid*.

subvert, instead of reinforce, pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience.⁴³²

Applying this advice to the discriminatory treatment of sexual violence complainants in the criminal justice system requires that systemic remedies provide women measures to increase their agency. Such measures would reduce structural inequality and allow women to be protected, be informed about, and participate in, the criminal process. One significant way in which to increase women's agency would be by providing state-funded legal counsel to represent complainants of sexual violence throughout the legal process.

4.8.1 State-funded legal counsel for sexual assault victims

Providing legal counsel to sexual assault complainants has been viewed as a means to increase fairness, dignity and respect for victims' privacy within the criminal justice process.⁴³³ According to Garvin and Beloof:

Crime victim agency is akin to the concept of crime victim autonomy, and at its core is the right and power of individuals to make fundamental decisions about their lives. This is particularly important in a criminal justice setting, where failure to respect crime victim agency can lead to additional harms or secondary victimization.⁴³⁴

Having a means to exert power or influence is important. Research shows that victims who participate in the criminal justice process can experience benefits including a sense of validation, increased feelings of safety and protection, improvement in depression, and better quality of life.⁴³⁵ Disempowerment can result in a loss of respect and confidence in

⁴³² Advancement of Women: Note by the Secretary-General, UNGAOR, 66th Sess, UN Doc A/66/215 (2011) at para 71.

⁴³³ *Supra* note 332 at 67.

⁴³⁴ *Ibid* at 68.

⁴³⁵ *Ibid* at 70.

the system and can cause victims to disengage in the criminal process or refrain from engaging in the first place.⁴³⁶

Those who advocate the merits of state-funded legal counsel for victims of sexual assault suggest that many objectives could be served by such representation at all stages of the proceedings,⁴³⁷ and it would “make the process more humane.”⁴³⁸ Rather than a non-lawyer, legal counsel is best positioned to effectively assert victims’ rights and best situated to interact with other stakeholders in the criminal justice system.

The benefits of legal counsel for sexual assault victims are supported by research. An Irish study comparing 15 European states’ regarding their use of legal representation for victims of sexual crimes found that legally representation improved victims’ experience of the justice process.⁴³⁹ Having a lawyer allowed sexual violence victims to more easily obtain information regarding the investigation, bail, and trial process, and improved their level of confidence when testifying.⁴⁴⁰

Additionally, the U.S. Military has made innovative reforms by utilizing a Special Victims’ Counsel for members of the military who are victims of sexual assault. Senator Claire McCaskill touted the move as a way to “ramp up the protection, information, and

⁴³⁶ *Ibid* at 71.

⁴³⁷ Lucinda Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*” *Sexual Assault in Canada, Law Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 1 at 148.

⁴³⁸ *Supra* note 404 at 164.

⁴³⁹ Bacik, Maunsell and Gogan, “The Legal Process and Victims of Rape” (1998), Dublin Rape Crisis Centre Website, Online: <http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>

⁴⁴⁰ *Ibid*

deference they give to victims.”⁴⁴¹ She described this initiative as crucial to encouraging the reporting of sexual violence in the military.⁴⁴²

4.8.2 Other recommended systemic remedies

In addition to providing state-funded legal counsel, other recommended systemic remedies would be to improve the quality and enforceability of victims’ rights contained in the *Canadian Victims Bill of Rights* and to provide a mechanism for the review of prosecutorial discretion, particularly regarding discontinuing prosecutions of sexual violence charges. Policies and laws enacted in other jurisdictions such as in England and Wales could be studied and adapted to the Canadian legal landscape.

4.9 CONCLUSION

In my submission, it is clear that the Canadian criminal justice system and its insufficient policies pertaining to sexual assault cases, is plagued by systemic discrimination. Women are adversely impacted by the policies that dictate their treatment regarding their protection, provision of information and participation in the criminal process. They are impacted by rape myths and gender stereotypes unlike any male victim. Yet policy reform could mitigate that harm. Systemic remedies could result in stronger, clearer and more effective victims’ rights that could better protect, inform and provide agency, particularly if facilitated by state-funded victims’ legal counsel.

⁴⁴¹ Erin Heuring, “’Til it Happens to You: Providing Victims of Sexual Assault their Own Legal Representative,” (2017) 53 Idaho L Rev 689 at footnote 131 referring to 159 CONG. REC. S8303 (daily ed. Nov. 20, 2013).

⁴⁴² *Ibid.*

Uncovering systemic discrimination through a human rights claim by women who have experienced the harms of engaging the criminal justice system, presents an opportunity for change. By accepting that the criminal process is discriminatory against women, that it results in harm to them, and may be at least in part responsible for women's resistance to engage the criminal system, the door is opened for positive reform. And systemic reform is not elusive. Concrete examples of effective victims' rights policies are operating in places such as England and Wales. Legal Counsel for victims of sexual violence is provided in other countries and is already available in Canada for limited purposes ('private records' and 'other sexual activity' hearings). These reforms would not cause undue hardship for the Canadian government or their provincial counterparts. In fact Canada could be seen as world leader in matching the legal reform started in the 1980s with the corresponding process reform necessary to pursue equality for women.

Sexual assault has been described as the most gendered crime and the most unreported. Adopting systemic remedies for discriminatory policies and practices in the criminal justice process could encourage more women to report to police and engage in the criminal process. That would be an important first step in combatting sexual violence against women. Alas, if unchecked violence against women persists, equality will never be achieved.

Chapter 5 CONCLUSION

Reform to criminal justice policies governing the treatment of sexual violence complainants is crucial. These policies, or lack thereof, harm women (who make up the vast majority of sexual violence complainants) discriminate against them under the *Canadian Human Rights Act* and violate their *Charter* rights to security of the person and equal benefit of the law. History demonstrates that Canadian women have always had to fight to be treated fairly in the law. They have fought for the right to own property, (a right first won in 1884),⁴⁴³ they have fought to be deemed legal persons, (achieved in 1929),⁴⁴⁴ and they fought for the right not to be raped by one's husband, (made law in 1983⁴⁴⁵). More recently, women's movement and feminist legal advocates pushed legislators to provide more protection to sexual violence complainants through amendments to the *Criminal Code* limiting the admissibility of 'other sexual activity' (rape shield law),⁴⁴⁶ and private records⁴⁴⁷ for complainants of sexual assault. The Supreme Court recognized the importance of women's privacy autonomy and security rights, when it ruled that consent to sexual activity cannot be implied,⁴⁴⁸ and - more recently – when it ruled that consent to sexual activity is conditional on the type of sexual

⁴⁴³ The *Married Women's Property Act* in Ontario allowed married women in 1884 to enter into contracts and buy property.

⁴⁴⁴ "Rights of Women," Government of Canada website, online: <https://www.canada.ca/en/canadian-heritage/services/rights-women.html>.

⁴⁴⁵ Bill C-127, *An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person*, S.C. 1980-81-82-83, c. 125.

⁴⁴⁶ Section 276 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁴⁴⁷ Section 278.1 – 278.96 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁴⁴⁸ *R v Ewanchuk* 1999 SCC 711.

activity agreed to, specifically regarding the use of a condom.⁴⁴⁹ These are positive legal achievements but are far from sufficient to end the scourge of sexual violence against women, and fail to address the discrimination and *Charter* violations women incur when engaging the criminal justice process.

Women have had to persuade legislators that legal reform was not just desirable but imperative. I have argued that the harmful treatment of female sexual violence complainants in the criminal justice system is discrimination against women under the *Canadian Human Rights Act (CHRA)* and violates their s. 7 and s. 15 *Charter* rights. Women's quest for equality demands legal reform to address this harmful treatment and end this discrimination. Provision of trauma-informed state-funded legal counsel for complainants of sexual violence is one such reform that is vital to mitigate the harm that women face when engaging the criminal process and to end this discrimination.

In this thesis, Chapters 4 and 6 have demonstrated the serious harm that women experience in engaging in the criminal justice process as complainants of sexual violence and demonstrated that the policies governing their treatment in the criminal justice system violates their *Charter* rights and is discriminatory under the *CHRA*. Accordingly, the Canadian government must engage in reform of such a harmful and discriminatory process. Moreover, the government must honour the commitment it made to the international community when it became a signatory to Convention on the Elimination of

⁴⁴⁹ *R v Kirkpatrick* 2022 SCC 33.

all Forms of Discrimination Against Women (CEDAW)⁴⁵⁰ and committed to ensuring that its institutions will not cause harm to women.

Article 15 of CEDAW establishes that women should have equality before the law and prohibits gender bias within legal systems.⁴⁵¹ Moreover, the Committee on the Elimination of all Forms of Discrimination against Women (the Committee) has considered the issue of women's 'access to justice' to be essential.⁴⁵² It has looked at women's challenges to accessing justice in cases of sexual violence, including institutional and procedural obstacles and found that institutional weakness is manifested by poor police investigations, poor collection of evidence, and general ineffectiveness of justice systems due to a lack of will by the state or a culture of impunity.⁴⁵³ It also addressed the problem of the lack of reporting of violence by women as an obstacle to access to justice. Moreover, it made the following important observation:

The inefficiency and/or lack of protection and legal support structures can hamper women's access to justice. The provision of legal aid services and the stage at which it is made available, notably in criminal procedures, is an important safeguard contributing significantly to ensuring access to justice.⁴⁵⁴

⁴⁵⁰ (1979) 1249 UNTS 13 (entered into force 1981). Canada signed the CEDAW on July 17, 1980 and ratified in on December 10, 1981.

⁴⁵¹ Access to Justice – Concept Note for Half Day General Discussion - Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, online: <https://www2.ohchr.org/english/bodies/cedaw/docs/Discussion2013/ConceptNoteAccessToJustice.pdf> at 4.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid* at 10.

⁴⁵⁴ *Ibid* at 11.

Consequently, the Canadian government has a duty to remove procedural obstacles and repair its criminal procedures to ensure that sexual violence complainants have genuine access to justice.

In *R v J.J.*⁴⁵⁵ the Supreme Court recently recognized the harms sexual violence complainants may face when engaging with the criminal justice system and signaled that more reform is necessary. The Court made the following compelling observations:

[1] The criminal trial process can be invasive, humiliating, and degrading for victims of sexual offences, in part because myths and stereotypes continue to haunt the criminal justice system. Historically, trials provided few if any protections for complainants. More often than not, they could expect to have the minutiae of their lives and character unjustifiably scrutinized in an attempt to intimidate and embarrass them, and call their credibility into question — all of which jeopardized the truth-seeking function of the trial. It also undermined the dignity, equality, and privacy of those who had the courage to lay a complaint and undergo the rigours of a public trial.

[2] Over the past decades, Parliament has made a number of changes to trial procedure, attempting to balance the accused's right to a fair trial; the complainant's dignity, equality, and privacy; and the public's interest in the search for truth. This effort is ongoing, but statistics and well-documented complainant accounts continue to paint a bleak picture. Most victims of sexual offences do not report such crimes; and for those that do, only a fraction of reported offences result in a completed prosecution. More needs to be done.

Indeed, more needs to be done. The reforms that legislators and courts have implemented to date have had next to no impact on the 95% of sexual violence survivors who have declined to engage the criminal justice system. Many of those survivors do not benefit from those reforms because the criminal process is too frightening to be accessible to them.⁴⁵⁶ It follows that legal reform must address and improve the environment to which

⁴⁵⁵ 2022 SCC 28.

⁴⁵⁶ Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 3.

complainants are being asked to subject themselves. Moreover, fear and distrust of the system must be reduced by tackling issues within the processes that cause harm. That said, the specific concerns of sexual violence complainants requires a legal voice to effect change. Without legal representation and standing for sexual violence complainants, it potentially falls to Crown prosecutors to advance complainants' best interests. However, that is clearly outside of the Crown's role, since the Crown's duty is to uphold the public interest, which is not necessarily aligned with a complainant's best interest.

5.1 THE BENEFITS OF LEGAL REPRESENTATION FOR SEXUAL VIOLENCE COMPLAINANTS

A complainant's legal representative would be well positioned to advocate for the interests of complainants and raise issues that may be impeding engagement by the majority of survivors. To be sure, legal counsel for complainants will not solve every concern for survivors. For instance, having to endure cross-examination by defence counsel will always be challenging for complainants and meeting the high standard of proof for conviction will not be diminished. However, there are many areas in the criminal process where complainants' counsel could address and advocate for better treatment for complainants.

Indeed, legal reform that amends criminal law policies to allow for state-funded legal representation for sexual violence complainants at any point in the process where complainants' interests require protection would be a giant stride toward improving the treatment of survivors and addressing the discrimination they face.

Such reform would allow victims of sexual abuse to retain a lawyer prior to reporting to police so they could properly prepare for the police interview. Preparation

by their lawyer in this way could reduce the trauma of telling their story because they know what to expect. Legal representatives could also point police to evidence that may not have been collected and advocate for best investigative practices. They could encourage the use of community review committees to review ‘unfounded’ cases where no charges were laid. Complainants’ counsel could also advocate for adequate bail conditions to keep their clients feeling safe when charges are laid and could advise complainants about whether the accused has breached their bail conditions when situations of concern arise. They could keep their client up-to-date about the stages of the criminal process and explain what to expect.

Importantly, they could advocate on behalf of their clients when delays are proposed, particularly when section 11(b) of the *Charter* is being waived by defence counsel. Currently, lengthy delays can be agreed to by Crown counsel when the accused’s *Charter* rights are waived without regard to the impact of the delay on the complainant (no policy requires Crown counsel to oppose such delays or consult with the complainant). Complainants’ views can be included in plea negotiations through their counsel and innovative resolution suggestions could be offered, perhaps even resolutions that include restorative justice features, should these resolutions become available.

At trial, the complainant’s counsel could be restricted to involvement pertaining to the complainant’s treatment and well-being. For example, the complainant’s counsel would be in the best position to gather and present the grounds to make an application for the complainant to be permitted to testify outside the courtroom,⁴⁵⁷ or to have their

⁴⁵⁷ Pursuant to section 486.2 of the *Criminal Code*.

identity protected,⁴⁵⁸ or to request a restriction on publication.⁴⁵⁹ Objections at trial raised by complainant’s counsel could be permitted when the complainant’s privacy, dignity or security is seen to be threatened. Counsel’s role would be distinct from that of a prosecutor and fulfill the objective as envisioned by the Supreme Court in *J.J.* that counsel addresses a “direct and necessary interest in making representations.”⁴⁶⁰ Writing for the majority the Chief Justice and Justice Moldaver explained that a complainant’s participation in the criminal process does not duplicate the role of the prosecutor:

Far from becoming a “second prosecutor”, a complainant’s contributions are valuable exactly because they are different from the Crown’s. This may also strengthen the appearance of prosecutorial independence because the Crown no longer bears the burden of representing or conveying to the judge the complainant’s perspective...⁴⁶¹

While the Court’s comments in that case were directed to the complainant’s participation in an admissibility hearing regarding private records, the point has broader application since complainants can make many other types of valuable contributions that are different than those of the Crown and which address their own ‘direct and necessary’ interests.

Further, the treatment of complainants after they have testified is a critical aspect of their experience of the process. For instance, many complainants are told that they are not permitted to sit in the courtroom and hear the subsequent evidence after they have testified because the prosecutor may need to recall them. However, most prosecutors would agree that recalling a complainant is a very rare occurrence and even if it does

⁴⁵⁸ Pursuant to section 486.31 of the *Criminal Code*.

⁴⁵⁹ Pursuant to section 486.4 and 486.5 of the *Criminal Code*.

⁴⁶⁰ *Ibid* at para 177.

⁴⁶¹ *Ibid* at para 179.

arise, the complainant's attendance in the courtroom does not prohibit their eligibility to be recalled (although it may affect the weight given to their evidence). In fact, complainants often have a strong interest in hearing the entirety of the trial evidence and understanding the strengths and weaknesses of the case to make sense of the ultimate decision rendered. If the accused testifies, it is often particularly important to a sexual assault complainant to hear that testimony.

Being prohibited from being present in the courtroom can leave a complainant disempowered and feeling that the whole the process lacks transparency, despite legal principles that require an open court. If complainants are not provided the opportunity to witness the entire trial, their only recourse is to pay for a transcript of the proceedings after the fact, which is usually extremely cost prohibitive. Complainant's counsel could outline to the prosecutor the important benefits of the complainant hearing the subsequent evidence and argue that prohibiting the complainant from attending the courtroom is unwarranted. Counsel's insistence on the complainant being present in the courtroom, if that is indeed their desire, could make a dramatic difference in the complainant's court experience.

A complainant's lawyer could also assist in post-trial issues whether it be to help explain a judgement, prepare a victim impact statement, or advocate for an appeal. It stands to reason that allowing a legal voice for complainants in the criminal process will improve fairness and their overall treatment. Importantly, it will also protect against discrimination and promote access to justice.

Addressing discrimination and *Charter* violations by improving the treatment of sexual violence complainants is critical to all survivors in Canada, but even more

important to groups that disproportionately experience sexual violence, particularly Indigenous women and girls. Indigenous women experience sexual violence at a rate of more than three times that of non-Indigenous women.⁴⁶² Exacerbating the problem is the history of law enforcement's ineffective protection of Indigenous women and girls, as emphatically pointed out in the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.⁴⁶³ Moreover, because of the enduring nature of colonialism still present in Canadian society, particularly as manifested through the impacts of intergenerational trauma and racism, Indigenous women and girls' who experience sexual violence face almost insurmountable barriers to accessing justice. A complainant's lawyer could aid in breaking down those barriers and help to combat the discriminatory practices experienced by Indigenous women and girls based on their gender, as well as discriminatory practices based on their Indigeneity.

5.2 MYTHS, STEROTYPES AND SEXUAL VIOLENCE

Mandated reforms to the criminal justice system to date have not gone far enough to ameliorate myths, stereotypes and sexual violence against women.⁴⁶⁴ The Supreme Court has acknowledged this and signaled to legislators that more must be done to address these serious issues that impact all women, but particularly impact sex workers

⁴⁶² JustFacts, Department of Justice, Canada, July 2017, online: <https://justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/july05.html>

⁴⁶³ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, online: <https://www.mmiwg-ffada.ca/final-report/>

⁴⁶⁴ See *R v Barton* 2019 SCC 33 at para 1.

and Indigenous women. Justice Moldaver’s opening comments in *R v Barton* make this point emphatically:

We live in a time where myths, stereotypes, and sexual violence against women...— particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and *must* — do better.⁴⁶⁵

My proposal for legal reform would be a step in the right direction. Given that the central objective of the Canadian criminal justice system to “ensure overall safety, wellness and productivity of Canadians”⁴⁶⁶ it is critical that the government better protect women not only from sexual violence, but also from the harm inflicted by the criminal justice process itself. Moreover, reforming policies to improve treatment of sexual violence complainants is essential to address the processes that discriminate against women and violate their human rights.

Government-funded legal counsel available for all complainants of sexual violence allows survivors to have a voice throughout the criminal process. If survivors learn that legal support is available, it could be a game-changer for them. It could make the difference in them deciding whether or not to come forward to police. At the very least, having a confidential conversation with a lawyer trained in trauma-informed

⁴⁶⁵ *Ibid.*

⁴⁶⁶ “The Canadian Criminal Justice System: Overall Trends and Key Pressure Points,” Department of Justice, Government of Canada website, online: <https://justice.gc.ca/eng/rp-pr/jr/press>

practices could help survivors make informed decisions about reporting. If even a small portion of the 95% of sexual violence victims that currently do not report decided to report because of the availability of complainants' counsel, it could be the beginning of a shift that continues to build momentum. Such an increase in the reporting rate could send a message to potential offenders resulting in a strong deterrent effect. If the rate of sexual offending were reduced even slightly, more women would be spared the horror and trauma of being sexually violated, which is indeed a lofty goal.

Reform to the policies dictating the treatment of sexual violence complainants is essential. Survivors need legal advocates to protect them from the retraumatization and harm inherent in the criminal justice process. They need to know that if they report, a legal ally will ensure that they are treated fairly during the process. They need an advocate who will focus solely on their interests and well-being. Survivors who are required to put their private pain into the public realm for the sake of justice deserve no less.

In my experience, as a former Crown in private practice, the vast majority of sexual violence survivors who decide to come forward and report do so for altruistic reasons. They are concerned about the perpetrator doing the same thing to someone else and putting another person through the pain and anguish they have experienced. They feel obliged to do their part to prevent harm to someone else, despite knowing that the criminal justice process may cause them embarrassment and humiliation and provides no guarantee of a conviction. It is only fair that they have access to state-funded legal representation throughout the criminal justice system process, to protect their rights. Canadians expect that women's rights to security of the person, equal benefit of the law

and the right to be free from discrimination are protected and respected. More can be done to ensure that happens; the government can implement reform that funds complainants' counsel to fill that desperately needed role for sexual violence survivors.

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Appendix A Permission from Publisher

Gmail

Karen Bellehumeur [REDACTED]

Permission for use of article in Doctoral thesis

2 messages

Karen Bellehumeur <[REDACTED]>

To: WYAJ <[REDACTED]>

Mon, Aug 29, 2022 at 9:45 AM

Hello Vidya,

I hope you are well. I am following up to an email I sent on August 24th.

I write to seek permission to use my article "A Former Crown's Vision for Empowering Survivors of Sexual Violence" published in Volume 37 (No. 1) of the WYAJ. I am coming to the end of my term as a Phd candidate at Western University Faculty of Law and would like to include the article in my doctoral thesis, which I am submitting in an integrated article format. I require the permission of the WYAJ to do so. Could you kindly provide me with your permission on behalf of the WYAJ?

I apologize for asking for a quick response but the deadline for my thesis submission is on August 31st.

Many thanks,
Karen

**Karen Bellehumeur
Bellehumeur Law**

[REDACTED]

www.BellehumeurLaw.com

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WYAJ <[REDACTED]>

To: Karen Bellehumeur <[REDACTED]>

Tue, Aug 30, 2022 at 3:43 PM

Hello Karen

I am sorry for the delay in getting back to you.

The only requirement we have is that you acknowledge the Yearbook as the first cite of publication.

Hope this helps

Vidya

*Vidya Balachandar
Coordinator
Windsor Yearbook of Access to Justice
University of Windsor, Faculty of Law*

[REDACTED]

CURRICULUM VITAE
KAREN BELLEHUMEUR

EDUCATION:

September 2018 - Present	Western University, London, ON PhD program - Faculty of Law
November 2015	University of Toronto, Toronto, ON Master of Laws (LLM)
March 1991	Law Society of Upper Canada Call to the Ontario Bar, Barrister and Solicitor
1986-1989	University of Ottawa, Ottawa, ON Bachelor of Laws (LLB)
1983-1984	Althouse College, Western University, London, ON Bachelor of Education (B.Ed.) Deans Honour List
1981-1984	Western University, London, ON Bachelor of Science (BSc)

EMPLOYMENT:

January 2018 to present	Bellehumeur Law Founder
January 2016 to December 2017	Jellinek Law Office Professional Corporation Sexual Assault Lawyer
1991 to December 2015	London Crown Attorney's Office, Ministry of the Attorney General Assistant Crown Attorney, County of Middlesex

ACADEMIC PAPERS COMPLETED:

- "A Former Crown's Vision for Empowering Survivors of Sexual Violence." *Windsor Yearbook of Access to Justice* 37 (2020): 1-20, Online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/6560>
- "Literature Review: Legal Representation for Victims of Sexual Offences in the Criminal Justice System," Prepared for *Guided Study and Research Methodology* (Western University)
- "Book Review: Elain Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession*," Prepared for *Guided Study and Research Methodology* (Western University)
- "Should Victims of Sexual Violence Have Legal Representation In Canada? An International Human Rights Perspective," Prepared for *International Human Rights Law* (A+) (University of Toronto)
- "The Problem of silence by Victims of Gender-based Sexual Violence," Prepared for *Feminist Theory: Challenges to Legal and Political Thought* (A) (University of Toronto)

- “Combating Global Gender-Based Violence Using the Right to Health,” Prepared for *International Human Rights and Global Health: The Right to Health in Theory and Practice* (A) (University of Toronto)
- “Using Scientific Evidence to Advance the Prosecution of Sexual Violence Crimes at the International Criminal Court,” Prepared for *Scientific Evidence: Use(s) and Abuse(s)* (A) (University of Toronto)
- “ICC Prosecution of Sexual Violence Crime: The Much Needed Change to Policies on Investigations and Intermediaries,” Prepared for *International Criminal Law* (A) (University of Toronto)
- “Fulfilling Promises: Best practices for transparent, effective and accountable human rights implementation in Canada,” Co-authored with Emily Bloxom and Edited by Renu Mandhane, Prepared for International Human Rights Program Clinic (University of Toronto)

HIGHLIGHTS OF ASSISTANT CROWN POSITION

Conducted Criminal Prosecutions

- Ontario Court of Justice and Superior Court of Justice.
- Judge alone and jury trials, preliminary hearings, bail hearings, bail reviews, certiorari hearings, fitness hearings, inquests and summary conviction appeals.
- All types of offences including homicides, with a focus on sexual abuse and child exploitation.

Provided Provincial and Local Legal Advice to Crowns and Police

- Regarding sexual abuse cases, testimonial aids, search and seizure issues, and many other issues.
- Regarding internet child exploitation cases, specifically child pornography, luring and voyeurism.
- Regarding child homicide cases, specifically shaken baby syndrome (abusive head trauma).
- Assisted in the development of curriculum for the Ontario Police College for issues regarding evidence of children.

Professional Development

- Attended numerous international and provincial conferences and training sessions related to sexual assault, child homicide and child internet exploitation.
- Attended *The 27th Annual San Diego International Conference on Child and Family Maltreatment* in California (January 2012).
- Attended annual educational programs held by the Ontario Crown Attorney’s Association.

PROFESSIONAL COMMUNITY INVOLVEMENT:

Guest Speaker

- Ontario Crown Attorney’s Association Summer School – July 2022
- Office of the Sport Integrity Commission – training for lawyers and investigators, Spring 2022
- Sport Dispute Resolution Centre of Canada – National conferences 2020, 2021
- Western University, Faculty of Law 2018 – 2021
- METRAC – Action on Violence
- Western University, Kings College, Childhood and Social Institutions.
- The Middlesex Law Association.
- Local community groups including the London Children’s Aid Society.

- Various high schools in London
-
- | | |
|-----------------------|---|
| Fall 2021 to present | <p>Office of the Sport Integrity Commissioner – Abuse Free Sport</p> <ul style="list-style-type: none"> • Member of working group on policy development prior to the launch of Abuse Free Sport • Developed protocols and procedures for all aspects of the complaint process • Trained investigators and lawyers on the legal aid roster |
| Fall 2018 to 2021 | <p>Safe Sport Advisory Committee member - Sport Dispute Resolution Centre of Canada (SDRCC)</p> <ul style="list-style-type: none"> • Assisted the SDRCC in training independent investigators assigned to investigate instances of abuse in sport regarding trauma-informed methods. • Participates in policy development and implementation for safe sport initiatives regarding national sport organizations. |
| Fall 2017 to present | <p>Violence Against Women Community Advocacy Group - Legal advisor (Sexual Assault Review Committee – based on Philadelphia model)</p> <ul style="list-style-type: none"> • Group created in cooperation with the London Police Service to review adult sexual assault cases reported to the London Police in which no charges were laid. • To provide community oversight and to ensure effective police responses to sexual assault reports. |
| 2017 | <p>METRAC - Action on Violence Guest speaker</p> <ul style="list-style-type: none"> • Webinar guest on “Legal Advice for Survivors of Sexual Assault - Ontario’s ILA Pilot Program” and • Speaker at multiple events including the WomanACT conference, Family Service Toronto workshop and Training for Downtown Frontline Workers regarding “Legal Responses to Sexual Violence” |
| April 2017 to present | <p>LEAF (Women’s Legal Education and Action Fund) Case Committee Member</p> <ul style="list-style-type: none"> • Invited to be part of panel of experts for intervention into the appeal of a Nova Scotia sexual assault case <i>R v Al-Rawi</i> • Consulted on submissions to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-51 • Invited to be part of a panel of experts for intervention into the Supreme Court of Canada appeal of <i>R v Jarvis</i> |
| Sept 2016 – 2021 | <p>Board of Directors of Anova (formerly Sexual Assault Centre London and Womens Community House)</p> |
| July 2016 to present | <p>Member of the Independent Legal Advice for Survivors of Sexual Assault Program Referral List</p> <ul style="list-style-type: none"> • Provided individual legal advice of survivors of sexual abuse |
| 2015 to 2017 | <p>Developed phone app for documenting sexual violence</p> <ul style="list-style-type: none"> • App provides guidance for documenting legally relevant information to be stored securely until survivor is ready to come forward to the authorities |

- Developed through a grant by the Ministry of Children and Youth Services to create a toolkit for children leaving the care of Children’s Aid Societies in Ontario. The App comprises one part of the toolkit. (Completion pending)
- 2012 to 2014 **Child Homicide Review Team – Member of the Provincial Team**
- Invited to be a member of this 8-person child homicide resource team created as a result of the Goudge Inquiry into Pediatric Forensic Pathology in Ontario.
 - Provided consultation and legal advice to Crown counsel across Ontario prosecuting child homicide cases requiring assistance with pediatric forensic pathology.
- 2012 to 2014 **”Use of Closed-Circuit TV for Young Witnesses” - Research Project
Co-collaborator with Pamela Hurley - RSD Department of Justice**
- Created project to document the impact of utilizing closed-circuit television (CCTV) for children testifying in court compared to testifying without it or using a screen, as it relates to the trauma they experience. The project also set out to identify the barriers to utilizing CCTV across the west region of Ontario.
 - Assisted in coordinating and providing consultation for research project recently funded by the Department of Justice Canada.
 - Prepared a case law review to accompany the findings and final report
- 2012 to 2014 **Craigwood Youth Services – Member of Board of Directors**
- Attended meetings and conducted board of directors business regarding this non-profit youth mental health agency providing day treatment and residential programs for hard-to-serve youth.
- 2007 to 2014 **Internet Child Exploitation (ICE) Team – Member of Provincial Team**
- Invited to be a member of this team to provide legal advice to Crown counsel and police in the county of Middlesex regarding internet child exploitation cases.
- 2000 to 2014 **Child Abuse Prevention Council of London and Middlesex – Member**
- Representative of the London Crown Attorney’s Office on this multi-agency community umbrella group working collaboratively on maltreatment prevention initiatives.
 - Participated in initiatives that sought to prevent, identify and treat child abuse and neglect through community partnerships, as well as public and professional awareness and education.