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# Moving Forward: Promising Practices for the Prosecution of Cases of Sexual Assault against Adults

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# MOVING FORWARD: PROMISING PRACTICES FOR THE PROSECUTION OF CASES OF SEXUAL ASSAULT AGAINST ADULTS

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.<sup>1</sup>

Sexual assault usually occurs in private. It is a profound invasion of its victims'<sup>2</sup> physical and psychological boundaries. In most cases the perpetrator is known to the victim. The attack often leaves no outward injury, but can devastate its victims, who may suffer in isolation, and often in silence.

Sexual assault is the most underreported violent crime in Canada.<sup>3</sup> People with disabilities are at greater risk of victimization and are even less likely to engage with the criminal justice system.<sup>4</sup> Class, ethnicity, religion, nation of origin, community, age, sexual orientation and gender identity may make reporting more difficult.

## *Where We Are*

Canada has progressive criminal legislation and appellate commentary relating to crimes of sexual violence. Research, training, and better coordination between justice personnel and victim/ survivor advocates have served to increase awareness about the dynamics of sexual assault and its effects on victims, and has resulted in changes in practices related to investigations and prosecution. Despite these developments, and the hope associated with them that reliance on rape myths could be minimized or eliminated, there is a lack of confidence in the criminal justice system's ability to protect victims and to hold offenders

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<sup>1</sup>Justice L'Heureux-Dube, *R. v. Seaboyer, R. v. Gayme*, 1991 2 S.C.R. 577; 97% of persons accused of sexual offences are male, 87% of the victims are female. See Cristine Rotenberg, *Police-reported sexual assaults in Canada, 2009-2014: A statistical profile* Juristat (Ottawa: Statistics Canada, 2017). The pronouns used in the paper will reflect this reality.

<sup>2</sup> While various terms for those who have been sexually assaulted will be used throughout the paper, for example, complainant in the context of criminal proceedings, as well as victim or survivor, the terms used are not meant to define the person in relation to the experience, or to suggest they lack agency and resilience, or to imply guilt with respect to an accused person.

<sup>3</sup> Rotenberg, *supra*, note 1.

<sup>4</sup> O'Malley, Nancy. "Working with Victims of Sexual Assault with Disabilities: It is Ability, Not Disability that Counts." VII in CDAAC Manual.

accountable, conviction rates have not improved, and fear of re-victimization during the course of the prosecution remains.<sup>5</sup>

While false reports of sexual assault exist and are likely devastating to the individuals accused in such circumstances, there is no evidence to suggest that reports of sexual assault are fabricated at a higher rate than those of other crimes. Despite research which indicates between 2-8% of sexual assault allegations are false (based on specific criteria and a thorough investigation which determined a sexual assault or attempted sexual assault did not occur)<sup>6</sup>, the rate for cases labelled as “unfounded” (charges dismissed by the investigating officer based on his or her assessment of credibility, the view that there is insufficient evidence to charge, or a determination that a crime did not take place<sup>7</sup>) by police nationally was 19.39%, nearly twice as high as the rate for physical assaults.<sup>8</sup> Further, there are significant variations between and within police forces with respect to the “unfounded” rate.<sup>9</sup> These differences may reflect different criteria in applying the term (see above), deficiencies in the investigation, ‘inadequate training, dated interview techniques that do not take into account the effects of trauma and the persistence of rape myths infusing subjective assessments of credibility’.<sup>10</sup>

The proportion of defendants who plead guilty to sexual assault is low relative to other offences and a higher proportion of cases result in acquittals compared to other offences.<sup>11</sup> For those who report a sexual assault, there is no guarantee that the charge will proceed. There is significant attrition at each decision making point causing a self-perpetuating cycle where a decision to report, to charge or label the report as unfounded, to screening by the prosecutor, is influenced by expectations about what is likely to happen at the next stage.<sup>12</sup> The nature of sexual assault, its effects, and the continuing prevalence of rape myths, which still haunt the

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<sup>5</sup> Reporting rates for sexual offences to police hover around 5%, with 41% of those cases resulting in a charge being laid. See Rotenberg, *supra*, note 1; Data for over 35 years from Australia, Canada, England and Wales found a statistically significant decline in conviction rates during the last 15 years, in Canada from 26.5% to 14%. See Kathleen Daly and Brigitte Bouhours. 2010 “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries.” 39:1 J of Crime and Justice.

<sup>6</sup> Lonsway, Kimberly, Joanne Archambault and David Lisak. 2009. “False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault.” 3:1 The Voice at 2.

<sup>7</sup> Johnson, Holly. 2012. “24. Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth Sheehy, eds, *Sexual Assault in Canada: Law, legal practice and women’s activism* (Ottawa: Les Presses de l’université d’Ottawa) at 627 and at 634.

<sup>8</sup> Doolittle, Robyn. 2017. “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless.” *Globe and Mail*.

<sup>9</sup> Canadian Centre for Justice Statistics (CCJS). July 2018. “Revising the classification of founded and unfounded criminal incidents in the Uniform Crime Reporting Survey.” <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54973-eng.pdf?st=NZSsbHMF>

<sup>10</sup> Ibid. Winnipeg, where police units had intensive training and experienced officers, had one of the lowest unfounded rates in the country.

<sup>11</sup> Lievore, Denise. 2004. *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Canberra: Australian Government’s Office of the Status of Women).

<sup>12</sup> Heath, Mary. 2010 “Women and Criminal Law: Rape” in Patricia Eastel, eds, *Women and the Law in Australia* (Canberra: LexisNexis) at 88.

adversarial forum, contribute to the potential for re-victimization of the complainant and impact the effective prosecution of these crimes.

### *Moving Forward*

Canada is one of many countries seeking to improve police and prosecution practice, court outcomes, and the experience of victims, within a framework that protects the rights of accused persons to a fair trial. There is a need to improve conventional justice responses, and find better ways to gather evidence, support victims and prosecute cases. It is also time to explore innovative approaches to address the justice needs of victims, including an acknowledgment of wrongdoing, and ways to repair harm.<sup>13</sup>

The justice system is an essential component of a comprehensive response to sexual assault. “Without prosecutions which test and refine our understanding of the dynamics of sexual violence and the law, our chance to hold offenders accountable in specific cases and more generally in the future may be lost”.<sup>14</sup>

It is helpful to reflect on what success means in the context of the criminal justice system. One measure of success is conviction rates. That measure may not reflect the ‘quality of the process, the relative difficulty of the case, or the experience of the victim’.<sup>15</sup> Other key elements in measuring “success” are:

reduced reliance on myths and generalizations in decision-making;  
increased reporting; increased referral rates from law enforcement;  
increased collaboration with other professionals; victim input being solicited and respectfully considered; introduction of all relevant and probative evidence; exclusion of irrelevant evidence; protection of victim privacy and safety consistent with fair trial rights; support for victims throughout the process; trial strategies which expose predatory behaviour and educate the fact finder; and appropriate sentences reflecting the seriousness of the crime and reduced incidence of sexual violence.<sup>16</sup>

With this broader definition of success in mind, some of the challenges prosecutors face in these prosecutions will be explored, from reporting through to sentencing and release, as well as promising practices that have evolved in Canada and in other jurisdictions to address some of these challenges. In a country as large and diverse as Canada, what works in one jurisdiction

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<sup>13</sup> Daly, Kathleen. 2011. “Conventional and innovative justice responses to sexual violence.” ACSSA 1.

<sup>14</sup> Heath, *supra*, note 11, 26.52

<sup>15</sup> Long, Jennifer and Elaine Nugent-Borakove. 2014. “Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions.” 12 Strategies 1.

<sup>16</sup> The Justice Management Institute. 2017. *Model Response to Sexual Violence for Prosecutors: An Invitation to Lead* (Washington, D.C.: AEquitas) at 14.

may not fit as well with the demands in another, but the sharing of knowledge and experience may serve to spark the development of similar approaches adapted to regional realities.

## CHALLENGES & PROMISING PRACTICES

### *Nature and Impact of Sexual Assault*

There are many reasons why those who have been victimized by sexual violence do not report assaults to the police. Some of those reasons include: a lack of confidence in the criminal justice system to address the harm done and hold the offender accountable, a sense of shame or self-blame, a fear of not being believed or of there not being enough evidence, fear of facing the perpetrator, potential repercussions arising from going to the authorities, a lack of understanding that what happened was an offence or a feeling that it was a minor event, or concern about consequences to the perpetrator, who is often someone known to the victim.<sup>17</sup>

Some of these concerns may be exacerbated in small communities in the North, where victims may not be able to avoid a perpetrator who lives in the community, and local resources offering assistance may be few or non-existent. There may also be pressure not to report from family or friends of the offender, or others.<sup>18</sup>

Further efforts to understand the barriers in accessing justice faced by individuals due to socioeconomic status, race, sexual orientation or gender, religion, or the presence of a disability are required. An individual's perception of law enforcement and the crime itself may differ based on these factors.<sup>19</sup>

Male victims, many of whom are socialized to be tough, and self-reliant, may experience a great deal of shame or self-blame for not successfully resisting the assault. Fewer resources are available for male victims and they may be less comfortable seeking help.<sup>20</sup>

Sexual assaults reported to police may raise unique challenges for investigators and prosecutors. There are rarely witnesses to sexual assault. Because of delayed disclosure or the

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<sup>17</sup> Rotenberg, *supra*, note 1; Shana Conroy and Adam Cotter, "Self-reported sexual assault in Canada" Juristat (Ottawa: Statistics Canada, 2014); L. Wilson, "Victims of Sexual Assault: Who Represents Them in Criminal Proceedings?" (2008) unpublished paper at 3; Elaine Mossman, Lesley MacGibbon, Venezia Kingi and Jan Jordan, "Responding to sexual violence: Environmental scan of New Zealand agencies" (2009) Ministry of Women's Affairs New Zealand at xxi.

<sup>18</sup> Cooke, Lani. 2016. "Hush Hush No More: Sexual Assault in the NWT." YWCA Yellowknife, online [https://www.assembly.gov.nt.ca/sites/default/files/td\\_219182.pdf](https://www.assembly.gov.nt.ca/sites/default/files/td_219182.pdf).

<sup>19</sup> Conroy and Cotter, *supra*, note 16; Research and Statistics Division, 2017. "Sexual Assault." *JustFacts*; Melissa Lindsay. 2014. "A Survey of Survivors of Sexual Violence in the Northwest Territories." (Ottawa: Dept. of Justice) at 6; The Justice Management Institute, *supra*, note 15 at 37.

<sup>20</sup> McDonald, Susan and Adamira Tijerino. 2013. "Male Survivors of Sexual Abuse and Assault: Their Experiences." (Ottawa: Department of Justice) at 6; Vogel et al., 2011; Hernandez, S., et al., 2014



nature of the offence, forensic evidence may not be present by the time the offence is reported. The victim may be so traumatized that their ability to provide a comprehensive and chronological account of what occurred is impacted.

Individuals have different life experiences, and various access to internal and external resources, and each will react differently to sexual violence. The nature of the attack may affect how the victim reacts.<sup>21</sup> The sense of powerlessness and fear many feel during the sexual assault and the breach of trust when the attacker is known may profoundly affect a victim's sense of self, safety, and view of the world. Some have described the experience as resulting in an 'emotional tattoo'. Trauma symptoms may represent ways of coping with an overwhelming experience.<sup>22</sup>

In cases involving extreme stress, the victim's body will be flooded with hormones. Often an initial instinctive response is to freeze.<sup>23</sup> Attempts to deny what is occurring or feelings of disbelief might serve to protect the victim during the assault. While the flood of chemicals may help the victim to cope during the attack, and for some, to resist it or try to flee, their presence may impair the ability to perceive all aspects of the attack and to fully encode memories. The elevated hormones that flood the victim's system during the attack can remain in the body for a few days and interfere with the encoding of memory. REM sleep is required to transfer emotionally charged experiences to retrievable verbal memory.<sup>24</sup>

This reality has been recognized in some jurisdictions in cases involving police shootings. Immediately following the event, the officer may be asked to provide only basic information. A more comprehensive interview is scheduled at a later time, when memories have been encoded and more details are likely to be retrieved.<sup>25</sup>

Survivors of sexual assault represent the largest non-combat group who experience Post-Traumatic Stress Disorder (PTSD).<sup>26</sup> A traumatized victim may not be able to generate the kind

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<sup>21</sup> Fanflik, Patricia. 2007. "Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?" (Alexandria, VA: American Prosecutor's Research Institute) 7.

<sup>22</sup> Office of Justice Programs, "Resources for Sexual Assault Response Teams", online: SART toolkit [https://www.ncjrs.gov/ovc\\_archives/sartkit/](https://www.ncjrs.gov/ovc_archives/sartkit/).

<sup>23</sup> Kristiansson, Viktoria and Charlie Whitman-Barr. 2015. "Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions." 13. This information was presented on a *Law and Order SV Unit* program, followed by a blog by Dr. Rebecca Campbell. One victim wrote: "I cannot believe I am reading this article. After years of blaming myself, questioning myself, feeling tormented, I now understand why I froze every time I was assaulted. It now has a name. I don't have to wonder why or what's wrong with me or why didn't I do anything. I can't tell you how much relief this article brings me...You give us a voice. You give us compassion. You give us strength and hope."

<sup>24</sup> Adapted from a presentation by Lori Haskell, March 2017.

<sup>25</sup> Office of Justice Programs, *supra*, note 21; Wisconsin Office of Justice Assistance, *Wisconsin Prosecutor's Sexual Assault Reference Book* (Madison, WI: Wisconsin Office of Justice Assistance, 2009) at 19; State of New Hampshire Governor's Commission on Domestic and Sexual Violence, "A Model Protocol for Adult Sexual Assault Cases" Office of the Attorney General (2017) at 21.

<sup>26</sup> Office of Justice Programs, *ibid*.

of narrative memory that normally follows an important experience. Memories may be fragmented or out of sequence. There may be detailed, specific recall of some elements and few details about other aspects of the event. This type of memory storage is characteristic of the way traumatic memories are stored and recalled.<sup>27</sup>

In the days, weeks and months following the attack, victims may react in a variety of ways depending on their specific coping strategies, the severity of the assault, the victim's relationship with the assailant, their support system and personality. Some may have difficulty making decisions, and may feel confused or ashamed, which may delay reporting. Some may try to cope by engaging in routine behaviours immediately following the attack, in an effort to establish that life can be "normal" or to regain a sense of control.<sup>28</sup> Certain sensory memories that are more easily stored may trigger flashbacks, and panic attacks. Some may suffer from anxiety or depression, and be preoccupied with the event, while others may try to avoid reminders of it. Some may engage in destructive strategies to numb or distract from the emotional pain, isolating themselves or self-medicating with alcohol or drugs. Others may use more constructive outlets such as spending time with supportive family or friends, getting counselling, journaling, or engaging in meditation.<sup>29</sup>

### *Investigative Stage*

The quality of the initial investigative interview with the victim affects the strength of the case. Where a victim of sexual assault reports the event shortly afterwards, for some victims who experienced extreme stress, the best practice may be to get a brief statement to facilitate evidence collection and offender identification, and schedule a comprehensive interview when the victim has had medical treatment and is rested.<sup>30</sup>

In these cases where inconsistencies are likely to be the subject of cross-examination at trial, it is important to have trained officers who are aware of the effects of trauma conducting these interviews. A trauma-informed approach will prompt questions such as, "what are you able to remember about...."; or the canvassing of sensory experiences which are more easily remembered, such as, "what did you see, hear, taste, smell, or think as the event was unfolding?"<sup>31</sup>

Several North American and United Kingdom jurisdictions have developed "one-stop" multi-disciplinary centres where investigators, victim advocates, health professionals (including forensic examiners), welfare, legal and counselling services are available for child victims or those who have been subject to domestic violence. They may be located in health facilities or in stand-alone locations. Their goal is to reduce secondary victimization and wait times, and

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<sup>27</sup> Office of Justice Programs, *ibid.*; Wisconsin Office of Justice Assistance, *supra*, note 24, pp. 16-18

<sup>28</sup> State of New Hampshire, *supra*, note 24.

<sup>29</sup> Office of Justice Programs, *supra*, note 21; Wisconsin Office of Justice Assistance, *supra*, note 24 at 7.

<sup>30</sup> Office of Justice Programs, *ibid.*; Wisconsin Office of Justice Assistance, *ibid.* at 19.

<sup>31</sup> The Justice Management Institute, *supra*, note 15 at 65.

provide for more effective investigations and prosecutions. In Canada, there are a number of Child Advocacy Centres located across the country. Some jurisdictions have developed multi-disciplinary protocols, setting out best practices for the various professionals dealing with cases of adult sexual violence.<sup>32</sup>

Similar services are offered by the Sexual Assault Response Teams (SART) model. Coordinated responses by law enforcement, victim services organizations and health care providers provide multiple access points for service, better evidence collection and serve to reduce trauma and increase reporting. In Surrey, a Mobile Assault Response Team provides a 24-hour crisis response in partnership with the local hospital, by phone and in person for women and girls who have experienced physical or sexual violence. Some of the services offered are safety planning, hospital accompaniment and assistance with accessing housing, income assistance and legal aid. The leads of the various disciplines meet regularly and engage in cross-disciplinary training to address turnover. Regular contact among professionals helps to identify gaps in services, address concerns as they arise and generate solutions.

There is evidence to suggest that victims who receive immediate care and counselling recover more steadily and are less likely to need long-term care.<sup>33</sup> Improved and sensitive evidence collection and documentation, with immediate comprehensive support, not only result in better investigations, but may serve to increase confidence in the criminal justice system.

In England and Wales, Independent Sexual Violence Advisors provide targeted professional and independent support to victims in cases of serious sexual violence, from the beginning of the legal process until after it is completed.<sup>34</sup> They offer support from the time the investigative statement is taken, keep the victim informed as the case progresses, and accompany the complainant to court. Some are based in Sexual Assault Referral Centres, rape crisis centres, voluntary organizations or police stations. They provide a link to Victim/Witness programs, counselling and health services.

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<sup>32</sup> See, for example, State of New Hampshire, *supra*, note 24.

<sup>33</sup> Berman, Greg, Adam Monsky, Greg Parston and Jon Harvey. 2005. "Community Justice Centres: A US-UK Exchange." 3:3 *British Journal of Community Justice*; Centre for Family Justice, San Diego CA, 2002; UN Office on Drugs and Crime and UN Women, *Handbook on effective prosecution responses to violence against women and girls* (2014) at 103; Rebecca Campbell, Debra Patterson and Deborah Bybee, "Prosecution of Adult Sexual Assault Cases: A Longitudinal Analysis of the Impact of Sexual Assault Nurse Exam Program" (2012) 18:2 *Violence Against Women* at 224.

<sup>34</sup> The Crown Prosecution Service. 2012. "CPS Policy for Prosecuting Cases of Rape." (London: CPS Communication Division); Rt. Hon. Dame Elish Angiolini. 2015. "Report of the Independent Review into the Investigation and Prosecution of Rape in London."

## *Alcohol and Drug Facilitated Sexual Assault*

Approximately half of sexual assaults are associated with alcohol use by the perpetrator or victim or both.<sup>35</sup> Subjectively, just over half of those victimized by sexual assault believed that the incident was related to the offender's drug or alcohol use.<sup>36</sup>

Such cases may be particularly challenging for the prosecution. Research has demonstrated that the public tends to view a woman who drank or got drunk as more sexually available and more likely to engage in sexual acts than a woman who did not drink.<sup>37</sup> A toxicologist who can provide expert evidence on the blood alcohol level at the time of the event will also testify that alcohol decreases inhibitions and impairs perception. In high doses, it may cause amnesia or unconsciousness. These effects may be enhanced in combination with other drugs.<sup>38</sup>

In sexual assault cases, the credibility of the complainant and the ability to prove the case are intertwined. Intoxication, whether by drugs or alcohol, may undermine the reliability of the victim's memory and affect the ability of the prosecution to prove the case beyond a reasonable doubt.<sup>39</sup>

The use of alcohol may also make the victim more likely to be targeted by an offender. Those under the influence of alcohol (or drugs) may find others more trustworthy or be less able to anticipate danger. Alcohol affects memory, and impairs judgement and physical ability, making the victim more vulnerable.<sup>40</sup> It may lower the offender's inhibitions such that he may be more willing to commit the offence and minimize it later as being due to intoxication. Some may view sexual assault in these situations as a crime of opportunity as opposed to the predatory behaviour that it is.<sup>41</sup>

In these cases, it is particularly important to ensure a thorough investigation is done and that both blood and urine samples are taken at the earliest opportunity. Investigators should seek to determine who was buying or supplying drinks. They should interview witnesses who were

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<sup>35</sup> Abbey, Antonia, Tina Zawacki, Philip Buck, Monique Clinton and Pam McAuslan. 2004. "Sexual assault and alcohol consumption: What do we know about their relationship and what types of research are still needed?" 9:3 *Aggression and Violent Behaviour*; *Alcohol and Sexual Assault*, 25(1) *Alcohol Res. & Health* 43 (2001); Antonia Abbey, Monique Clinton-Sherrod, Pam McAuslan, Tine Zawacki and Philip Buck. 2003. "The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assault Committed by College Men." 18:7 *J. of Interpersonal Violence* 813.

<sup>36</sup> Conroy and Cotter, *supra*, note 16.

<sup>37</sup> Corbin, William, Jeffrey Bernat, Karen Calhoun, Lily McNaire and Karl Seals. 2001. "The Role of Alcohol Expectancies and Alcohol Consumption Among Sexually Victimized and Nonvictimized College Women." 16:4 *J. of Interpersonal Violence* 297.

<sup>38</sup> Scalzo, Teresa P. 2007. "Prosecuting Alcohol-Facilitated Sexual Assault." NDAA.

<sup>39</sup> The Justice Management Institute, *supra*, note 15 at 7.

<sup>40</sup> *Ibid.* at 158; Nina Burrowes. 2013. *Responding to the challenge of rape myths in court: A guide for prosecutors* (London: NB Research) at 27.

<sup>41</sup> Burrowes, *ibid.*

present before and after the attack who are able to provide evidence of the level of intoxication of the parties and describe events. There may be bar bills, or empty bottles or glasses which provide evidence of quantity or drug residue. The victim may have unexplained injuries or clothing which was re-arranged or missing. Video footage may be available which assists in assessing impairment. Social media use by the victim or offender before, during or after the attack may be relevant. Like members of the public, the victim may blame herself for being in a risky situation and be hesitant to reveal embarrassing details. She should be made aware how crucial it is to provide as many details as possible, no matter how seemingly insignificant or embarrassing they might be. A thorough investigation will allow the prosecution to provide the trier of fact<sup>42</sup> with a context to assess credibility.<sup>43</sup>

Like alcohol, many drugs facilitate sexual assault by making it easier to overcome resistance, and reduce the victim's ability to provide a detailed account of the events. It may seem to observers that the perpetrator was helping a very intoxicated woman, instead of isolating her in order to commit an offence. For those attacked while incapacitated there may be a particularly profound sense of powerlessness when they do not know the extent of what was done to them.<sup>44</sup>

It is essential that investigators and prosecutors have some knowledge of drugs that may have been used to facilitate sexual assault in order to ask the right questions about ingestion and the symptoms the complainant might have experienced to help to narrow the list of potential drugs that may have been used.<sup>45</sup> There are more than 50 drugs known or suspected to be involved in drug facilitated sexual assault, some recreational, some available by prescription and some over the counter or available through illicit means.<sup>46</sup> The victim may have little memory, but it is important to ask what she felt or tasted before the assault, her symptoms during and after it, and to canvass other witnesses for their observations. (For example, did she lose consciousness slowly or quickly? What about bodily functions? How did she feel when she woke up?)

The impact of substances on a complainant's capacity to consent is often challenging to determine factually. Clearly, an unconscious person is incapable of consenting. Short of that, case specific determinations need to be made. In an attempt to clarify these issues, *Bill C-51* was introduced on June 6, 2017, and received Royal Assent in December 2018.<sup>47</sup> The proposed amendments to the *Criminal Code* intended to codify the Supreme Court of Canada's decision in *R. v. A. (J.)*,<sup>48</sup> by adding to sections 273.1 and 153.1(3) that there is no consent if the complainant is unconscious or otherwise incapable of consenting.

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<sup>42</sup> A person, or group of persons, who determines facts in a legal proceeding, usually a trial.

<sup>43</sup> Scazlo, *supra*, note 37.

<sup>44</sup> Jordan, J. and E. Schulman. 2012. "Drug Facilitated Sexual Assault." VII-13-VII14 in *Investigation and Prosecution of Sexual Assault* (Sacramento: CDAA).

<sup>45</sup> Larkin, H. "The Sexual Assault Medical Examination Things You Should Know Before Trial", III-7, in CDAA, *ibid*.

<sup>46</sup> Jordan, *supra*, note 43.

<sup>47</sup> <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9002286>

<sup>48</sup> [2011] 2 S.C.R. 440 (S.C.C.)

## *Myths and Misconceptions*

...myths and stereotypes have no place in a rational and just system of law, as they jeopardize the courts' truth-finding function... . Our Court has rejected the notion that complainants in sexual assault cases have a higher tendency than other complainants to fabricate stories based on "ulterior motives" and are therefore, less worthy of belief. Neither the law, nor judicial experience, nor social science research supports this generalization.<sup>49</sup>

A rape myth is an inaccurate assumption about sexual violence and how victims of assault should behave. Negative attitudes towards victims of sexual assault are prevalent and affect the decision making of all those involved, from the victim herself, to the perpetrator, witnesses, police, prosecutors, health practitioners, and judges.<sup>50</sup> Assessments of credibility may be based on personal biases and attitudes rather than what a witness says.<sup>51</sup> A 2011 national population study in Ireland found 40% of participants felt accusations of rape were often false and that the reason most rapists commit rape is overwhelming sexual desire.<sup>52</sup>

Stereotypes persist that "real" sexual assault is committed by a stranger, and that a "real victim" will have suffered physical injuries because she "fought for her honour". There may still be an expectation that most victims would raise a "hue and cry" immediately following the attack. The preoccupation with the victim's conduct may detract from an appropriate assessment of the conduct of the alleged offender.

The persistence of stereotypes suggests a lack of understanding of the context in which most sexual assaults occur. Sexual assaults are typically perpetrated by a man known to and trusted by the woman who was engaging in normal activities, such as socializing at a party, a bar or on a date, accepting a ride, or inviting someone into her home.<sup>53</sup>

Victims of sexual assault themselves may be subject to the insidious effects of these assumptions and may interpret their behaviour accordingly. With the benefit of hindsight, they may blame themselves for what happened (ex. "I should have left in a cab"; "I shouldn't have had so much alcohol") or for their character traits which they fear may have resulted in the sexual assault (ex. "I'm too gullible"; "I should have known better"). Victims who blame

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<sup>49</sup> L'Heureux-Dubé J., *R. v. G.A.*, [2000] 1 S.C.R. 439, paras. 2-3

<sup>50</sup> Burrowes, *supra*, note 39 at 5.

<sup>51</sup> Cunliffe, Christina, Sokratis Dinos, Karen Hammond and Nina Burrowes. 2014. "A systematic review of juries' assessment of rape victims: Do rape myths affect juror decision making?" 43:1 *Int. J. of Law, Crime and Justice* at 10.

<sup>52</sup> McGee, Hannah, Madeleine O'Higgins, Rebecca Garavan and Ronan M. Conry. 2011. "Rape and child sexual abuse: what beliefs persist about motives, perpetrators, and survivors?" 26:17 *J. of Interpersonal Violence* 3581.

<sup>53</sup> Johnson, *supra*, note 7 at 626.

themselves may often struggle to cope with the impact of the attack.<sup>54</sup> Focusing on the behaviour of the complainant, especially using myths and hindsight, may cause people to overlook the role of the offender in choosing a victim and context that enhanced the chances of committing an assault and avoiding punishment.<sup>55</sup>

Burrowes outlines some commonly held rape myths and alternative narratives:

- *Rape occurs between strangers in dark alleys.* The majority of rapes are committed by someone known to the victim and often occur on private property.<sup>56</sup>
- *Rape is a crime of passion.* Inaccurate assumptions relating to the motivation for rape are widely held. Forcing someone to have sex against their will is about power, control and violence. Many rapes are premeditated and planned. Many rapists fail to get an erection or ejaculate.<sup>57</sup>
- *People who use alcohol or drugs are asking to be raped.* Vulnerability does not imply consent.
- *If the victim didn't scream, fight or get injured, it wasn't rape.* Victims in rape situations are often legitimately afraid of being seriously injured or killed and may co-operate for that reason. A victim's perception of threat influences their behaviour, often causing them to freeze. Rapists use manipulative techniques to intimidate and coerce their victims. Very few victims physically resist an attack. Only 4% of victims have serious physical injuries.<sup>58</sup>
- *You can tell if a woman has been "really" raped by the way she acts.* Reactions to rape are varied and individual. Many women experience a form of shock after rape that leaves them emotionally numb or flat and apparently calm.<sup>59</sup>

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<sup>54</sup> Burrowes, *supra*, note 39 at 9; Fanflik, P., *supra*, note 20 at 11. Note that "rape" is used here as used in the original sources.

<sup>55</sup> Burrowes, *ibid.* at 16.

<sup>56</sup> Rotenberg, *supra*, note 1.

<sup>57</sup> Burrowes, *supra*, note 39 at 8, citing McGee et al.; Larkin, *supra*, note 44: less than 33% of rapists actually ejaculate, and if condoms are used, there may be an absence of semen, which doesn't mean that the sexual assault did not occur.

<sup>58</sup> Acierno, Ron, Heidi Resnick, Dean Kilpatrick, B. Saunders and C.L. Best. 1999. "Risk Factors for Rape, Physical Assault and Post-Traumatic Stress Disorder in Women: Examination of Differential Multivariate Relationships." 13:6 J. of Anxiety Disorders 541.

<sup>59</sup> Survivors Network UK. N.d. "Rape Myths." <<https://survivorsnetwork.org.uk/wp-content/uploads/2019/01/Rape-Myths.pdf>>. [Accessed 12 April 2019]

- *Women cry rape when they regret having sex or want revenge.* Estimating levels of false reporting is complex and controversial due to difficulty defining and proving a false allegation. The level of false reporting is likely somewhere between 2-8%.<sup>60</sup>
- *If the victim didn't complain immediately, it wasn't rape.* The vast majority of victims never report the rape to police.<sup>61</sup>

### *Legislative and Judicial Response*

In an attempt to ensure the fair treatment of complainants and enhance truth-seeking without reliance on discredited assumptions, changes in legislation and the development of Canadian jurisprudence have attempted to address some of these myths.<sup>62</sup>

For example, in the early 1980's the common law rule relating to "recent complaint" was abrogated by s. 275 of the *Criminal Code*. Prior to the amendment, there was an expectation that a "true" victim of sexual assault would immediately raise an outcry following the attack. A complaint in such circumstances was admitted to show consistency and rebut an adverse inference the trier of fact would otherwise be invited to draw that the allegation was untrue.

In *R. v. D.(D.)*, the Supreme Court held that where there is an issue of delayed disclosure, the trial judge should instruct the jury that there "is no inviolable rule relating to how people who are the victims of trauma like a sexual assault will behave, and that delayed disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant".<sup>63</sup>

The Supreme Court has explicitly "rejected the notion that complainants in sexual assault cases have a higher tendency than other complainants to fabricate stories based on 'ulterior motives'".<sup>64</sup>

In 1992 the *Criminal Code* was amended following the *Seaboyer*<sup>65</sup> decision of the Supreme Court. According to the Alberta Court of Appeal in *R. v. Barton*,<sup>66</sup> "prior to these reforms, Parliament had before it a mountain of evidence identifying serious inequities embedded in jury charges then in use".<sup>67</sup> Section 276 of the *Code* was amended to protect complainants from cross-examination about irrelevant aspects of their past sexual conduct, prohibiting the

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<sup>60</sup> Kelly, Liz, Jo Lovett and Linda Regan. 2005. "A gap or a chasm? Attrition in reported rape cases." (London: Home Office Research Development and Statistics Directorate); Lonsway et al., *supra*, note 6.

<sup>61</sup> Burrowes, *supra*, note 39 at 6.

<sup>62</sup> *R. v. Barton*, 2017 ABCA 216 (Alta. C.A.), para. 90

<sup>63</sup> [2000] 2 S.C.R. 275 (S.C.C.)

<sup>64</sup> *R. v. A.G.*, [2000] 1 S.C.R. 439 (S.C.C.) para. 3

<sup>65</sup> [1991] 2 S.C.R. 577 (S.C.C.)

<sup>66</sup> At the time of writing, *Barton* was before the Supreme Court, which subsequently released its decision in May 2019: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17800/index.do>.

<sup>67</sup> *R. v. Barton*, *supra*, note 61, para. 157.



use of such evidence to suggest that complainants who had sexual contact with the accused or others were more likely to have consented or were less credible.<sup>68</sup>

The amendments included a statutory definition of consent in s. 273.1 which requires the “voluntary agreement of the complainant to engage in the sexual activity in question”, focusing on “whether the complainant positively affirmed her willingness to participate in the subject sexual activity as opposed to whether she expressly rejected it”, in an effort to overcome the historical tendency to treat silence, non-resistance or submission as “implied consent”.<sup>69</sup>

The amendments contained in s. 273.2 with respect to mistaken belief in consent required that an accused claiming such a belief not hold it recklessly, or be wilfully blind or intoxicated. It required an accused to take reasonable steps to ascertain consent, “debunking the theory that unless and until a woman objects to, or resists sexual activity, she is consenting to that activity”.<sup>70</sup>

The Court in *Barton* noted that it “is often insufficient to simply instruct the jury on the letter of the law. What is missing and what is required to ensure the law is properly understood and applied is an explanation of the underlying myths the law is designed to overcome”.<sup>71</sup>

Despite the research on the rate of false allegations of sexual assault, the defence is likely to be that a sexual act never occurred, or that what occurred was consensual, and the complainant may have regretted it later, or the allegation was motivated by revenge. By the time of trial, many complainants have undergone a detailed interview with strangers at a police station, been subjected to an intrusive physical examination, met with a prosecutor before appearing as a witness at the preliminary inquiry, and then months or years later, appeared once again as a witness at trial. From a common sense point of view, it could be argued that the fact that the complainant underwent such an onerous process should be something the trier of fact should be able to weigh in assessing credibility and to rebut the suggestion of a motive to fabricate, particularly given the prevalence of inaccurate beliefs relating to the frequency of false allegations in these cases. The defence would likely take the position that such evidence would reverse the onus of proof. In Canada, it is unclear how far the prosecutor can go in using such evidence to rebut the defence position. It may depend on how explicitly a particular motive is suggested.

The prosecutor has a role in confronting these myths to help doubters understand the real nature of sexual assault, and in challenging the tendency to take a hindsight view of what the victim did and blaming her for engaging in commonplace behaviour.<sup>72</sup>

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<sup>68</sup> Ibid., note 53, paras. 91 and 106.

<sup>69</sup> Ibid., paras. 179-180.

<sup>70</sup> Ibid., paras. 259-261.

<sup>71</sup> Ibid., para. 159.

<sup>72</sup> Burrowes, *supra*, note 39 at 18.

In some cases, the complainant may be able to explain her behaviour or reactions during and after the attack. In other cases, calling expert evidence may be necessary to confront misconceptions and demonstrate that what might be perceived as counterintuitive behaviour is actually quite common.

### *Expert Evidence*

In sexual assault trials, the victim's credibility is linked to her behaviour before, during and after the incident. The evaluation of her conduct may be infused with misconceptions. Expert evidence is one way to provide an accurate context to assess that evidence.

In Canada, the introduction of such evidence is governed by the *Mohan* factors of relevance, necessity, the absence of an exclusionary rule and a properly qualified expert,<sup>73</sup> and further refined by *White Burgess Langille Inman and Halliburton Co.*, with respect to the duty of the expert to give fair, objective and non-partisan opinion evidence.<sup>74</sup> The expert should not be giving evidence that the complainant was sexually assaulted or is being truthful. Their role is to educate the trier of fact. The expert should not be someone who treated the particular complainant, to ensure that there is no issue about impartiality and to protect privacy and the therapeutic relationship.<sup>75</sup> Expert evidence can be admitted in sexual assault cases to explain the presence or absence of genital injuries.<sup>76</sup>

Finding a witness with the appropriate expertise, and securing its admission in relation to issues relating to human behaviour may be challenging.<sup>77</sup> Analogous evidence has been admitted in cases involving domestic violence and child abuse to explain delayed and incremental disclosure, recantation, children's memory and suggestibility, and why the victim may continue to associate with the abuser. One of the recommendations of the New Zealand Law Reform Commission was to encourage parties to agree upon the parameters of expert evidence or provide a joint written statement to address myths and misconceptions surrounding sexual violence in jury cases.<sup>78</sup> This practical approach is a potential solution to some of the challenges posed by calling such evidence.

In determining how to address rape myths in a particular prosecution, it helps to begin by identifying behaviours which may be perceived as 'counterintuitive'. The victim may be able to

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<sup>73</sup> (1994), 89 C.C.C. (3d) 402 (S.C.C.), further refined in *R. v. Abbey* [2009] O.J. No.3534 (Ont. C.A.)

<sup>74</sup> [2015] 2 S.C.R. 182, at paras. 35, 49, 54

<sup>75</sup> The Justice Management Institute, *supra*, note 15 at 74.

<sup>76</sup> *R. v. Quashi* [2005] O.J. No. 2694 (Ont. C.A.); *R. v. Aulakh* [2012] B.C.J. no. 1695 (B.C.C.A.), *R. v. A.D.* [2004] O.J. No. 4632 (Ont. Sup. Ct.), *R. v. Salehi* [2009] O.J. No. 296 (Ont. Sup. Ct.)

<sup>77</sup> *R. v. Ennis-Taylor*, [2017] O.J. No 5517 (Sup. Ct. of Justice) for example, where the Crown sought to call expert evidence on how the brain processes trauma, as well as how survivors of sexual assault behave during and after an assault. After considering the qualifications of the expert and the basis for the proposed opinion, the court held that the probative value of the evidence was outweighed by its prejudicial effect.

<sup>78</sup> Hammond, Grant, Peter Boehier, Geoff McLay and Wayne Mapp. 2015. "The Justice Response to Victims of Sexual Violence: Criminal trials and alternative processes." (Wellington: NZLC).

provide evidence as to what she was thinking and feeling at the time so that the trier of fact may be able to more fairly understand and assess the evidence.

The expert should not be giving an opinion on the actual behaviour of the complainant in the case, but testifying with respect to their knowledge of, and experience with, sexual assault victims and their common behaviours.<sup>79</sup>

### *Jury Instructions*

Jury instructions provide objective information, which may assist the trier of fact to focus on the probative value of the evidence and discourage reliance on inaccurate assumptions.

After years of calling expert evidence in domestic violence and child abuse cases, the Supreme Court of Canada has recognized that delayed or incremental disclosure are common behaviours and as a result a standard jury instruction on that issue was developed.<sup>80</sup> Instead of spending years calling expert evidence in individual cases to attempt to address the research that supports that rape myths exist, are prevalent, do not reflect the reality of human behaviour, and impact assessments of credibility, it would be preferable to develop model jury instructions drawing on the expertise of relevant professional bodies and research about responses to sexual assault.<sup>81</sup>

In 2010, the *Crown Bench Book* for judges in the United Kingdom (UK) was published. It includes specific directions for sexual offences that seek to address stereotypes relating to the behaviour and demeanour of victims and directs an approach to the evidence on its merits. Other sample directions relate to situations where the complainant and defendant were known to one another, or had a previous relationship, or were drinking, “flirting”, or there was a lack of resistance during the incident, and delayed disclosure following it.<sup>82</sup>

In *R. v. Barton*<sup>83</sup>, the Alberta Court of Appeal made reference to the practice in the UK and concluded it was time to “push the reset button for jury charges” for cases involving alleged sexual assaults. The Court listed a number of reasons for promoting this approach: to align the

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<sup>79</sup> Long, Jennifer. 2009. “Introducing Expert Testimony to Explain Behaviour in Sexual and Domestic Violence Prosecutions.” (Alexandria, VA: APRIL) at 17.

<sup>80</sup> *R. v. D.D.*, *supra*, note 54, para. 65.

<sup>81</sup> Hammond et al., *supra*, note 77, 27-12 at 117.

<sup>82</sup> For example at 357: “It would be understandable if one or more of you came to this trial with assumptions as to what constitutes rape, what kind of person would be the victim of rape, and what kind of person may be a rapist or what a person who is being or has been raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts there is not a stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach this case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgement strictly on the evidence you have heard from witnesses.”

<sup>83</sup> *supra*, note 61.

charges in use nationally with the law on sexual assault adopted years ago; to communicate the present law correctly and effectively; in recognition that despite efforts to thwart them, myths and stereotypes continue to 'stalk the halls of justice and reduce the entitlement of individuals to equal protection of the law'; and in recognition that sexual assault is largely a gender-based crime.<sup>84</sup>

The Court went on to deal with proper instructions relating to consent and prior sexual history and noted that, without proper instructions, myths and stereotypes can distort credibility assessments and result in discriminatory fact-finding.<sup>85</sup> Finally, the Alberta Court of Appeal endorsed the concept of having a national committee to update jury charges and offered suggestions to start the conversation.<sup>86</sup>

### *Reducing Trauma during the Prosecution*

An accused should face a trial only where the screening standard is met. That trial must be fair and there must be a right to cross-examine witnesses and challenge evidence. This does not mean that the experience need cause further trauma to the complainant, nor does it mean that rape myths should make their way into the evidence or submissions.

Most prosecutors are dedicated professionals and feel the weight of responsibility in trying to meet the many demands of these prosecutions. It may be difficult to accept that many survivors may feel ignored or abandoned during their experience with the criminal justice system. By acknowledging such experiences, efforts to understand them and identify ways to improve the criminal justice response are more likely to meet with success.<sup>87</sup>

The unrealistic demands on the complainant as a witness are evident in a description by prosecutors as to how a "perfect" witness in a sexual assault trial would testify and reflect expectations that have little to do with the reality of sexual violence and its impact:

She would be confident and relaxed, not aggressive or argumentative; if the complainant and accused were in a prior relationship she would have just the right amount of anger, i.e. anger over the sexual assault but not so angry that it would be construed as a motive to fabricate; she would show some distress while testifying but not overwhelming distress; she would have a good memory and be articulate; she would provide a coherent account that focuses on the elements of the offence rather than opinions about the offender.<sup>88</sup>

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<sup>84</sup> Ibid., paras. 8, 161-162.

<sup>85</sup> Ibid., paras. 157, 159.

<sup>86</sup> Ibid., para. 217.

<sup>87</sup> The Justice Management Institute, *supra*, note 15 at 9.

<sup>88</sup> Lievore, Denise. 2004. "Victim credibility in adult sexual assault cases: Trends and issues in crime and criminal justice." (Canberra: Australian Institute of Criminology) at 4.

Those who are from a different culture, or who are traumatized, intellectually challenged, or suffering from mental health issues may be at even more of a disadvantage in an adversarial setting that relies so heavily on the quality of an oral presentation in a formal, public setting.<sup>89</sup>

Many victims need acknowledgment and support; the adversarial process requires them to endure a public challenge to their credibility. Often victims need to re-establish a sense of control over their lives; the court requires them to submit to rules and procedures during a timeline that fits with the court and lawyers' schedule. Most victims would like to be able to talk about what happened in their own way, in a setting of their choice, at a time of their choosing and to a person/s of their choice. The court requires them to face the perpetrator as they relive their experience months or years later, and be subject to cross-examination.<sup>90</sup>

Some complainants may experience validation and support during the prosecution, but many experience secondary victimization. Victims report more positive experiences in the criminal justice system when they have been treated respectfully, been heard and taken seriously, been given timely and accurate information and been prepared for the experience.<sup>91</sup> A Canadian study suggested that victims do not want ultimate decision-making power, but do want to present their views and concerns to the decision-maker.<sup>92</sup>

Being aware of the effects of trauma relating to a sexual assault can improve the quality of the investigation and prosecution, as well as serve to reduce further trauma during the court process. Individuals must consider how to restore a sense of safety and dignity to the victim, and encourage their input within the context of an offender focused process.<sup>93</sup>

### *Charge Screening*

Whether the police lay a charge based on reasonable and probable grounds that is later screened by the Crown, or the Crown prosecutor decides whether a charge will be laid through pre-charge screening or approval, the charge screening process requires prosecutors to determine whether a charge will be prosecuted.<sup>94</sup> At the screening stage the Crown will also consider whether the appropriate charges have been laid and the election, either by summary conviction (if the charge is laid within six months, and depending on the seriousness of the

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<sup>89</sup> Ibid.

<sup>90</sup> Daly, *supra*, note 5 at 8, citing Judith L. Herman. 2005. "Justice From the Victim's Perspective." 11:5 Violence Against Women.

<sup>91</sup> Australia Law Reform Commission, *Sexual Assault and Family Violence*, 26.73

<sup>92</sup> Wemmers, Jo-Anne and Katie Cyr. 2004. "Victims' Perspectives on Restorative Justice: How Much Involvement are Victims Looking For?" 11:2/3 International Review of Victimology 259.

<sup>93</sup> The Justice Management Institute, *supra*, note 15 at 5.

<sup>94</sup> British Columbia, Quebec and New Brunswick require screening by Crown counsel based on a review of a police report, with the Crown determining whether a charge will be approved. In other provinces and territories, police decide whether to lay a charge. All charges are reviewed early in the process by a Crown to determine whether the prosecution should proceed.

allegations) or by indictment. In sexual assault cases, experienced prosecutors should be making these decisions. While there is some variation in the charge screening standards set by Crown policies across the country, they all require consideration of the strength of the case and, if the applicable standard is met, the public interest in proceeding with the prosecution.<sup>95</sup>

The prosecutor is one of the gatekeepers in the criminal justice system. The decision whether to proceed and the election have significant consequences for those accused of sexual assault. Sexual assault prosecutions are difficult. There may be no forensic evidence, no witnesses, or no visible injuries. The absence of these features impacts the likelihood of conviction, but is not necessarily fatal.<sup>96</sup> The decisions made from screening the charge to sentence should be informed by research and not by myths and stereotypes. It is necessary to be aware of one's own biases, and misconceptions, and to have enough insight to understand how they may impact decision making.

Whether a charge is screened before charge or after, any decision about whether the screening standard is met should only be made after a comprehensive investigation has been completed. Where the prosecutor is having difficulty with the screening decision, a meeting with the complainant should be considered. There may be other avenues of investigation to be explored, or explanations with respect to aspects of the case. In some cases, it may be appropriate to call expert evidence to educate the trier with respect to the impact of trauma and correct misconceptions that arise from the evidence in the case. In any event, the decision about whether the screening standard is met, and the basis for it, should be explained and the complainant's questions should be answered. In some cases the election decision may be difficult and input from the complainant about the potential of having to appear as a witness twice, over a longer process, may be helpful.

Many of the diverse Indigenous communities throughout Canada face even greater rates of sexual violence<sup>97</sup> and may have less reason to trust authorities. It may be particularly difficult for individuals in small or remote communities to come forward. Respect and a commitment to learn from and work with these communities in a sensitive manner is necessary.<sup>98</sup>

At a meeting of Federal-Provincial-Territorial Ministers in September 2017, representatives of the Assembly of First Nations, the Native Women's Association of Canada, Congress of Aboriginal Peoples and Women of the Metis Nation met with Ministers and their

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<sup>95</sup> McCuaig, G., *British Columbia Charge Assessment Review*, May, 2012: British Columbia requires a determination of whether there is a 'substantial likelihood of conviction', requiring the prosecutor be satisfied there is a strong, solid case of substance (in exceptional cases, with approval, cases may proceed based on a 'reasonable prospect of conviction'); Alberta, Saskatchewan, Manitoba, PEI and Newfoundland and Labrador define the standard as 'reasonable likelihood of conviction'; Ontario, Nova Scotia, New Brunswick and the Public Prosecution Service of Canada use the "reasonable prospect of conviction" standard.

<sup>96</sup> Daly, *supra*, note 5, at 4.

<sup>97</sup> Lindsay, *supra*, note 18, citing Perreault, 2011; Perreault, et al., 2012.

<sup>98</sup> Ministry of the Attorney General Ontario. 2017. "D. 3 Charge Screening." in *Crown Prosecution Manual* 148.

representatives to discuss the public safety challenges for Indigenous communities with respect to delays, restorative justice, gaps in services, Indigenous policing and violence against Indigenous women and girls.<sup>99</sup> It is hoped that such efforts will continue and result in improved justice services to remote communities.

### *Preparing for Trial*

Pre-trial meetings with complainants may pose challenges for those living in rural or remote communities. The use of technology may offer a solution for some, as well as having a victim/witness support person resident in, or familiar with, remote communities or First Nations Territories. Most jurisdictions provide information about the criminal justice system, and the roles of the professionals online, which may help bridge some of the challenges posed by distance, depending on internet access in remote communities and language barriers.

The complainant's views about whether she wishes to continue with the process will always be an important factor in considering the public interest in prosecution, but the decision remains with the prosecutor, and must include consideration of the public interest. Meeting with the complainant early in the process affords an opportunity to provide information and to identify the complainant's concerns. Time, victim/witness support, appropriate referrals and preparation may alleviate some concerns.<sup>100</sup>

Sexual assault cases rarely result in a guilty plea because of the stigma associated with conviction and the consequences of it with respect to sentencing and the Sex Offender Registry. Prosecutors assigned to these cases should be experienced litigators who have the ability to work with victims, the training to understand common behaviours of both victims and offenders and the knowledge to allow them to rebut myths surrounding sexual assault.<sup>101</sup>

Vertical prosecution (where Crown counsel is assigned to the prosecution early in the process and follows the case to its conclusion) for all sexual assault cases should be the norm. Ideally the same prosecutor will screen the case, identify any gaps or areas for further investigation, meet with the complainant, conduct the pre-trial, preliminary inquiry and trial. Vertical prosecution has been shown to reduce victim trauma, improve conviction rates, and provide more consistent and appropriate sentencing.<sup>102</sup> It fosters the development of trust between the prosecutor and the complainant, and a more effective working relationship with the investigator.

Assumptions about how a disability may affect a complainant's ability to testify should be avoided. Each individual's abilities and the determination of what might assist them as a

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<sup>99</sup> Canadian Intergovernmental Conference Secretariat. 2017. "Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety." 831-176.-

<sup>100</sup> Ministry of the Attorney General Ontario, *supra*, note 97.

<sup>101</sup> Long, *supra*, note 14, adapting the Scalzo model at 3.

<sup>102</sup> Wisconsin Office of Justice Assistance, *supra*, note 24 at 38.

witness should be assessed in a sensitive and respectful manner with the help of the individual, their family members and the professionals who know them.<sup>103</sup>

Prosecutors can prepare complainants to testify by meeting with them to review their statement and by advising them generally about what they might expect during cross-examination. Complainants should be aware of the protections surrounding sexual history or private records. Through victim/witness services or the prosecutor, the complainant should be provided with an orientation to the court and an explanation of roles of the people in it. A discussion relating to what, if any, testimonial aids might be required should be done prior to their appearance to ensure any required application can be prepared beforehand. Finally, the standard of proof in a criminal trial should be discussed so that the complainant is prepared for any verdict.

In isolated communities, court may be held on an infrequent basis. Judges and most lawyers live in cities, where the majority of court staff and supports are located. There are limited opportunities to travel to these communities prior to the trial date. Where possible, phone meetings are held but many victims in these communities do not have phones. Geographic challenges pose real barriers to proper preparation of complainants in remote communities.

The prosecutor assigned to the case should be mindful of protecting the complainant's privacy by redacting any irrelevant medical information<sup>104</sup> or cyber evidence so that only relevant material is provided to the defence. For particularly sensitive material, it may be appropriate to have the defence and accused view the evidence in a secure environment instead of providing a copy. In other cases, the prosecutor should consider obtaining an order or getting an undertaking with conditions that limit the manner and location where such information is to be kept and viewed, prohibits distribution of it, and requires its return at the end of the case.<sup>105</sup>

Delays during the course of prosecution and adjournments where the complainant is scheduled to testify may be particularly difficult for victims of sexual assault. In the days approaching the trial, the complainant will likely be thinking about the experience and reliving it. Sleep may be disturbed. Whether in the context of a specialized court, or through the use of a priority list, trials involving sexual assaults should be expedited once they are ready for a date to be set and requests for adjournments appropriately opposed to allow the complainant to move past the experience more quickly and to begin or continue the healing process.

After testimony and the trial, the complainant should be offered an opportunity to debrief with the prosecutor or victim/witness worker. It is also an opportunity for the prosecution to receive

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<sup>103</sup> O'Malley, *supra*, note 4.

<sup>104</sup> The sexual assault kits separate questions relating to medical treatment from the forensic information but if questions on the form are asked that are clearly not relevant to the investigation (for example, when the allegation is forced oral penetration, there should be no need to ask when the time of last intercourse occurred) the form should be edited accordingly. Other privacy issues arise where there may be multiple profiles and consent is needed from those who aren't suspects to enter the profiles on the DNA databank)

<sup>105</sup> The Justice Management Institute, *supra*, note 15 at 78.



feedback about what helped the complainant deal with the process and what might be improved. Where there is a guilty verdict, the complainant should be offered an opportunity to provide a victim impact statement. If they choose to do so, the process of drafting an impact statement, including a description of the information that should not be included, should be explained to the complainant.

The experience of a complainant in a sexual assault trial is greatly influenced by the individual representatives of the criminal justice system. Judges have the power to intervene during the cross-examination of a witness where it is abusive, repetitive or otherwise inappropriate.<sup>106</sup>

### *Specialization*

Cases of sexual violence require specialized knowledge about the nature of the crime, offenders, the impact on victims, and the applicable law, as well as an ability to be sensitive to victims of it and inspire their trust. They are difficult cases intellectually and emotionally. They require superior litigation skills. Multi-disciplinary training, mentoring programs, sharing of guidelines and information, and specialization are all ways to improve prosecution practice.

Specialized sexual assault prosecution teams attract those with an interest, allow focused training to a smaller group, and provide an opportunity for the development of knowledge and understanding. Once developed, the core group can offer training and mentorship within the prosecution service, as well as advice and guidance to investigators and advocates. The team approach fosters consistency, more informed decision making and efficiency in dealing with cases. Expertise leads to better assessments of whether an offender is high risk and should be flagged or whether a long-term or dangerous offender application should be made.

Banks of legal memos on recurring issues and summaries of non-legal research can be developed for use by the team and other prosecutors across the province or territory where the team is located.<sup>107</sup> In larger jurisdictions, cases may be set in a courtroom dedicated to hearing specific types of cases, which facilitates the use of testimonial aids.

Specialist courts were piloted in South Africa in 1993 in an effort to reduce secondary victimization. The history of these courts provides evidence of the positive effects arising from specialization. A 1997 evaluation showed partial success in reducing trauma during the court process, establishing collaboration between agencies, and improving reporting and conviction rates in the Cape Town area. Additional specialized courts were rolled out across South Africa in 2000 with success in providing vertical prosecution, reducing delay, and increasing conviction

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<sup>106</sup> *Criminal Code*, s. 537(1.1), s. 557

<sup>107</sup> The Justice Management Institute, *supra*, note 15 at 23.

rates when compared to non-specialist courts.<sup>108</sup> Defence counsel viewed the prosecutors as objective and competent.<sup>109</sup>

In the mid-2000s, the specialized courts were dismantled. Conviction rates fell, and the time required to deal with sexual assault cases increased. With the re-establishment of the courts more recently, the earlier positive gains were once again reached, despite resource constraints, workload and inadequate training of justice personnel.<sup>110</sup>

The prosecution service in the state of Victoria, Australia, has had a Sex Offence Unit since 2007, which is responsible for the prosecution of all sexual assault offences, including those involving children. Prosecutors, advocates, and solicitors are all co-located and work as a team in the same unit. They are provided with training, and the same prosecutor follows the case from start to finish. Sexual assault cases are given priority. Victims of sexual assault are able to have a support person present, testify by closed-circuit television (CCTV) or the courtroom may be closed to the public. An evaluation in 2011 showed increased support was made available to victims before and during the prosecution, training was developed internally and between agencies, and the average time to trial declined despite the increased number of cases received.<sup>111</sup>

Many Canadian provinces have some level of specialization to deal with cases of intimate partner violence (IPV), which often include sexual assaults. Some jurisdictions have special prosecution units to deal with crimes involving child witnesses. In Winnipeg, a special prosecution team is assigned to the prosecution of domestic violence, child abuse and, more recently, sexual assaults involving adults outside of an intimate relationship. Deputies for each of those areas provide advice to prosecutors in other areas across the province.

Toronto has had both a dedicated domestic violence team and a child abuse prosecution team since the mid-1990s, with cases scheduled in separate courts dedicated to these prosecutions. Judges sit for short periods of time in these courts then rotate out to non-specialist courts.

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<sup>108</sup> Reyneke, Mariette and H.B. Kruger. 2006. "Sexual Offences Courts: Better Justice for Children?" 31:2 J. for Juridical Science.

<sup>109</sup> Walker, S.P. and D.A. Louw. 2007. "The Court for Sexual Offences: Perceptions of the professionals." 30:2 Int. J. Law and Psychiatry.

<sup>110</sup> Kruger, Beatri and Mariette Reyneke. 2008. "Sexual Offences Courts in South Africa: quo vadis?" 33:2 J. for Juridical Science; Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters. 2013. "Report on the Re-Establishment of the Sexual Offences Courts."; Daly, *supra*, note 5 at 14.

<sup>111</sup> Daly, *ibid.* at 13.

There is some evidence that specialized courts may become more efficient as issues are recognized and addressed.<sup>112</sup> There is also evidence that specialized courts result in greater victim satisfaction.<sup>113</sup>

Specialization may take many forms. Some jurisdictions start at the investigative stage with police and prosecutors on joint sexual assault teams located in the same office.<sup>114</sup> In Denver, each case is assigned to a team made up of an investigator, a victim advocate and a Deputy District Attorney.<sup>115</sup> There is a difference between the role of a District Attorney and a Canadian prosecutor with respect to the level of involvement in the investigation. An Assistant District Attorney or state prosecutor has authority to investigate people, issue subpoenas, and file formal charges, as well as prosecute cases. In Canada, an Assistant Crown Attorney (Crown Prosecutor or Crown Counsel depending on the jurisdiction), may provide legal advice to police during an investigation but is not responsible for the investigation. The Crown will review charges laid by police (or in some jurisdictions will approve the laying of charges) but there is a distinct line between investigation and prosecution, which allows both police and the Crown to exercise their discretion independently.

Recently, some pilot programs in Canada have experimented with having a prosecutor located at police facilities to offer guidance on bail or for complex cases. Large jurisdictions may wish to consider having a prosecutor available to investigators to provide advice early in complex sexual assault investigations. In smaller jurisdictions, where the parties interact regularly, prosecutors are usually available to provide advice after hours. Whether formal or informal, such arrangements are likely to improve practice.

In Ontario, there is a regional advisory group on sexual assault prosecutions, and mentors in each office. Co-counsel are assigned to support less experienced prosecutors for their first sexual assault case and to provide ongoing guidance. The Sexual Violence Advisory Group provides legal and strategic advice for all prosecutors and has developed a detailed *Best Practices Manual* to assist local office mentors in working with junior prosecutors assigned to sexual violence prosecutions. The Advisory group is collecting data, and has developed a bank of facta, submissions on various issues, draft application responses on common issues and sentencing principles.

A similar program in California links requests for assistance with investigator and prosecution experts in the specific area of need. Individual offices may request onsite training by regional

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<sup>112</sup> Parkinson, Patrick. 2016. "Specialist prosecution units and courts: a review of the literature." (Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse) at 20.

<sup>113</sup> Klein, Andrew. 2009. "Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges" (Washington, D.C.: U.S. Dept. of Justice).

<sup>114</sup> See the discussion of Justice Centres; UK Crown Prosecution Service, Merseyside; Rt. Hon. Dame Elish Angiolini, *supra*, note 33; UK Guidance on Sexual Assault Interventions. 2013. "Recommendations to improve standards of policy and practice in the UK." (Liverpool: Centre for Public Health, Liverpool).

<sup>115</sup> Knight Burns, Amy. 2014. "Improving Prosecution of Sexual Assault Cases." Stanford Law Review.

instructors. Regional mentors are available for brainstorming, strategizing and answering questions.<sup>116</sup> The California District Attorneys Association has also developed a detailed manual outlining best practices.<sup>117</sup>

There are many ways to adapt to the volume of these cases and resource restrictions in particular jurisdictions. Some larger urban courts have specialized prosecution teams. Some smaller jurisdictions may have specialized court lists. Others have both specialized prosecution teams and courts. Concerns that specialist judges might become less objective or be perceived as such, have led most of the specialist courts to have judges sit for short periods and then rotate out of the court to other courts.<sup>118</sup>

Recruitment of specialized team members should be based on a voluntary commitment and the opportunity to rotate off the team after two or three years upon request. A smaller team of individuals with expertise provides numerous opportunities for mentoring and ongoing support. Difficult decisions are made easier with the opportunity to talk through issues and decisions with knowledgeable colleagues.

A close association with victim/witness staff and community partners allows access to those who have expertise, and fosters co-ordination of resources and activities, and mutual sharing of information. However, there is a risk that specialist teams might be marginalized within a large office. Efforts to recruit new members, and interact within the whole office are important. Further, the assignment to these teams should be recognized as requiring skilled prosecutors and the work has to be valued and appropriately resourced. Homicides involving sexual assault should also be part of the assignment.

Working on these cases can be challenging, and requires not only legal and litigation expertise but also emotional intelligence. It may be some of the most meaningful work to which a prosecutor is assigned.

### *Vicarious Trauma*

Given the nature of these crimes and the difficulty associated with their prosecution, concerns have been expressed that staff who specialize in these cases may experience vicarious trauma or burnout. It is normal to be affected by the pain of others. Cumulative exposure to suffering

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<sup>116</sup> California District Attorneys Associations' Sexual Assault Mentor DA Program

<sup>117</sup> *Investigation and Prosecution of Sexual Assault* 2012, which is a helpful resource, as is a similar manual from Wisconsin Office of Justice Assistance, *supra*, note 24. Ministry of the Attorney General Ontario, *supra*, note 97, provides detailed guidance reflective of the Canadian context. The Province of Alberta has also developed a manual for the prosecution of sexual assault cases which is available online. For Canadian jurisdictions who wish to adapt the manuals to the practice in their province, these resources may be of assistance.

<sup>118</sup> Parkinson, *supra*, note 111, suggests that concerns about lost objectivity through specialization have not been borne out; See Hammond et al., *supra*, note 77 from. 92-106 for further discussion on specialist courts; Daly, *supra*, note 12 at 13.

can result in feelings of depletion, or being overwhelmed. Some may experience acute sensitivity, while others construct defences to keep distressing feelings at bay.<sup>119</sup> Staff struggling with vicarious trauma, compassion fatigue or burnout may seek to avoid certain cases, experience higher absenteeism or have difficulty getting along with co-workers. They might experience deterioration in health and have a reduced sense of job satisfaction.<sup>120</sup>

Leaders should promote work/life balance, and find ways to regularly connect with team members and set up opportunities to debrief after difficult cases. Constructive ways to cope should be encouraged. Manitoba Justice, Victim Services and Prosecution Services acknowledge these risks, and have hired two full time clinical psychologists to address these issues with staff including victim service workers, Crown Attorneys and support staff. In addition, these psychologists consult with management on maintaining a trauma-informed, healthy workplace, and in developing organizational policies (such as mandatory debriefing on complex and violent cases) to minimize the vicarious trauma experienced by justice staff.

### *Independent Counsel for Survivors*

The discussion earlier outlined some of the reasons why sexual assault victims /survivors may be at higher risk for re-traumatization by the criminal justice system. The adversarial forum places substantial weight on cross-examination to aid its truth finding function. The complainant is required to testify in great detail about very personal matters in the presence of the person accused of attacking her. Many complainants list the fear of testifying and not being believed as their primary concern with the process.<sup>121</sup>

A European study found that a significant relationship existed between being legally represented and the victim's level of confidence in giving evidence and a greater satisfaction with the process.<sup>122</sup> Higher stress levels make it more difficult to process questions and retrieve memories, which may impact the quality of testimony. The presence of counsel when the victim testifies may not only reduce anxiety, but also increase the awareness of the needs of the victim during the trial process. It may also serve to ensure that only admissible questions are asked and result in less animosity from defence counsel.<sup>123</sup>

Victims of sexual assault can be represented by their own counsel in some civil law countries and such counsel may actively participate in the trial, in effect as a co-prosecutor. In France, a victim can attach a civil claim to the criminal prosecution and has the right to participate and cross-examine. In Spain and Brazil, the victim has a right to their own legal representation free

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<sup>119</sup> The Justice Management Institute, *supra*, note 15, Appendix C *Vicarious Trauma* at 104.

<sup>120</sup> Dr. Peter Jaffe, psychologist, Prof. Western University and Academic Director, Centre for Research and Education on Violence Against Women and Children, London, Ontario.

<sup>121</sup> Braun, Kevin. 2014. "Legal Representation for Sexual Assault Victims-Possibilities for Law Reform?" 25:3 Current Issues in Criminal Justice at 821.

<sup>122</sup> *Ibid.*, citing Bacik et al. (1998) at 17.

<sup>123</sup> *Ibid.*, at 822-825.

of charge, to assist with dealings with police and prosecutors.<sup>124</sup> Victims of serious violent crime in Germany may participate at trial with a state-funded lawyer. While the potential to participate appears to lead to greater satisfaction with the process, few victims of sexual assault in Europe actually take advantage of the opportunity. Most leave the prosecution to public officials.<sup>125</sup> In Germany, costs for legal representation are generally borne by the victim, but state funded legal representation is available for more serious crimes which include sexual offences. The Danish criminal system, where victims of sexual assault have the right to be legally represented, has found that the victim's evidence took a shorter time, the victim was more willing to testify and fewer follow-up questions were necessary.<sup>126</sup>

Victims of sexual assault and prosecutors share some, but not all interests during the course of prosecution. The prosecutor has a duty to ensure the criminal justice system operates fairly for all, including the accused. Legally available evidence must be presented fairly. Crown counsel do not represent the complainant. Complainants should be made aware of the prosecutor's role early in the trial process and their duties with respect to disclosure.

Many jurisdictions in Canada recognize the right of complainants in criminal trials to be represented in defence applications for private records<sup>127</sup> and some fund counsel through legal aid, or, if the complainant does not qualify, through other government resources. Generally, this is the extent of the limited role of independent counsel in sexual assault cases in Canada. In Manitoba, there have been a few cases where the complainant has been able to retain counsel to respond to an application relating to prior sexual history. Counsel for the complainant and the prosecutor can both address privacy issues should production of the records be ordered, and seek editing of the record, restrictions on who has access to it and where appropriate, an order to prohibit copying of it and the return of the record upon completion of the trial.

Two sets of recent amendments to the *Criminal Code*, in 2015 and in 2018, clarify that a complainant has a right to counsel and to make submissions in third party records production proceedings and in admissibility of evidence proceedings.<sup>128</sup>

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<sup>124</sup> UN Office on Drugs and Crime and UN Women, *supra*, note 32 at 47.

<sup>125</sup> Wilson, *supra*, note 16 at 16-17.

<sup>126</sup> Braun, *supra*, note 120 at 831.

<sup>127</sup> BC and Manitoba have victim rights legislation which specifically provides the right of legal representation on records applications (*Victims of Crime Act*, R.S.B.C. 1996, c. 478, s. 3(a); *The Victims' Bill of Rights*, S.M. 1998, c. 44, s. 25). In Alberta and Ontario, representation is provided for those who meet the financial requirements of provincial legal aid plans. Ontario and Manitoba provide reimbursement to counsel at legal aid rates for those who don't qualify; Newfoundland/Labrador provides funding for victims; PEI has legislation which states victims should have access to legal services; Nova Scotia legislation provides that a victim has the right to access social, legal, medical and mental health services, but the legislation hasn't resulted in programs; Wilson, *supra*, note 16 at 12; in Quebec a prosecutor who is not involved in the complainant's case will provide information to the complainant relating to third party records applications.

<sup>128</sup> In July 2015, (then) Bill C-32, the *Victims Bill of Rights Act*, came into force and effect and amended the *Criminal Code*, by adding to section 278.4(2) the following, as subsection 2.1: "The judge shall, as soon as feasible, inform any person [who has possession or control of the record and any other person related to the record] who participates in the hearing of their right to be represented by counsel." Bill C-51 received Royal Assent on

Ontario has developed a pilot program in certain jurisdictions that offers up to four hours of free independent legal advice to any victim of sexual assault. The victim/survivor is entitled to this support whether or not they have reported the attack to police. Information about the program is available online.<sup>129</sup> There is a roster of lawyers who are trained on the neurobiology of trauma, options outside of the criminal justice system and how to provide advice relating to what is involved in the criminal justice system, civil proceedings, the Criminal Injuries Compensation Board and other areas. Since the launch of Ontario's pilot, other provinces have implemented similar programs. Newfoundland and Labrador, Nova Scotia, Saskatchewan and Alberta have all announced pilot projects to provide independent legal advice for victims of sexual assault.

There have been advances in programs across the country that provide general information, case-specific updates, court preparation and accompaniment for complainants in sexual assault cases. Victim/Witness programs are associated with prosecution offices across Canada and provide invaluable service to victims involved in criminal proceedings.<sup>130</sup> These services should continue to be provided by Victim/Witness Programs. Consideration of the array of services offered in the relevant jurisdiction is necessary to determine how best to focus legal resources. Programs providing services must not interfere with the fair trial rights of an accused, and should augment rather than duplicate or interfere with existing services.

With those caveats in mind, there is a potential role for independent counsel to provide early legal advice to victims of sexual violence on their legal options in addition to any decisions to be made regarding the criminal justice system. For example, such advice might cover potential insurance coverage, compensation claims, civil actions and dealing with professional disciplinary bodies.

Early involvement may prompt a defence challenge to credibility, by suggesting a financial incentive for the allegation. If the common police practice of taking a lengthy and detailed statement immediately is replaced by brief information gathering with the full investigative interview taking place a couple of days later as might be suggested by a trauma-informed approach, University of Windsor law professor, Larry Wilson suggests that counsel meet with the complainant in the interim to explain the significance of the detailed statement and the need to be truthful and comprehensive.<sup>131</sup>

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December 13, 2018. The Bill amends the "rape shield" provisions in the *Criminal Code* to introduce an admissibility hearing for evidence of sexual activity and new provisions allow the complainant to appear and make submissions, have counsel and that the judge must inform the complainant that she has the right to counsel. New provisions also clarify that communications of a sexual nature or for a sexual purpose are also subject to these admissibility provisions.

<sup>129</sup> Ministry of the Attorney General Ontario. 2018. "Independent Legal Advice for Survivors of Sexual Assault Pilot Program." online: Ontario Victim Services <<https://www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php>>.

<sup>130</sup> UN Office on Drugs and Crime and UN Women, *supra*, note 32: One study in the US found that when a victim met with a Victim Witness representative, co-operation increased threefold, David Ford and Susan Breall. 2000. "Violence Against Women: Synthesis of Research for Prosecutors." U.S. Dept. of Justice.

<sup>131</sup> Wilson, *supra*, note 16 at 23.

The lawyer for the victim could also provide legal information and advice throughout the process. An evolving issue in criminal trials is whether posts on various social media platforms are considered to be private records. Texts or emails to close associates of the victim may attract a reasonable expectation of privacy. The police may have grounds to ask for them, particularly if they are communications with the suspect or if they are relevant to capacity at the time of the allegations. In order to obtain an informed waiver, a role for counsel early in the investigation to provide independent advice on such issues is desirable. Consideration should be given to allowing counsel to appear on applications that directly affect the complainant, not only for private records, but for applications relating to sexual history, or applications for testimonial aids.

Pilot programs offering early advice by trained lawyers on a variety of options for victims of sexual assault is a promising practice. Should the victim become a complainant in criminal proceedings, the same counsel should be available for advice and representation on applications for private records or with respect to the admissibility of sexual history or communications. In the event of a conviction, counsel may provide assistance with respect to any application for restitution. Evaluations of the pilot programs will provide further information with respect to the types of issues that arise and the appropriate time they require.

### *The Preliminary Inquiry*

In most cases in Canada, the complainant in a sexual assault case will have been interviewed on videotape. The defence will have been provided with full disclosure. In cases where the Crown elects to proceed by indictment, there is often an election for a preliminary inquiry with the trial to be held some time later in the higher level of court. At the preliminary inquiry, the complainant is usually the only witness called. Appearing twice, separated in time, months and years after the offence, may be particularly difficult for victims of sexual assault. The delay inherent in two appearances may also contribute to mental suffering.

The purpose of a preliminary inquiry is to determine whether sufficient evidence exists in order for the accused to stand trial and to afford the defence with an opportunity to ascertain the nature and strength of the prosecution's case.<sup>132</sup>

Given the Crown's disclosure obligations, the Supreme Court of Canada has recognized that "the discovery function of the preliminary inquiry has lost much of its relevance."<sup>133</sup> In *R. v. Jordan*, the Court suggested that, "Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations".<sup>134</sup>

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<sup>132</sup> *Skogman v. The Queen* [1984] 2 S.C.R. 93; *R. v. Arcuri* (2001) 3 S.C.R. 828.

<sup>133</sup> *R. v. S.J.L.* [2009] 1 S.C.R. 426, para 3.

<sup>134</sup> 2016 SCC 27, para. 140.



The vast majority of cases involving charges of sexual assault will meet the test for committal, prompting the question as to what is gained by having a preliminary inquiry in these cases other than the hope that the testimony might result in some inconsistencies for use at trial. Counsel for the accused person may use it to explore whether there is a basis to bring applications at trial (which is preferable to those issues arising mid-trial).<sup>135</sup> Some counsel argue that it serves as a way both sides can further their understanding of the strengths and weaknesses of the case, leading to a more focused trial or a guilty plea, or withdrawal of charges.<sup>136</sup> The results are mixed on the issue of whether having a preliminary inquiry impacts the likelihood of a trial taking place.<sup>137</sup> The question remains whether such benefits outweigh those gained by eliminating the preliminary inquiry.

In 2004, amendments were made to the *Criminal Code* in an attempt to minimize the extent to which complainants were subject to examination and cross-examination at the preliminary inquiry through the enactment of section 540(7). The amendments allow the presiding Justice to receive evidence that is credible and trustworthy, including a statement made by a witness that is in writing or otherwise recorded. However, subsection (9) provides that the justice shall, on application of a party, require any person the justice considers appropriate to appear for examination or cross-examination.<sup>138</sup>

Where the investigative statement covers the elements of the offence and is of good quality, the use of this provision may help to reduce the trauma associated with having to repeat the allegations in open court, save court time and focus the cross-examination at the preliminary inquiry. The practice varies across jurisdictions with respect to applications by the defence to cross-examine and how circumscribed the cross-examination of the complainant is in the wake of these amendments.

The time required to schedule the preliminary inquiry contributes to the potential for further trauma. Many complainants find it difficult to move forward, and lengthy delays impact memory when a trial date is finally reached months later.

It is time to consider whether the preliminary inquiry is necessary in these cases at all, or whether it should be restricted to certain cases and certain areas of evidence.<sup>139</sup> A presumption against the holding of a preliminary inquiry unless the defence establishes, on a balance of

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<sup>135</sup> *R. v. E.B.* [2002] O.J. No. 75 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. 94 (S.C.C.) holding counsel may ask the complainant about the existence of a record, and whether what happened was discussed, without getting into any details, as well as the time period covered in the record and its location.

<sup>136</sup> Gourlay, Matthew. 2017. "After Jordan: The fate of the speedy trial and prospects for systemic reform." 36:2 *The Advocates' Journal*.

<sup>137</sup> Department of Justice. 2017. "Preliminary Inquiries." *Just Facts*. Justice Canada found having a preliminary inquiry did not impact trial rate, while C.M. Webster. 2005. "A Preliminary Inquiry into the Preliminary Inquiry." found some evidence to indicate it did decrease the likelihood of a trial.

<sup>138</sup> *R. v. Vaughn* [2009] B.C.J. No. 912 provides an overview of some of the case law on these sections.

<sup>139</sup> *The Criminal Procedure Act 1986 (NSW)* s. 91; see also *Summary Procedure Act 1921, SA*, s. 106 for examples where there is a presumption that a complainant in a sexual offence will not be ordered to attend a committal hearing unless court is satisfied the "interests of justice" cannot be adequately served otherwise.

probabilities, that it is in the interests of justice to hold a preliminary inquiry, would still protect fair trial rights in specific cases where there are real issues that need to be canvassed at the preliminary inquiry level. Restricting such hearings to specific issues which may impact committal, or are not covered by the disclosure or are required for full answer and defence would streamline the process. Reforms relating to the availability of preliminary inquiries were one of the items discussed at the Federal-Provincial-Territorial Meeting in September 2017.

### *Crown Election*

In many cases, after considering what the sentence is likely to be, it will be appropriate to elect by summary conviction if the charges have been laid within six months or the defence consents (s. 786(2)). Legislative reform, that would extend the limitation period for summary conviction offences, may capture the less serious cases where there has been delayed disclosure and result in the complainant being required to testify on only one occasion.

For cases of sexual assault under s. 271 of the *Criminal Code*, where the sentence is likely to be a high reformatory term if the accused is convicted, it may be worthwhile to seek the input of the complainant before making an election. Raising the maximum penalty to two years less a day where the prosecution proceeds summarily would also result in more cases being heard in the Provincial courts and, therefore, only one appearance by the complainant. Reclassification of offences was also part of the discussion at the Federal-Provincial-Territorial Ministers meeting in September 2017.

In cases where the potential for trauma is exceptional due to the complainant having to appear twice and experience the delay if a preliminary hearing is required, it may be appropriate to seek a direct indictment. Generally it will require compelling circumstances that make it in the interests of justice and a strong prosecution case involving serious allegations.

Finally, given how any appearance to give testimony requires the complainant to relive the experience, every effort should be made to oppose unnecessary adjournment requests by the defence. Given that meeting the complainant to prepare her for testimony often results in further details being provided, it is advisable to schedule that meeting some time before the hearing so that the new details can be disclosed to the defence and they will have time to address them before the scheduled date.<sup>140</sup>

### *Testimonial Aids*

In Canada, there is a presumption that any trial is open to members of the public (s. 486). Exclusion may be ordered if it is in the interest of the proper administration of justice. Amendments to the *Criminal Code* in 2015<sup>141</sup> require the court to consider, among other

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<sup>140</sup> Ministry of the Attorney General Ontario, *supra*, note 97.

<sup>141</sup> s. 486(2)

factors, society's interest in encouraging the reporting of offences and the participation of victims and witnesses, and the ability of the witness to give a full and candid account.

There is a significant public interest in citizens and the media being able to attend and scrutinize how justice is administered in individual cases. In remote jurisdictions, it is not uncommon for many community members to attend the gym or community centre where the trial is being heard. There may be people who attend to support either the accused person or the complainant. There may be high school law classes sitting in. Often, but not always, members of the public might be asked to leave during particularly sensitive evidence. Other jurisdictions would go further and recommend that a judge be authorized to clear the court at any point in a proceeding involving sexual violence where the order is necessary to avoid causing undue distress to the complainant, subject to an exception for the media.<sup>142</sup>

The criteria in s. 486.2(2) of the *Criminal Code* granting the use of a screen or remote testimony by CCTV has been relaxed from "being necessary to obtain a full and candid account" to "facilitating the giving of a full and candid account or it being otherwise in the interests of justice". There is now a provision for a witness to have a support person present and close by based on the same test, but for this section specific factors are to be considered in making that determination. The complainant should be made aware of these provisions and applications should be made in appropriate cases.

In northern Canada, while the major cities might have access to CCTV, the remote areas may not. The same is true for fly-in courts in the provinces. Many of the sittings of the court are in small community centres with no separate areas available to interview the witness (some meetings have been held in storage rooms, or even a broom closet to ensure privacy), or to wait separately from the accused.

The reality is that the resources are so few, and the distances are so great, that meaningful preparation and protections during testimony are often not attainable. While great initiative is shown (for example, using a tele-health line, or applying to have a change of venue in order to make use of CCTV facilities to have a complainant testify remotely with the trial in one of the Territories cities), there is still much that needs to be done to provide better resources to these communities.

Victim/Witness workers have made a tremendous difference in reducing trauma for victims and providing information and support across Canada. In the three Territories, there are now 21 Crown Witness Coordinators, some of whom are Inuit or from other Indigenous backgrounds, who help bridge language barriers (the NWT recognizes 11 official languages, 9 of which are Indigenous<sup>143</sup>) on behalf of the prosecution. In small communities where many Indigenous people live, victims and witnesses may communicate primarily in local Indigenous languages. While interpreters are used, English is used in proceedings. Open courts for the airing of

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<sup>142</sup> Hammond et al., *supra*, note 77, recommendation 16.

<sup>143</sup> *Official Languages Act*, RSNWT 1988, c -1, s. 4.

disputes may provide a context that is quite foreign to Indigenous cultures as a means of resolving conflict and dealing with serious problems in the community.

Efforts to provide safe interview and waiting areas, with an internet connection would facilitate preparation by video, and live testimony. Consideration should be given to amending the *Criminal Code* to facilitate remote testimony to address the significant barriers faced by victims in remote communities. Local support services should receive ongoing training on how to best support victims in these communities.

### *The Offender*

In general, it is often in the public interest to prosecute sex offences although such decisions must be made with respect to the details of each case. Most victims do not report sexual assault and most perpetrators are never prosecuted. Where offenders have been granted immunity in exchange for a truthful accounting of their other crimes, researchers found an average of seven, and in another study, an average of 11 victims for each offender. Sexual offending often begins in adolescence and may span several decades. Between one-third and two-thirds of rapists have also sexually attacked children.<sup>144</sup> There should be a thorough investigation of the accused's background, whether or not there are previous convictions, and appropriate resources for investigative and prosecutorial services dealing with these crimes.<sup>145</sup>

Men who sexually assault adults have a 92% chance of avoiding contact with the criminal justice system and a 97% chance of avoiding legal consequences.<sup>146</sup>

Prosecutors need to understand the nature of sexual assault and common offender dynamics. Contrary to the stereotypical image of the stranger rapist, in most cases the offender is known to the victim. Some may view these cases as less harmful or the rapists as somehow less morally blameworthy. Lisak argues that characterizing such crimes as "an unfortunate encounter because of too much alcohol or too little clear communication" or 'date rape', "obscures one of the most troubling facts about sexual violence: The majority of sexual assaults are committed by predatory individuals who tend to repeat the offence and are multi-faceted offenders".<sup>147</sup>

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<sup>144</sup> Lisak, David. 2008. "Understanding the Predatory Nature of Sexual Violence." 14:4 Sexual Assault Report at 2; See also: Patrick Lussier, Marc LeBlanc and Jean Proulx. 2005. "Generality of Criminal Behaviour: A Confirmatory Factor Analysis of the Criminal Activity of Sexual Offenders in Adulthood." 33:2 J. of Criminal Justice 177; G.G. Abel and C. Osborn. 1992. "Stopping Sexual Violence." 22:6 *Psychiatric Annals* 301; Kim English et al., 2000. "The Value of Polygraph Testing in Sex offender Management." (Denver: Office of Research and Statistics).

<sup>145</sup> Harwell, M.; Lisa, K. Nov/Dec. 2010. *Why Rapists Run Free*, Sexual Assault Report, Vol. 14, No. 2, pp. 17-26

<sup>146</sup> Tjaden, P., Thoennes, N. Jan. 2006. *Extent, Nature and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, Special Report U.S. Dept of Justice.

<sup>147</sup> Lisak, *supra*, note 143; Lussier et al., *supra*, note 143; Abel, *supra*, note 143; Kim English et al., *supra*, note 142.

As with sexual assault victims, stereotypes exist with respect to sex offenders, as “sex starved” or “mentally ill” individuals.<sup>148</sup> In reality, sex offenders are a heterogeneous group, and often have social skills, such that friends and acquaintances find it hard to accept that someone like that would commit such a crime.

Sexual abuse, physical abuse and neglect are all significantly more prevalent in the background of rapists when compared to non-offending men.<sup>149</sup> Self-report studies of offenders indicate they endorse one or more of the following beliefs: women are sexually preoccupied and highly receptive to sexual advances; women are deceptive, unknowable and malevolent; males are superior and dominant; the world is dangerous; or that they cannot control strong urges and impulses, including sexual arousal.<sup>150</sup>

A prosecutor should seek to understand what motivates sex offenders and what skills they use to manipulate victims. Offenders are often adept at identifying “likely” victims and testing their boundaries; they use strategies to isolate them physically; and usually use instrumental, not gratuitous violence or threats, that is, only enough to have the victim submit.<sup>151</sup>

Sexual assault fulfills an offender’s needs. Some are motivated by the need to control or dominate the victim and avoid being controlled by her. Others are motivated by resentment and general hostility to women.<sup>152</sup> Some may lack internal filters such as feelings of guilt, remorse, compassion or empathy. They may have a belief system that devalues the rights of others and overvalues their own and they may feel the rules of society do not apply to them.<sup>153</sup>

Less common, is the sadistic rapist who is indifferent to or aroused by pain, fear, suffering, injury or the humiliation of others. A truly consensual encounter may not meet such an offender’s needs.<sup>154</sup> Offenders may use non-consensual sex to feel in control, or may feel entitled to sex with or without consent. A self-deluding rapist may view the sexual act is consensual, and try to block feelings of inner turmoil. “When there are no consequences for their acts, these attitudes are reinforced”.<sup>155</sup>

An offender-focused prosecution will highlight the actions taken by the accused leading to the sexual assault and any actions taken to reduce the chances of being held accountable.

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<sup>148</sup>Fanflik, *supra*, note 20 at 5.

<sup>149</sup> Lisak, D., *supra*, note 143 at 4; Cathy Widom and M. Ashley Ames. 1994. “Criminal Consequences of Childhood Sexual Victimization.” 18:4 Child Abuse and Neglect 303.

<sup>150</sup> S. Hogan. 2012. “Understanding Rape: The Influence of Static, Situational and Contextual Factors on Offender Behaviour.” VI-9, in *Investigation and Prosecution of Sexual Assault* (Sacramento: CDAA).

<sup>151</sup> Lisak, *supra*, note 143 at 6.

<sup>152</sup> *Ibid.* at 4.

<sup>153</sup> Valliere, V. 2007. “Understanding the Non-Stranger Rapist.” 1:11 The Voice 2.

<sup>154</sup> Valliere, *ibid.* at 2.

<sup>155</sup> Burrowes, *supra*, note 39 at 20.

### *Offender-based Prosecution*

Focusing on a series of choices or action taken by the offender may reveal his underlying needs /wants and the planning behind his acts. A victim who knows the offender may be dependent on him in a way that makes her vulnerable. An offender often seeks a victim who demonstrates a willingness to trust, or who may lack self-confidence. He may test how compliant the potential victim is, offering drinks she did not ask for, or convincing her to stay when she wishes to leave. Following the assault, the victim may blame herself, feeling she somehow “led him on” or did not have the right to say no.<sup>156</sup>

Some prosecutors will have had the experience of a pre-trial judge asking why they are continuing with the prosecution of a “he said, she said” case, which is unlikely to result in a finding of guilt beyond a reasonable doubt. In many cases, there will be no statement and the prosecutor only learns the nature of the defence during cross-examination of the complainant. If there is no DNA, it may be suggested that it never happened, or, if there is DNA, it was consensual. The underlying suggestion where an accused is articulate and presentable, is often that he had no “need” to sexually assault anyone, and the complainant not only consented, but initiated the encounter. Only afterwards, because the complainant is vindictive, crazy or regretting a consensual encounter, did she complain.

With no prior statement, it is difficult to establish inconsistencies. It is advisable for the police to attempt to get a statement from the accused at the time of arrest. Whatever position the accused takes, it will serve to commit him to a version of events early in the process. Many aspects of it are likely to corroborate the complainant’s account on peripheral matters. It may also provide insight into what motivated the particular accused.

In cross-examination of the accused, it is often possible to get agreement on the complainant’s narrative up to the point where the sexual assault happened. The events leading up to the attack may illustrate the purposeful conduct and choices the offender made to manipulate and isolate the victim. Knowledge of what motivates different types of sex offenders may provide the basis for a plan for the cross-examination of the accused and allow the prosecutor to build on their theory of the case.

The language used by the prosecutor should reflect the complainant’s evidence and not serve to obscure the actions of the offender or normalize the behaviour (ex. the defence may characterize the act as ‘you performed oral sex’, when the complainant has testified the accused put or forced his penis into her mouth).<sup>157</sup>

Finally, even where the evidence of the accused is not shaken in cross-examination, it does not necessarily mean there is a reasonable doubt. The accused’s evidence is not examined in

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<sup>156</sup> Valliere, *supra*, note 152 at 3-4.

<sup>157</sup> Ministry of the Attorney General Ontario, *supra*, note 97 at 117.

isolation, but in the context of all the evidence, which includes the evidence of the complainant. If that evidence is accepted, it can be a compelling basis for the rejection of the accused's evidence. A judge is "entitled to believe the uncorroborated evidence of the complainant."<sup>158</sup>

### *Similar Act Evidence*

Similar act evidence, or prior discreditable conduct of the accused, is presumptively inadmissible at trial. There is a danger that the admission of such evidence may lead the trier of fact to conclude that the accused is a bad person and to use the evidence to find he was more likely to be guilty of the current offence instead of focusing on whether the acts in question have been proven beyond a reasonable doubt. Where the evidence shows more than bad character and is relevant to an issue in the case such evidence may be admitted where its probative value outweighs its prejudicial effect. Probative value increases with the degree of distinctiveness or uniqueness shared by the past and current allegation, where two or more persons are unknown to each other or have not shared with each other what they allege happened.<sup>159</sup>

Given the reality that a significant portion of offenders have a history of sexual offending, it is important that investigators do a thorough investigation including any prior complaints that may have been labelled "unfounded" or that were otherwise diverted from the criminal justice system. Subsequent complaints may prompt a re-investigation of such cases. In some cases, it may be appropriate to speak to prior intimate partners of offenders or their family members. Investigative and prosecution files should be preserved. The sad reality is the offender may be charged in the future and this evidence may be important either at trial as similar act evidence, or in long-term or dangerous offender applications.

### *Sentencing*

The reforms in 1983 creating various levels of sexual assault appear to have been associated with lower sentences generally. This may be particularly true in cases where the offender and victim are known to each other even though such situations apply to most sexual assault cases and may not reflect the harm or breach of trust element in such cases.

Given the difficulty of prosecuting these cases, and the potential for re-victimization of the victim during the process, there is real value to resolution of these charges. At the same time, it is difficult to justify sentences that do not reflect the harm done and the risk to the community. While the ultimate decision remains with the prosecutor, input from the victim/survivor should be sought prior to the acceptance of a resolution.

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<sup>158</sup> *R. v. G.(A.)* [2000] S.C.J. No. 18, para. 30; *R. v. D (JJR)* (2006), 215 C.C.C. (3d) 252; Ministry of the Attorney General Ontario, *ibid.* at 170.

<sup>159</sup> *R. v. Handy*, [2002] 2 S.C.R. 908 (S.C.C.).

There is value to providing an opportunity for the victim/survivor's voice to be heard and for the court to be reminded of the serious consequences borne by those who have been sexually assaulted. Victims should have the opportunity to submit a Victim Impact Statement, to provide the court with information about how the crime affected them. The statement cannot be used to air the victim's views as to sentence.

It is important to flag serial offenders early and prepare a package for sentencing and for consideration of whether an application for a long-term or dangerous offender designation is appropriate. Some provinces have Regional coordinators to assist with the gathering and storage of information and provide advice for these applications.

Some jurisdictions have incorporated active offender management and supervision by the court when dealing with sex offenders. In several counties in New York State, the court monitors and supervises defendants pre-sentence and while on probation or parole. These courts, which operate like other types of problem-solving courts, have a designated prosecutor, defence attorney and team of probation officers and work closely with local service providers to facilitate victim access to advocacy, counselling and other sources.<sup>160</sup>

A promising program for offender reintegration called Circles of Support and Accountability (CoSA) started in Ontario in the mid-1990s with the goal of providing social support for released high risk sex offenders. Other Canadian, UK, NZ, Australian and US jurisdictions have adopted the program. Participation is voluntary and only offenders who have completed their entire sentence may participate. One community member will meet with the offender daily for the first two or three months, followed by regular meeting on a less frequent basis. The focus is on support, positive social influences, help with problem solving and the reduction of social isolation. Research has found significantly lower rates of re-offending for CoSA participants compared to a control group.<sup>161</sup> At one point there were 18 projects across Canada, but government funding ended for all but three projects. Recently Federal funding was re-instated to provide for 14 sites across Canada.<sup>162</sup>

### *Training*

Whether specialists or not, all prosecutors should receive training on the law relating to sexual assault, the dynamics of these offences, victim and offender behaviour, the effects of trauma, and risk assessments. There are many excellent resources available.<sup>163</sup> Prosecutor training should include survivors of sexual assault from different backgrounds, advocates, medical and mental health professionals, toxicologists, and those who treat offenders. Similar training

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<sup>160</sup> Daly, *supra*, note 5 at. 14.

<sup>161</sup> Daly, *ibid.* at 15.

<sup>162</sup> News Release Public Safety Canada May 5/17

<sup>163</sup> For example see prosecution manuals from Ontario, Alberta, "Best Practices for Investigating and Prosecuting Sexual Assault" (2013) Wisconsin, and California; for human trafficking, see Department of Justice, "A Handbook for Criminal Justice Practitioners on Trafficking in Persons" (2015); online presentations on trauma informed approaches by R. Campbell, "The Neurobiology of Sexual Assault" (2013) The National Centre for Victims of Crime.



should be offered to police and judges. British Columbia, with the support of the Department of Justice Canada, has begun a five-year project to develop and implement a cross-sector, trauma-informed training, education and awareness curriculum for the justice, public safety and anti-violence community sectors.

### *Reaching Out to Encourage Reporting*

The criminal justice system plays an essential role in protecting victims of sexual violence and holding offenders accountable. Decades of legislative amendments, judicial guidance, and the evolution of policy and practice have improved the experiences of many victim/survivors but have not resulted in increased reporting. Efforts to think more imaginatively about how to serve not only those who decide to engage with the criminal justice system, but also, those who do not are necessary.<sup>164</sup>

### *Third Party Reporting*

A significant number of victims who do report to authorities do so with the hope that it will stop further abuse for themselves or others. Some of those victims wish there were other ways to come forward.<sup>165</sup> A Province-wide Third Party Reporting (TPR) program was developed in British Columbia in 2008 and updated in 2013. There are ongoing efforts to raise awareness regarding the program.<sup>166</sup> For those victims who are particularly vulnerable and who would not otherwise directly report to police (for example, sex workers, who are more likely to be sexually assaulted and physically harmed), TPR allows an adult victim of sexual to report anonymously, through a third party agency. The victim answers a questionnaire that serves to provide information on the nature of the sexual assault and what is known about the suspect. The intent is not to circumvent the criminal justice system, but to provide a means to reduce sexual assaults and help police apprehend serial or high risk offenders. It is also hoped that when a victim contacts a third party agency to report, with encouragement, information and support, she may choose to make a full report to police.

Other jurisdictions offer some form of anonymous reporting. For example, in certain cities in Alberta, when a victim undergoes a forensic examination, she may also make a statement to the health professional that will be kept with the kit. In Ontario, third party reporting is available in some locations. New Brunswick allows incident details to be uploaded into a national crime data base.

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<sup>164</sup> Daly, *supra*, note 5 at 24.

<sup>165</sup> Hattem, T., *Survey of Sexual Assault Survivors*, Department of Justice, October, 2000, pp. 14, 25

<sup>166</sup> *Third Party Reporting Guidebook: Increasing Reporting Options for Sexual Assault Victims*, Ending Violence Association of BC, Nov. 2015; *Sexual assault task force calls for anonymous reporting system on campuses*, Chiose, S., *Globe and Mail*, April 4/16, reporting police forces in BC, and parts of Ontario and Yukon's use of the system has identified repeat offenders.

### *Co-ordinated Multi-Disciplinary Centres*

In Quebec, 16 Crime Victim Assistance Centres (CAVACs) are located across the province. They offer free, confidential, front line services to all victims of crime and their immediate families, regardless of whether the perpetrator has been identified. The Centres offer post-trauma referrals to counsellors or legal, medical or community resources, information about the criminal justice system, victims' rights and remedies, assistance with filling out forms, and accompaniment to medical and community agencies where needed, as well as through the justice process.

### *Restorative Justice*

For some victims/survivors, having other options to address the harm done to them and hold offenders accountable may be more meaningful to them, particularly where the offender is known.<sup>167</sup> Restorative justice programs may offer victims greater participation and validation, while still providing offender accountability in a setting that may allow victims to regain a sense of control and healing.<sup>168</sup>

There is a significant body of research on restorative justice and sexual assault. Some of the complexities of this issue are canvassed in the work of Kathleen Daly who notes: the lack of an agreed upon definition of restorative justice; that it is not a fact finding process, but is a resolution mechanism; there is a gap between RJ ideals and aspirations and actual practices; the conference practice may help some victims recover but it is contingent on the degree of distress they experienced; and at best, one can expect modest results.<sup>169</sup> It is beyond the scope of this paper to comprehensively explore this option other than to highlight some of the potential benefits and drawbacks of such programs from the prosecutor's perspective.

Potential drawbacks include the risk of manipulation of the process by offenders, pressure on the victim to agree to outcomes, and a perception by some victims that the outcomes are too lenient.<sup>170</sup> There is some concern that such an approach may minimize the effect of violence and perpetuate discrimination against women and girls by reflecting prevailing attitudes in the community and consequently risk failing to hold the perpetrator accountable in order to promote harmony.<sup>171</sup>

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<sup>167</sup> Participation in a restorative justice process may reduce symptoms of PTSD and stress: Gustafson, 2005; Wager, 2013; Koss, 2014. If there is a pre-existing relationship between the victim and offender, the process may diminish fear of retaliation, and result in acknowledgement of the harm done: Mercer; Sten-Madsen, 2015

<sup>168</sup> Daly, *supra*, note 5 at 24.

<sup>169</sup> Daly, K. 2006. *The limits of restorative justice*, in Handbook of Restorative Justice, A Global Perspective, edited by Sullivan and Tift; See also: Daly, K., *Restorative Justice and Sexual Assault-an Archival Study of Court and Conference Cases*, British Journal of Criminology, Vol. 46, Issue 2, March /06

<sup>170</sup> Daly, *supra*, note 5 at 22-23.

<sup>171</sup> UN Office on Drugs and Crime and UN Women, *supra*, note, 32 at 129; see also: The Canadian Working Group *Recommendations for Restorative Justice in Violence Against Women Cases* for suggestions on how to achieve the appropriate balance, at p. 130

Given the serious harm caused by sexual assault and the potential for re-offending, there are legitimate concerns about piloting programs that operate outside the criminal justice system. Crown policies generally restrict or prohibit diversion for sexual assaults except in exceptional cases given the public interest in prosecution.<sup>172</sup> Approaches that would work in tandem with the criminal justice system for offenders who were suitable and for victims who wished to access aspects of this process might help to address these concerns. Opportunities pre-sentence or post-sentence for restorative justice are worth studying.

Some would argue the trade-off is not between a more or less serious response, but between any response and none at all.<sup>173</sup> While only 5% of sexual assault victims in Canada report the crime to police, as many as 25% of victims of sexual assault express interest in restorative justice.<sup>174</sup>

For some victims who would not otherwise come forward, aspects of the restorative justice process may encourage participation in the criminal justice process. These programs, when done well, require resourcing and need to protect the victim/survivor's safety. Facilitators must be well trained in power dynamics and how to manage them. Considerable thought needs to be given as to where they are located, how and when they are set in motion,<sup>175</sup> what type of cases should be referred, as well as whether the victim and offender should be provided with counsel and how such counsel would be funded.

Further, the use of any admissions during the process must be addressed if the program is not successfully concluded and even when it is. Given that many sexual offenders re-offend, thought needs to be given to how records of restorative justice would be kept, who would have access to them, and what use, if any, might be made of their contents in other proceedings.

The challenges are significant. Some jurisdictions have taken tentative steps in an effort to offer aspects of restorative justice to victim/survivors of adult sexual assault. In Canada and the US, there have been a small number of cases where voluntary meetings between the offender and

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<sup>172</sup> See for example *BC Crown Counsel Policy Manual, Sexual Offences Against Adults*, July 23, 2015; Manitoba Prosecution Policy, *Restorative Justice and Diversion*, May, 2015 indicates while all offences are potentially eligible for restorative approaches, crimes involving significant violence or which are very serious would rarely be eligible, and restorative aspects would be dealt with post-conviction as part of an overall sentencing plan; Crown Policy Manual (Ontario); *Community Justice Programs for Adults*, D.4; Daly, *supra*, note 5 at 23.

<sup>173</sup> Daly, *ibid.* at 26.

<sup>174</sup> Wemmers, J., *Judging Victims: Restorative choices for victims of sexual violence*, Victims of Crime Research Digest, no. 10, citing Tufts, 2000; Perrault, 2015. The Canadian study looked at those who had been victimized in the last 12 months. In a US study of lifetime victimization 56% of victims indicated they would have liked an opportunity for restorative justice in addition to the conventional criminal justice system. Those who had not chosen to report were most likely to favour restorative justice as an alternative to court. One study found 30% would like such an opportunity as an alternative to court. See Marsh and Wager, 2015.

<sup>175</sup> Daly, *supra*, note 5 at 22.

victim, run by professional facilitators, occurred after conviction. A key element of these meetings was that participation played no role in parole decisions.<sup>176</sup>

Any proposed programs must be voluntary for both the perpetrator and the victim, and offer options to victims about the pace of the process and its extent and ensure the rights of the perpetrator are protected. Legal representation for the offender and a clear understanding of the legal implications of participation in such programs should inform whether an offender wishes to consent to the process. Program providers need to be accredited and the programs subject to nationwide standards.

Some victims may want a face-to-face meeting, others may want indirect contact either by letter, or through a representative or other means. For some it helps to gain a sense of control, allowing them to move forward, and have some of their questions answered.<sup>177</sup>

In Arizona, between 2004 and 2007, a restorative justice program called RESTORE was developed by victim services, prosecutors, legal scholars and public health professionals for first time offenders for sexual assaults that occurred between acquaintances or cases that did not involve penetration. Prosecutors referred certain cases and the victims /survivors were contacted to determine if they wished to participate in the process. If so, the offender was contacted and if he agreed, he underwent treatment and was subject to ongoing monitoring and monthly reviews for 12 months. Both the victim/survivor and offender and their family or friends were prepared for a face-to-face dialogue to identify the harm done and develop a plan to redress it. Prosecutors tended to refer “weak” cases (cases with low chances of conviction), but an evaluation suggested there was “cautious optimism” about the feasibility and outcomes of the program.<sup>178</sup>

In South Australia, youth conferences have been used in cases of sexual violence. They were more likely to be used in intra-familial cases. From the victim’s perspective, they afforded some type of justice when compared to those cases that went through court, where half of the cases were dismissed.<sup>179</sup>

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<sup>176</sup> Daly, *ibid.* at 21.

<sup>177</sup> Jo-Anne Wemmers and Marisa Canuto. 2002. “Victims’ Experiences with, Expectations with, and Perceptions of Restorative Justice: A Critical Review of the Literature” (Ottawa: Department of Justice) at 26.

<sup>178</sup> Daly, *supra*, note 5 at 21; Mary Koss, Karen Bachar, Quince Hopkins and Carolyn Carlson. 2004. “Expanding a community’s justice response to sex crimes through advocacy, prosecutorial, and health collaboration: Introducing the RESTORE Program.” 19:12 J. of Interpersonal Violence; Mary Kross. 2013. “The RESTORE program of restorative justice for sex crimes: vision, process, and outcomes.” 29:9 J. of Interpersonal Violence; Hammond et al., *supra*, note 77: The RESTORE model was applied to crimes of sexual violence in a pilot in Auckland. The project noted the unique features of sexual violence which posed challenges to redressing harm while holding the offender accountable; the potential for a power imbalance between the offender and victim; the difficulty of ensuring safety of the victim/survivor during the process, and the requirement of an in-depth understanding of sexual violence for those providing the service at 132, 136, 155.

<sup>179</sup> Daly, *ibid.* at 20.

A pilot in South Australia that involved two sexual assault cases with adult victims indicated “greater thought” needed to be given in relation to how to encourage participation and deal with the complexities of these cases. Pre-sentence conferencing for these cases is available in New Zealand, but rarely used. The experience emphasized the need for well-trained service providers and appropriate resources for victims to be supported and safe, and the experience to be meaningful.<sup>180</sup>

There are many challenges to implementing a restorative justice model within the context of sexual assault. Legitimate concerns exist that such programs may not reflect the seriousness of the harm done and may not address concerns about the risk the offender poses. Given the interest of victims in restorative justice, further research and study is recommended.

## Conclusion

National and international efforts are underway to increase support to victims and enhance the quality and sensitivity of the justice response. We must seek to restore confidence in the criminal justice process by reducing reliance on myths and misconceptions in decision-making throughout the investigative and prosecution stages. Multi-disciplinary one-stop crisis services and early legal advice should be expanded. We must encourage multi-disciplinary trauma informed training to improve our knowledge and practice and solicit and respectfully consider victim input at relevant decision points. The development of prosecution expertise through specialization is to be encouraged. Thorough investigations will allow the introduction of all relevant and probative evidence. Trained prosecutors will be more effective in seeking to exclude irrelevant evidence, throughout an offender focused prosecution. With greater effectiveness and sensitivity to victims of sexual violence, it is hoped that more of its victims will have the confidence and support to come forward and more offenders will be held accountable.

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<sup>180</sup> Daly, *ibid.*