

# Systemic Discrimination Against Female Sexual Violence Victims

*Karen Bellehumeur<sup>†</sup>*

*In Canada, very few victims of sexual violence engage the criminal justice system. If they do, the process is not only unfriendly to victims but often results in harm and secondary victimization. I assess the policies and procedures that underpin the treatment of sexual violence victims and argue that they discriminate against women. My argument is advanced by applying the elements required to prove discrimination under the Canadian Human Rights Act to a group of women who have been harmed by their experiences as sexual violence complainants in the criminal justice process. By using this lens to scrutinize the policies dictating the way in which sexual violence victims are informed, protected and participate in the criminal justice process, it becomes clear that these policies provide inadequate protection from rape myths, gender stereotypes and misunderstandings about trauma. Consequently, this dearth of policies serves to perpetuate systemic discrimination against women. Moreover, only the application of systemic remedies can combat this systemic discrimination. I provide recommendations for effective remedies including the provision of state-funded legal counsel to victims of sexual violence.*

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<sup>†</sup> Karen Bellehumeur is a former criminal prosecutor, currently practicing as counsel to survivors of sexual violence in multiple legal venues. She received her PhD from Western University Faculty of Law in February 2023. She would like to extend her extreme gratitude to her supervisor Dr. Melanie Randall, whose insights and encouragement were crucial to completing this article. The author thanks the two anonymous peer reviewers for their helpful comments and Mitchell Spragg for his research assistance. The author was legal counsel to Mr. Abdoul Abdi who was the applicant in one of the case studies in this chapter.

*Au Canada, très peu de victimes de violences sexuelles ont recours au système de justice pénale. Lorsque c'est le cas, le processus leur est non seulement hostile, mais il entraîne souvent des préjudices et une victimisation secondaire. J'évalue les politiques et les procédures qui sous-tendent le traitement des victimes de violences sexuelles et j'avance qu'elles sont discriminatoires à l'égard des femmes. À cette fin, j'applique les éléments requis pour prouver la discrimination en vertu de la Loi canadienne sur les droits de la personne à un groupe de femmes lésées par leurs expériences en tant que plaignantes dans des affaires liées à la violence sexuelle, dans le cadre du processus de justice pénale. En utilisant cet angle pour examiner les politiques qui dictent la manière dont on informe et protège les victimes de violences sexuelles ainsi que la façon dont elles participent au processus de justice pénale, il devient clair que ces politiques offrent une protection inadéquate contre les mythes relatifs au viol, les stéréotypes de genre et les malentendus sur les traumatismes. Par conséquent, ce manque sert à perpétuer la discrimination systémique à l'égard des femmes. De plus, seule l'application de recours systémiques peut combattre ce type de discrimination. Je formule ainsi des recommandations relatives à des recours efficaces, y compris la mise à la disposition de conseillères et conseillers juridiques rémunérés par l'État pour les victimes de violences sexuelles.*

## I. Introduction

The Canadian criminal justice system's treatment of female<sup>1</sup> survivors of sexual violence - and the policies and practices dictating that treatment - violate women's human rights under the *Canadian Human Rights Act* ("CHRA").<sup>2</sup> While this argument is novel, it is nonetheless crucial to advancing effective reforms that could reduce sexual violence against women. I argue that a claim for discrimination under the CHRA filed by a group of female former sexual assault complainants could succeed. The claim would point to the lack of adequate policies governing the way in which sexual violence victims are informed, protected and participate in the criminal process, and then demonstrate how this results in adverse impact discrimination against women. Further, it would show that the consequence of this dearth of policy is a lack of protection against rape myths and gender stereotypes, and a misunderstanding about trauma, all of which are harmful to female complainants. It is essential to women's equality that this problem be addressed since widespread knowledge of the harmful treatment women experience when engaging the criminal justice system discourages women from reporting sexual violence.<sup>3</sup>

In fact, it is alarming to learn that only 5% of sexual violence victims report to the police.<sup>4</sup> However, it is unsurprising that many female sexual violence victims do not want to engage with a process that is known to be harmful and re-victimizing.<sup>5</sup> The cause of the harm experienced by sexual violence victims is indisputably tied to the way in which they are treated during the criminal justice process. Moreover, the lack of adequate policies dictating how sexual violence victims are treated during the criminal process contributes to the harm victims experience. These practices and policies have not been sufficiently challenged or reformed, and without

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<sup>1</sup> This article draws on my experience working with largely cisgender women who have experienced sexual violence. While many of the issues discussed herein have wider applicability among trans, non-binary and gender diverse people, a more fulsome discussion of these groups' particular experiences in the justice system is beyond the scope of this article.

<sup>2</sup> *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

<sup>3</sup> Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queens University Press, 2018) at 3.

<sup>4</sup> Shana Conroy and Adam Cotter, "Self-reported sexual assault in Canada, 2014" (11 July 2017), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm)> [perma.cc/ZZ5W-RVS7].

<sup>5</sup> Lori Haskell and Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims" (2019) at 5, online (pdf): *Government of Canada* <[justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](http://justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf)> [perma.cc/PKK6-AQCS].

change we cannot expect improvement in women's willingness to engage the criminal justice system. Importantly, without accountability through the criminal justice system, perpetrators will continue to offend with impunity. Hence, without reform to the process, we should expect that women will continue to experience sexual violence by mostly male offenders. The status quo will result in the continued perpetuation of systemic discrimination against women.

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

## II. Making a Human Rights Claim against the Federal Government

The argument that criminal justice policies, practices and lack of procedures violate the human rights of women can best be advanced by making a claim to the Canadian Human Rights Commission (CHRC). I propose filing a human rights claim against the federal government's department of justice on behalf of a group of female sexual violence victims who have each engaged in the criminal justice system and been harmed by the process itself.<sup>6</sup> There are plenty of potential candidates for such a group and plenty of examples of harmful treatment.

Since part of my law practice involves representing sexual violence survivors in criminal cases, and my previous career as crown counsel entailed prosecution of sexual violence crimes for two decades, I have witnessed first-hand the damage done by the criminal justice process to complainants. Unsurprisingly, it all begins with a complainant's first contact with the police. Most complainants have no access to legal resources to prepare them for police questioning and interviews. The result can be an

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<sup>6</sup> Each member of the group would provide evidence of the harm they experienced from engaging the justice system, particularly psychological harm and the consequences of that harm.

incomplete account of the allegation, or even inaccurate information due to the stress of talking about their experience with the police, particularly if the interview is not conducted using trauma-informed techniques.<sup>7</sup> Complainants can also over-disclose to police, since they are unfamiliar with the kind of information that is or is not relevant, and over-disclosure can unnecessarily violate their privacy.<sup>8</sup> In this way, poor police interviews can result in ample ammunition for cross-examination when complainants testify in court.

After the interview, if no criminal charges are laid, complainants have no recourse and no way of assessing whether police discretion was exercised appropriately. If charges are laid, complainants often find themselves in the dark, with long waiting periods and little input regarding bail conditions.

When criminal charges proceed, complainants continue to experience harmful treatment, much of which mirrors the power imbalance they experienced during their abuse.<sup>9</sup> For example, no policy compels a Crown to obtain and consider complainants' input about potential resolution deals before making agreements with defence counsel. Also, Crown counsel only has a limited ability to prepare complainants for testifying because of their duty to disclose any new information provided by the complainant<sup>10</sup> and the absence of confidentiality between the Crown and the complainant. This lack of in-depth preparation often leaves complainants defenseless to withstand the frequently aggressive and even humiliating cross-examination that ensues. Moreover, complainants often feel frustrated regarding the lack of protection they feel while testifying in court.<sup>11</sup> It is apparent to them that there is no policy that requires the Crown to object to harsh or unfair treatment of complainants, including defence counsel's use of stereotypical reasoning about expected behaviour from sexual violence victims.<sup>12</sup> While it could be argued that the Crown has a duty to protect

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<sup>7</sup> Haskell and Randall, *supra* note 5 at 25-26.

<sup>8</sup> These observations come from my 23 years of experience as a criminal prosecutor and my private practice representing sexual violence complainants.

<sup>9</sup> Craig, *supra* note 3 at 9-11.

<sup>10</sup> Resulting from Crown disclosure obligations pursuant to *R v Stinchcombe*, [1991] 3 SCR 326, [1991] 1 WWR 97.

<sup>11</sup> This is an observation I have made in my private practice, during which time I have spoken to hundreds of sexual violence complainants.

<sup>12</sup> Examples of stereotypical reasoning are the use of victim blaming and assertions that 'real' victims of sexual violence act in a specific manner, such as avoiding all contact with the perpetrator or telling someone at the first opportunity.

witnesses as part of its duty to protect trial fairness,<sup>13</sup> the execution of that duty has not sufficed to protect sexual violence complainants from harm.<sup>14</sup>

The poor treatment sexual violence complainants experience when engaging the criminal justice system in some cases causes more psychological harm than the criminal act itself.<sup>15</sup> This adverse impact is so significant that it may discourage women from engaging the criminal justice system in the future. Legislators have accepted that premise, making a connection between the impact of complainants' experiences in court and the willingness of future sexual violence victims to report to the police. New amendments to the *Criminal Code* regarding the admissibility of complainants' private records in sexual assault cases now require courts to take into account "society's interest in encouraging the reporting of sexual assault offence".<sup>16</sup> In *R v Green*,<sup>17</sup> the court interprets the purpose of the new subsections and the factors to be taken into account in determining admissibility of private records. The court finds that respecting complainants' privacy and equality rights are means of improving conditions for sexual violence complainants and encouraging more reporting:

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

The inclusion of the factors cited above at ss. 278.92(3)(b), (c), (g) and (h) show that the new statutory scheme is likewise motivated by the purpose of preserving a complainant's privacy and equality rights to the maximum extent possible, and promoting the reporting of sexual offences. The application process requires the judge or justice seized with the matter to consider the impact of production not only on the particular complainant, but also on other women who might not report sexual offences because they do not trust the justice system to protect their privacy rights at trial.<sup>18</sup>

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<sup>13</sup> Craig, *supra* note 3 at 136-37; *Boucher v The Queen*, [1955] SCR 16, [1954] SCJ No 54; *R v Barton*, 2019 SCC 33.

<sup>14</sup> Craig, *supra* note 3 at chapter 5.

<sup>15</sup> Haskell and Randall, *supra* note 5 at 26.

<sup>16</sup> *Criminal Code*, RSC 1985, c C-46, s 278.92(3) [*Criminal Code*].

<sup>17</sup> *R v Green*, 2021 ONSC 2826.

<sup>18</sup> *Ibid* at paras 37-38.

It is important to note the connection between privacy rights and equality rights made here, and by other courts repeatedly,<sup>19</sup> in cases of sexual violence. The courts have been clear that the two rights go hand-in-hand.

However, this recent legislation change regarding private records is far from enough to address the adverse impact experienced by female sexual violence complainants.<sup>20</sup> A human rights claim could bring to light the many ways in which current practices and lack of policies cause harm to women and discriminate against them. If successful, it could also lead to a mandate that systemic remedies be implemented.

This type of grassroots strategic litigation could be a powerful tool to effect systemic change and provide legal empowerment to women. This legal empowerment could strengthen women's capacity to ensure that the law prohibiting sexual violence is meaningful and accessible.<sup>21</sup> It could thereby advance women's equality.

Further, raising this claim with the CHRC and seeking a hearing at the Canadian Human Rights Tribunal (CHRT) would be a more accessible process for sexual violence survivors than commencing a constitutional challenge under section 15 of the *Charter of Rights and Freedoms*.<sup>22</sup> The CHRC considers itself the Canadian people's human rights watchdog. Their self-described mandate is well-suited to holding the Canadian government to account for the harm experienced by female sexual violence victims. Their website states:

We work for the people of Canada and operate independently from the Government. The Commission helps ensure that everyone in Canada is treated fairly, no matter who they are. We are responsible for representing the public interest and holding the Government of Canada to account on matters related to human rights.<sup>23</sup>

Moreover, while the administration of criminal law is within the jurisdiction of provinces and territories, procedural aspects of the criminal

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<sup>19</sup> *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478 [*Osolin*]; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1; *R v Shearing*, 2002 SCC 58; *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

<sup>20</sup> Craig, *supra* note 3 at 11.

<sup>21</sup> TAP Network, "Pursuing Law Reforms, Strategic Litigation and Legal Empowerment" (last visited 25 February 2023), online (pdf): *SDG Accountability Handbook* <sdgaccountability.org/wp-content/uploads/2019/05/Pursuing-Law-Reforms.pdf> [perma.cc/MPW6-B7U4].

<sup>22</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>23</sup> Canadian Human Rights Commission, "About Us" (last modified 2 February 2023), online: *Canadian Human Rights Commission* <chrc-ccdp.gc.ca/en/about-us> [perma.cc/VW8P-2Y4M].

law are the jurisdiction of the federal government, with many procedural provisions being contained in the *Criminal Code*.<sup>24</sup> For example, sections 486.1 to 486.3 of the *Code* outlines procedures for witnesses to be granted support persons, to testify outside of the courtroom, or to require an appointed lawyer to conduct the cross-examination (for witnesses under 18 years). Further, sections 486.4 and 486.5 provide a procedure for restricting the publication of a witness's name. Many other procedural processes are contained in Part XV of the *Code*, which is entitled "Special Procedure and Powers."

Hence, the most logical venue for a human rights claim is at the federal level, where systemic remedies for all Canadian women could be sought, including recommendations to the federal government for amending the *Criminal Code*. A recommended change to the procedures mandated under the *Criminal Code* could be a requirement that complainants of sexual violence be permitted legal representation for applications regarding any matter implicating their privacy, dignity or well-being. The *Criminal Code* could also be amended to mandate a requirement for an admissibility hearing whenever myth-based evidence is proffered during trials involving sexual violence, similar to a section 276 hearing. Accordingly, the best way to address the absence of robust procedures to protect sexual violence complainants and its discriminatory impact on women nation-wide is to make a claim against the Canadian Department of Justice.

Support for the position that the CHRT can impose remedies that impact federal legislation can be found in *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*.<sup>25</sup> In that case the CHRT addresses the Tribunal's primacy of remedial power over federal legislation in order to prevent discrimination. The Tribunal held that:

While the CHRA's mandate focuses on addressing discriminatory practices, which does not include challenges solely to legislation, it will take primacy wherever another law interferes with the fulfilment of its object and purpose. For example, where a complaint is properly before the Tribunal, and a provision of a federal law conflicts with the Tribunal's remedial powers, the provision may be treated as inoperative in order to allow the Tribunal to fulfill its mandate to prevent discrimination. The Tribunal has applied the primacy principle in this manner on numerous occasions,

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<sup>24</sup> *Criminal Code*, *supra* note 16, see especially Parts XIV and XV.

<sup>25</sup> *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 41.



where it has found the existence of a discriminatory practice. This reading is consistent with the principles stated in *Heerspink, Craton and Tranchemontagne. Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 the Supreme Court of Canada affirmed this analysis conducted by the Tribunal in both the *Matson* and *Andrews* complaints.

... The Court's conclusion that legislation conflicting with the Code's anti-discrimination protections may be rendered inoperable is entirely in line with legislative intent.<sup>26</sup>

The Tribunal in that case also points out its ability to intervene regarding federal policies:

On Canada's argument of separation of powers, the Panel has already addressed this in previous rulings including 2018 CHRT 4. The Panel has held that while it will not draft policies, choose between policies, supervise the policy drafting process, or unnecessarily embark on the specifics of reform, it will intervene if it finds that Canada's policy choices are resulting in discrimination in the same or similar ways found in the January 2016 *Merit Decision*.<sup>27</sup>

### **III. Policies and Practices Regarding Treatment of Sexual Violence Complainants**

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

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<sup>26</sup> *Ibid* at paras 366-67.

<sup>27</sup> *Ibid* at para 370.

offences.<sup>28</sup> This failure amounts to adverse impact discrimination against women.

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

[T]here is still a need for the judicial system to examine the way it deals with crimes of violence against women. ... Change is crucial in order to ensure that such crimes will be reported, that the system is fair for both accused and complainant, that the psychological trauma suffered by victims of male violence is recognized and taken into account by our legal responses to sexual assault... Only when all actors in the judicial process recognize the need to revamp attitudes and practices will legislative reform efforts produce the kind of justice for victims of violence against women that international convention and national legislation have mandated.<sup>29</sup>

Similarly, former Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane, writes about systemic discrimination in the criminal justice system, in light of the *Globe and Mail's* Unfounded investigation. She reasons that police services are either not fit or averse to investigating sexual assault cases, and this problem is in part due to "systemic bias against women - which is a human-rights issue."<sup>30</sup> She continues that:

Like much of the systemic discrimination in the criminal-justice system, failure to properly investigate and prosecute sexual offences likely begins with an overreliance, whether consciously or unconsciously, on stereotypes. These stereotypes or rape myths are myriad and well documented: stereotypes about the types of women who get assaulted, how they should behave during an assault and how they should behave afterward.<sup>31</sup>

She concludes with recommendations that police services enact policies and procedures to address this concealed systemic discrimination. She provides examples such as eliminating the exercise of police discretion when

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<sup>28</sup> Holly Johnson, "Limits of a Criminal Justice Process: Trends in Police and Court Processing of Sexual Assault" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 613.

<sup>29</sup> Claire L'Heureux-Dubé, "Still Punished for Being Female" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 4.

<sup>30</sup> Renu Mandhane, "Unfounded sexual assault cases: A human-rights issue" (16 February 2017), online: *The Globe and Mail* <[theglobeandmail.com/opinion/unfounded-sexual-assault-cases-a-human-rights-issue/article34047721](http://theglobeandmail.com/opinion/unfounded-sexual-assault-cases-a-human-rights-issue/article34047721)> [perma.cc/BE63-Z62B].

<sup>31</sup> *Ibid.*

laying sexual assault charges and requiring independent monitoring of police practices.<sup>32</sup>

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

Furthermore, discriminatory policies and practices regarding the treatment of sexual violence victims may do more than harm complainants; they may also serve to impair the functioning of the criminal justice system.<sup>33</sup> Garvin and Beloof suggest "disempowered victims may lose confidence in and respect for the system, may not report their victimization, or may disengage part way through the process."<sup>34</sup> In this way, they argue that complainants of sexual violence may consider themselves to be excluded from those who can seek the protection of the law and its processes, which thereby significantly impairs society's ability to fight against sexual violence.

#### IV. Policies that Require Change

When it comes to the nature of policy changes required for the full engagement of sexual violence complainants, it is necessary to drill down into the nature of the harm women currently experience, and how it is experienced. The way in which harm is experienced by complainants can be divided into two categories: their treatment by the justice system (service), and their agency in the process (participation).<sup>35</sup> Reform to policies and practices in these categories is crucial in order to improve complainants' experiences and encourage engagement with the criminal justice system.

On the surface it appears as though Canada protects the treatment of victims in the criminal justice process. For instance, the federal government enacted the *Canadian Victims Bill of Rights (CVBR)*,<sup>36</sup> but in reality, the bill provides very little to address the needs of sexual assault victims.<sup>37</sup> After

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<sup>32</sup> *Ibid.*

<sup>33</sup> Margaret Garvin and Douglas Beloof, "Crime Victim Agency: Independent Lawyers of Sexual Assault Victims" (2015) at 71, online (pdf): *Ohio State University* <kb.osu.edu/bitstream/handle/1811/75400/OSJCL\_V13N1\_067.pdf> [perma.cc/ZV9C-RQ3F].

<sup>34</sup> *Ibid.*

<sup>35</sup> Marie Manikis, "Imagining the Future of Victims Rights in Canada: A Comparative Perspective" (2015) 13:1 *Ohio State J of Crim L* 163 at 164.

<sup>36</sup> *Canadian Victims Bill of Rights*, SC 2015, c 12, s 2 [CVBR].

<sup>37</sup> Manikis, *supra* note 35 at 173.

Canada became a signatory to the *United Nations' Declaration of Basic Principles of Justice for Victims of Crime*,<sup>38</sup> the federal government and most provinces and territories enacted various victims' rights instruments to fulfill Canada's international obligations. The rationale behind the United Nations Declaration was that "victims were ignored and excluded from the criminal justice process for too long and, as a result suffered secondary victimization and failed to collaborate with the system."<sup>39</sup> These various federal and provincial enactments were meant to frame victim-related guidelines and principles that respond to the concerns identified.<sup>40</sup>

The newest version of that legislation is the *CVBR*, which in a limited way addresses victims' treatment regarding both services provided and participation permitted by the justice system. However, the *CVBR*'s deficiencies render its helpfulness to victims negligible. For example, sections 6, 7 and 8 provide victims with rights to information, but the *CVBR* does not specify which agency is obliged to provide which type of information at which stage of the process. Further, there is no enforcement mechanism. This lack of specificity and detail results in empty rights, that in turn lead to further disappointment and aggravation experienced by complainants. Indeed, research shows that one of the most important needs identified by victims of crime is to be kept informed about the process at all stages of the proceeding.<sup>41</sup> Moreover, when victims are left uninformed about developments in their cases, the result is often secondary victimization, arising from the experience of stress levels similar to the offense itself.<sup>42</sup>

The findings of "Progress Report: *The Canadian Victims Bill of Rights*", released by the Canadian Office of the Federal Ombudsman for Victims of Crime in 2020, confirm the significant shortcomings of this legislation. The report examines the treatment of victims in the justice system and how well victims' rights under the *CVBR* have been upheld. Overall the report finds

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<sup>38</sup> *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 96th Sess, Supp No 53, UN DOC A/40/53 at 214 [*United Nations Declaration*].

<sup>39</sup> Manikis, *supra* note 35 at 164.

<sup>40</sup> *Ibid* at 165.

<sup>41</sup> Manikis, *supra* note 35 at 166, referencing Jo-Anne Wemmers, "Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims' Attitudes and Compliance" (1995) 3 *Intl Rev Victimology* 323 at 338.

<sup>42</sup> Manikis, *supra* note 35 at 167, referencing Helen Fenwick, "Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice 60 Process?" (1997) *Mod L Rev* 317 at 321.

that the “objectives set out in the Act have not been met”<sup>43</sup>, and that “the situation of victims of crime has not fundamentally changed since it was passed.”<sup>44</sup> It goes on to point out that in order for the *CVBR* to be effective, the roles and responsibilities of criminal justice official must be spelled out, particularly who has the obligation to inform victims of their rights.<sup>45</sup> It also calls for the *CVBR* to be amended to provide a legal remedy for a violation, thereby becoming enforceable.<sup>46</sup> It further recommends that the “federal government should work with provincial and territorial authorities to improve how victims are treated throughout the criminal justice system.”<sup>47</sup> Consequently, there can be no doubt that the treatment of victims of crime falls squarely within Canada’s federal jurisdiction. Moreover, the report is a source for potential systemic remedies, should the proposed human rights claim against the federal government succeed.

In other countries a clear division of duties has been established that identifies which agency is responsible for providing specific types of information to victims. Examples are found in the US state of Arizona and in the *Code of Practice for Victims of Crime in England and Wales*.<sup>48</sup> Manitoba’s *Victims’ Bill of Rights*<sup>49</sup> is the only Canadian statute that divides informational duties between agencies at each stage of the process. This specificity allows victims to understand how to obtain the information they seek and holds the responsible agencies accountable. Policy reform is necessary for all Canadian victims of crime, especially victims of sexual violence, to enable them to be kept informed about the process in which they have engaged.

Victims of sexual violence also require some means of asserting influence in the criminal justice process. The *CVBR* includes a ‘Participation’ section but provides no instructions regarding the process to be followed to convey their views and have them considered. Similarly, the ‘Protection’ section of the *CVBR* lacks any detail as to how victims can go about having their

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<sup>43</sup> Government of Canada Office of the Federal Ombudsman for Victims of Crime, “Progress Report: The Canadian Victims Bill of Rights” (November 2020) at 2, online (pdf): <[victimsfirst.gc.ca/res/pub/prcvbr-reccd/40-061B%20FOVC%20Progress%20Report\\_EN\\_web.pdf](https://victimsfirst.gc.ca/res/pub/prcvbr-reccd/40-061B%20FOVC%20Progress%20Report_EN_web.pdf)> [perma.cc/QM23-XQQS].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid* at 4.

<sup>48</sup> Manikis, *supra* note 35 at 172.

<sup>49</sup> *Victims’ Bill of Rights*, CCSM 1998, c V55.

security or privacy interests protected, nor which agencies are responsible for doing so.

Outside of the CVBR, under the *Criminal Code*,<sup>50</sup> complainants in sexual violence cases are provided participation rights by way of standing in two types of defense applications: applications for records containing complainants' personal information in which they have a reasonable expectation of privacy under section 278 of the *Code*, and applications for the admissibility of evidence of complainants' other sexual activity under section 276. If defense counsel wishes to obtain or proffer private records relating to the complainant or wishes to proffer evidence of sexual activity by the complainant other than the subject matter of the charge, the complainant is entitled to legal representation limited to the four corners of those hearings. While victim participation in those applications is a very necessary and positive legal development,<sup>51</sup> given the highly private nature of the subject matter, there is still a need for much more policy reform to allow victims to be empowered throughout the balance of the criminal process.

For instance, complainants in sexual assault cases have no right to confer with prosecutors regarding the accused's bail conditions, regarding defense requests to delay trial dates, regarding negotiation of guilty pleas, or even regarding whether the prosecutions should continue. Prosecutorial discretion in decision-making is "one of the least transparent and unfettered powers in Canadian criminal law."<sup>52</sup> Establishing policies requiring prosecutors to communicate with complainants about specified topics, or allowing a legal representative to liaise with the prosecutor, would improve transparency and help victims understand the reasons for decisions regarding their cases.

In England and Wales, victims now have a role in ensuring prosecutorial decisions are explained to them. Additionally, in 2011, the Court of Appeal made a finding that recognized victims' rights to seek review of a decision not to prosecute. As a result, the Crown Prosecution Service has released the *Victims Right to Review Scheme* comprising formal guidelines for victims to exercise that right.<sup>53</sup> Canada has no policy or procedure to review any prosecutorial decision. In sexual assault cases, if a prosecutor assesses that

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<sup>50</sup> *Criminal Code*, *supra* note 16.

<sup>51</sup> Based on my own legal experience representing many complainants in these hearings.

<sup>52</sup> Manikis, *supra* note 35 at 177.

<sup>53</sup> *Ibid.*

the case is not strong enough to proceed, the victim not only cannot appeal that decision, but they also cannot even assert a right that requires an explanation.<sup>54</sup>

However, of all the highlighted flaws regarding Canadian policy omissions, the most flagrant is the complete unenforceability of victims' rights legislation in Canada. The issue was raised and determined in *Vanscoy v Ontario*.<sup>55</sup> In that case, the claimants had not been provided with informational rights contained in the Ontario *Victims' Bill of Rights*,<sup>56</sup> however the Court dismissed the claim, ruling that no remedy was available under the *Bill*. The Court interpreted the *Bill* to contain only a "statement of principle and social policy beguilingly clothed in the language of legislation ...".<sup>57</sup> Consequently, the decision has been applied across the country and victims' rights bills across Canada are now considered to be legally unenforceable, containing only principles of good practice that are recommendations but not mandatory.<sup>58</sup>

This is not the case in other common law jurisdictions. The *Code of Practice for Victims of Crime in England and Wales*<sup>59</sup> sets out a procedure for victims to lay a complaint to the Parliamentary Ombudsman. Under this process, breaches of victims' rights can result in a range of remedies including apologies and compensatory payments.<sup>60</sup> A number of US states also have enforceable court-based processes allowing victims to receive remedies for breaches of their rights.<sup>61</sup> Indeed, a comparative study found that US states possessing strong statutory protection of victims' rights were more likely to provide victims with their rights than states without such protection.<sup>62</sup> The study confirms the notion that consequences for non-compliance are required in order for obligations by the state to be taken seriously, and further that enforcement of state duties may actually promote compliance.

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<sup>54</sup> As a victim's counsel, I have had several experiences of trying to assist clients in obtaining explanations for discontinued sexual assault prosecutions. The answers provided by prosecutors were shrouded in secrecy and not particularly helpful to the victims.

<sup>55</sup> *Vanscoy v Ontario* [1999] OJ No 1661, 42 WCB (2d) 358 [*Vanscoy*].

<sup>56</sup> *Victims' Bill of Rights*, SO 1995, c 6.

<sup>57</sup> *Vanscoy*, *supra* note 55 at para 22.

<sup>58</sup> Manikis, *supra* note 35 at 180.

<sup>59</sup> Code of Practice for Victims of Crime in England and Wales (UK), 2020.

<sup>60</sup> *Ibid* at 183.

<sup>61</sup> *Ibid* at 183.

<sup>62</sup> *Ibid* at 184, referencing National Victim Center, Comparison of White and Non-white Crime Victim Responses Regarding Victims' Rights (5 June 1997).

It is not unreasonable that victims expect that a government espousing rights for victims will ensure that those rights can be actualized. A false expectation may be worse than no expectation at all. As Marie Manikis emphasizes, “the creation of false hopes and expectations coupled with the absence of a redress mechanism to respond to breaches likely create a form of secondary victimization.”<sup>63</sup> The CVBR and most of its provincial counterparts appear to do no more than set up false hopes for victims of sexual violence. This policy failure has a higher impact on sexual violence complainants compared to other victims because of the intensely private and highly traumatic nature of sexual crimes, coupled with the stigma and stereotypes that encompass it. Consequently, the dearth of policies and practices that ensure sexual assault victims are informed, protected and participate in the criminal process result in adverse impact discrimination against women.

## V. The Government is Analogous to an Employer

Since adverse impact discrimination is a well-developed area of the law in employment settings, it is worth comparing the role of employers to the role of the government. Both are authoritative positions, and when we consider government policies concerning the treatment of sexual assault complainants, they can be viewed as similar to the policies established by employers regarding the work environment of their employees. In *Robichaud v Canada*,<sup>64</sup> the Supreme Court expanded the concept of employer liability to include sexual harassment of an employee by another employee.<sup>65</sup> Liability was based on the fact that only employers are capable of providing their employees with a healthy work environment and of rectifying discriminatory practices. The Court considered the central purpose of human rights legislation to be remedial and “to eradicate anti-social conditions without regard to the motives or intention of those who cause them.”<sup>66</sup> Hence, the Court found that only by making remedies available against employers could the remedial objectives of human rights legislation be fulfilled in workplace sexual harassment cases.

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<sup>63</sup> Manikis, *supra* note 35 at 181.

<sup>64</sup> *Robichaud v Canada*, [1987] 2 SCR 84, 40 DLR (4th) 577 [*Robichaud*].

<sup>65</sup> The Supreme Court affirmed that sexual harassment was a form of discrimination based on sex in *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352.

<sup>66</sup> *Robichaud*, *supra* note 64 at para 11.



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

Continuing with the analogy of government as employers, courts have held that the absence of proactive policies to avoid adverse effect discrimination can deem an employer liable. A good example of this is found in *Canadian National Railway Co. v Canada (Canadian Human Rights Commission) [Action Travail des Femmes]*.<sup>67</sup> In that case, the Court found that CN Rail allowed discrimination against female employees by employing practices that resulted in a failure to hire women in blue-collar positions. The evidence at the hearing included numerous examples of female employees enduring sexual harassment by their male colleagues. From the female employee's description of this sexual harassment, it appeared to have been used to discourage and intimidate women from seeking out blue-collar positions.<sup>68</sup> Hence, indirectly, the employer's failure to protect female employees from sexual harassment resulted in its liability for low female hiring rates and a finding of discrimination. Ultimately, the Supreme Court held that the imposition of an affirmative action plan was an appropriate method by which to correct the employer's discriminatory practices.

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

Colleen Sheppard's systemic approaches to address workplace sexual harassment are equally apt to address mistreatment of sexual violence complainants in the criminal process. She suggests that structural inequalities exist in institutional environments where women are more vulnerable to discrimination. In order to prevent the sexual discrimination, the structural conditions must change.<sup>69</sup> Also, understanding the ways in

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<sup>67</sup> *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193 [*Action Travail*].

<sup>68</sup> Colleen Sheppard, *Inclusive Equality, The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queens University Press, 2010) at 89.

<sup>69</sup> *Ibid* at 81.

which organizational structures, practices and workplace norms institutionalize sexual discrimination is important in order to effectively respond to it.<sup>70</sup>

A positive example of an institutional policy response to systemic discrimination is found in the settlements of two class actions against the Royal Canadian Military Police.<sup>71</sup> A class of female members of the RCMP alleged that their employer failed to ensure a work environment free of discrimination, intimidation and harassment. The agreement between the plaintiffs, the RCMP and the Government of Canada resulted in an acknowledgement that discrimination bullying, and harassment have no place in the RCMP.<sup>72</sup> The RCMP agreement included to adopt measures to change the organizational culture of the force and committed to “a holistic approach to culture change and an RCMP free of violence, harassment and discrimination.”<sup>73</sup> These changes to institutional policies in an effort to combat systemic discrimination within a law enforcement organization are encouraging first steps for policy reform within the criminal justice system.

## VI. Establishing a *Prima Facie* Case of Discrimination

In order to prove a claim of discrimination under the *CHRA*,<sup>74</sup> a claimant, such as a group of female complainants, must establish a *prima facie* case that the respondent has been involved in a discriminatory practice. Section 5 of the *CHRA* describes prohibited discriminatory practices as follows:

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

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<sup>70</sup> *Ibid* at 85-86.

<sup>71</sup> “Merlo/Davidson Settlement” (6 October 2016), online (pdf): *Complex Law* <complexlaw.ca/pdf/1-Merlo-Davidson-Settlement-Agreement-FINAL\_3.pdf> [perma.cc/SK6L-LQDY].

<sup>72</sup> *Ibid* at para B.

<sup>73</sup> Sarah MacEachern, “Final Report on the Implementation of the Merlo Davidson Settlement Agreement” (12 March 2021), online: *Public Safety Canada* <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20210325/035/index-en.aspx> [perma.cc/56JJ-YAHZ].

<sup>74</sup> *CHRA*, *supra* note 2.

In order for female sexual violence complainants as a group to show that the criminal justice process involves policies and practices that are systemically discriminatory, they must establish that: 1) they have a characteristic protected from discrimination; 2) they have been denied services, or adversely impacted by the provision of services by the government; and 3) the protected characteristic is a factor in the adverse impact or denial.<sup>75</sup>

## A. Prohibited Ground of Discrimination

Because the relevant policies and practices adversely impact women, the protected ground upon which discrimination is based is sex. This is established through consistent statistical evidence that women are disproportionately and overwhelmingly the victims of sexual violence, perpetrated by men.<sup>76</sup> Sexual assault has been called “the most gendered of crimes”,<sup>77</sup> and has been repeatedly recognized by the Supreme Court of Canada as disproportionately affecting women.<sup>78</sup> For example, the Court in *R. v. Osolin*, wrote:

Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrates that 99% of the offenders in sexual assault cases are men and 90% of the victims are women.<sup>79</sup>

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

Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children...[and] the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security

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<sup>75</sup> *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at para 33 [Moore].

<sup>76</sup> Conroy and Cotter, *supra* note 4.

<sup>77</sup> *Ibid.*

<sup>78</sup> One example is by Madam Justice L’Heureux-Dubé in *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193.

<sup>79</sup> *Osolin*, *supra* note 19 at 669.

of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the Canadian Charter of Rights and Freedoms.<sup>80</sup>

Moreover, a department of the federal government, the Status of Women Canada, issued a brief entitled “Sexual Violence Against Women in Canada,” which begins with the sentence: “One of the most pressing human rights issues facing Canadians today is the high rate of sexual violence against women.”<sup>81</sup>

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

## B. Provision of a ‘Service’

The next element required to prove discrimination is that access to a government service has been denied or adversely impacted. In order to prove that the government conduct in question meets the definition of a government ‘service... customarily available to the public’ it must be determined if the government is holding out a “benefit” or “assistance.”<sup>82</sup> Further, a public relationship must exist between the service user and the service provider.<sup>83</sup>

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

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<sup>80</sup> Bill C-46, *An Act to Amend the Criminal Code (Production of Records in Sexual Offence SC Proceedings)*, 2nd Sess, 35th Parl, 1997, Preamble (assented to 25 April 1997), c 30.

<sup>81</sup> Cecilia Benoit et al, “Issue Brief: Sexual Violence Against Women in Canada” (December 2015), online: *Status of Women Canada* <[cfc-swc.gc.ca/svawc-vcsfc/index-en.html](http://cfc-swc.gc.ca/svawc-vcsfc/index-en.html)> [perma.cc/QS9U-SAC4].

<sup>82</sup> *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 [FN Caring Society].

<sup>83</sup> *Ibid* at para 31.

a public relationship exists between the government and victims of any crime including victims of sexual violence.

Support can be found in comparable cases resulting in rulings that governments provided a 'service customarily available to the public.' For example: in *R v Moore*,<sup>84</sup> the provision of education was deemed to be a service; in *XY v Ontario (Government and Consumer Services)*,<sup>85</sup> the provision of birth certificates was a government service; and in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*,<sup>86</sup> government funding of welfare services for children was identified as a 'service.'

More particularly, in *Crockford v British Columbia (Attorney General)*,<sup>87</sup> the British Columbia Court of Appeal distinguished which activities performed by the Attorney General and Crown were subject to review as 'services' and which were protected by crown immunity. The Court made reference to *Krieger v Law Society (Alberta)*,<sup>88</sup> which discussed the nature of Crown immunity for prosecutorial discretion. In finding that Crown immunity does not apply to policy matters, the Court held in *Crockford*:

The definition of prosecutorial discretion in *Krieger* does not encompass the role of the Attorney General and Crown counsel in the creation of policy. *Krieger* does not preclude a review of a policy created in the public interest. While a policy that guides Crown counsel in deciding whether to prosecute will ultimately touch on the Crown's core functions related to prosecutorial discretion, such as the Policy in this case, creating the policy is not part of the actual exercise of discretion in any particular case.<sup>89</sup>

The Court went on to find that "[t]he appellant's complaint of systemic discrimination arising from the creation and implementation of the Policy by the Crown is not immune from review under the principles in *Krieger*".<sup>90</sup> Hence, that case goes a long way to support the notion that policies regarding the treatment of victims of sexual violence can be considered a 'service customarily available to the public' for the purpose of a systemic discrimination claim.

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<sup>84</sup> *Moore*, *supra* note 75 at para 66.

<sup>85</sup> *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726.

<sup>86</sup> *FN Caring Society*, *supra* note 82.

<sup>87</sup> *Crockford v British Columbia (Attorney General)*, 2006 BCCA 360 [*Crockford*].

<sup>88</sup> *Krieger v Law Society (Alberta)*, 2002 SCC 65.

<sup>89</sup> *Crockford*, *supra* note 87 at para 69.

<sup>90</sup> *Ibid* at para 82.

Indeed, courts have suggested that when analyzing a *CHRA* claim, a broad, purposive approach should be applied, that takes into account “the full social, political and legal context of the claim”.<sup>91</sup> In applying that lens to the policies in question, it is important to look not only to the potential harm that sexual assault victims suffer during the criminal process, but also on the way in which the process discourages victims from engaging the criminal justice system, denying them access to justice. As such, the tribunal’s comments in *Eldridge v British Columbia (Attorney General)*,<sup>92</sup> a case ruling that the denial of medical services to a deaf person is discriminatory, are very apt to the discrimination in question: “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public.”

### C. Adverse Impact

Next, it must be demonstrated that sexual violence complainants have been adversely impacted by the provision of government services. Expert evidence is often provided to establish this point, as was done in *FN Caring Society*. In that case, four expert witnesses were called to demonstrate the adverse effects of inadequate funding for First Nation children on reserves and showed that the effects perpetuated historical disadvantage of Indigenous peoples.<sup>93</sup>

For the proposed claim, there are various components about which expert evidence could be called. An expert witness could be called to provide a statistical analysis of Canadian sexual assault data. For example, Holly Johnson has studied statistical trends in data found in reports of sexual assault in Canada. Using police statistics and victimization surveys, she has estimated the prevalence of sexual assault over a number of decades in Canada.<sup>94</sup> Her research reveals trends showing a sharp rise in reported rape cases after the implementation of sexual assault law reform in 1983, followed by a drop in reported cases after 1993.<sup>95</sup> Johnson comments that the rise in reported cases might be attributed to an increased willingness by female victims to report their sexual assaults to police due to the many

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<sup>91</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 30, SCJ No 12.

<sup>92</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 78, SCJ No 86.

<sup>93</sup> Cindy Blackstock, “The Complainant: The Canadian Human Rights Case on First Nations Child Welfare” (2016) 62d:2 McGill LJ 285 at 320.

<sup>94</sup> Johnson, *supra* note 28 at 616.

<sup>95</sup> *Ibid* at 617.

positive social changes at the time, including sexual assault law reform.<sup>96</sup> She goes on to opine:

If improvements to the justice system response to sexual assault were indeed associated with the rise in reported sexual assaults prior to 1993, it is feasible that negative experiences with the legal process since that time may have reduced women's confidence that they will be treated with dignity, fairness, and compassion, resulting in a decline in willingness to engage with the criminal justice system.<sup>97</sup>

Furthermore, the 2014 General Social Survey on Canadians' Safety (Victimization) reveals that only 5% of incidents of sexual assault are reported to police.<sup>98</sup> The survey indicates that some of the reasons given for not reporting include victims not wanting the hassle of dealing with the police, or not wanting to go through the court process, believing that if they did, there would not be a conviction due to a lack of evidence.<sup>99</sup> When interviewed about the survey, Johnson commented: "[t]he reporting rate just keeps dropping and it can't drop much lower, and the prevalence stays the same. So we're not making any progress here."<sup>100</sup>

Johnson's research has also revealed that negative biases and stereotypes about sexual assault complainants often impact the processes of police laying charges, prosecutors making decisions and jurors deliberating.<sup>101</sup> She referenced Justice L'Heureux-Dubé, who identified many myths and stereotypes that have "skewed the law's treatment of sexual assault claimants", citing the following:

The rapist is a stranger

Women are less reliable and credible as witnesses if they have had prior sexual relations

Women are more likely to have consented to sexual advances if they have had prior sexual relations

Women will always struggle to defend their honour

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Conroy and Cotter, *supra* note 4.

<sup>99</sup> Leslie Young, "Statistics Canada report finds self-reported sexual assault rates steady over 10 years" (July 11, 2017), online: *Global News* <[globalnews.ca/news/3590345/statistics-canada-report-finds-self-reported-sexual-assault-rates-steady-over-10-years/](http://globalnews.ca/news/3590345/statistics-canada-report-finds-self-reported-sexual-assault-rates-steady-over-10-years/)> [perma.cc/T4FN-ERC9].

<sup>100</sup> *Ibid.*

<sup>101</sup> Johnson, *supra* note 28 at 624.

Women are “more emotional” than men so unless they become “hysterical,” nothing must have happened

Women mean “yes” even when they say “no”

Women who are raped deserve it because of their conduct, dress and demeanour

Women fantasize about rape and thereafter fabricate reports of sexual activity even though nothing happened.<sup>102</sup>

Justice L’Heureux-Dubé has also been adamant in her views that more must be done to remove stereotypes and myths about women who have been sexually assaulted.<sup>103</sup> She suggests “there is still a need for the judicial system to examine the way it deals with crimes of violence against women.”<sup>104</sup> Moreover, she provides an excellent summary of the changes required to address the various adverse impacts experienced by complainants of sexual violence as follows:

Change is crucial in order to ensure that such crimes will be reported, that the system is fair to both accused and complainant, that complainants are treated with respect at all stages of the process, and that the psychological trauma suffered by victims of male violence is recognized and taken into account by our legal responses to sexual assault.<sup>105</sup>

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

Research on sexual assault complainants who engage with the criminal justice system suggests that the damaging experiences articulated by these women are not anomalous. Numerous studies have concluded that despite progressive law reforms aimed at protecting witnesses in sexual assault cases, for many the impact of testifying as a sexual assault complainant remains traumatizing and harmful.<sup>106</sup>

Melanie Randall and Lori Haskell have also cited research demonstrating that complainants of sexual assault often experience harm

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<sup>102</sup> *Ibid* at 624-25, referencing Claire L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality and Justice,” (2001) 10 J Social Distress & Homeless 89.

<sup>103</sup> L’Heureux-Dubé, *supra* note 29 at 3.

<sup>104</sup> *Ibid* at 4.

<sup>105</sup> *Ibid*.

<sup>106</sup> Craig, *supra* note 3 at 4.



and re-traumatization by engaging the criminal justice system.<sup>107</sup> They attribute some of that harm to society's lack of understanding of trauma and the way in which sexual violence victims react to it. Randall and Haskell also describe how those misunderstandings contribute to deficiencies in the treatment of sexual assault complainants during the criminal process.<sup>108</sup>

#### **D. Connection Between Protected Characteristic and Adverse Impact**

The final element requires proof that the protected characteristic is a factor connected to the adverse impact suffered. The connection between the prohibited ground, in this case sex, and the adverse impact experienced by sexual violence complainants, need not be causal, nor the sole reason for the adverse impact.<sup>109</sup>

An example is found in the recently decided *Fraser v Canada*,<sup>110</sup> where the Supreme Court holds that a law's disproportionate adverse impact on women is a violation of their right to be free from discrimination under section 15 of the *Charter*.<sup>111</sup> In that case, the negative pension consequences of job-sharing RCMP positions disproportionately impacted women because women filled the majority of part-time positions, due to childcare responsibilities. The Court found that disproportionate impact can be proven by demonstrating that a protected group receives a different quality of treatment or must "take on burdens more frequently than others."<sup>112</sup>

The Court clearly articulated that discrimination is equally harmful to equality whether it is intentional and direct or due to its disproportionate negative impacts on a protected group.<sup>113</sup> The Court further elaborated that:

At the heart of substantive equality is the recognition that identical or facially neutral treatment may "frequently produce serious inequality" (Andrews, at p. 164). This is precisely what happens when "neutral" laws ignore the "true characteristics of [a] group which act as headwinds to the enjoyment of society's benefits" (Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, at para. 67; Eldridge, at para. 65).<sup>114</sup>

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<sup>107</sup> Haskell and Randall, *supra* note 5 at 6.

<sup>108</sup> *Ibid.*

<sup>109</sup> *FN Caring Society*, *supra* note 82 at para 25.

<sup>110</sup> *Fraser v Canada (Attorney General)*, 2020 SCC 28.

<sup>111</sup> *Ibid* at para 113.

<sup>112</sup> *Ibid* at para 55.

<sup>113</sup> *Ibid* at paras 45-46.

<sup>114</sup> *Ibid* at para 47.

The Court also confirms that the approach taken by courts in section 15 *Charter* challenges is not different than that in the human rights context.<sup>115</sup>

Consequently, *Fraser* helps establish that a connection can be made out between sexual assault, described as “the most gendered of crimes”,<sup>116</sup> and complainants’ poor treatment by the justice process through evidence of their exposure to gender myths, stereotypes and re-traumatization. Put more simply, being female is a relevant factor to sexual violence complainants’ treatment by the criminal process. Myths and stereotypes at every stage of the criminal process about how women behave before, during, and after being sexually assaulted, cause such harm that in some cases it is responsible for discouraging women’s engagement with the criminal process entirely.

## E. Comparator Groups

While section 5b) of the *CHRA* references adverse differentiation in relation to any individual, the courts have now been clear that comparator groups are not required in order to prove discrimination. In *Moore v British Columbia (Ministry of Education)*,<sup>117</sup> the Supreme Court rejected the necessity for a comparator group analysis, used in section 15 *Charter* challenges, even though that case involved a government service and could have attracted *Charter* scrutiny.<sup>118</sup> Instead the court identified the harmful effects of the failure to accommodate a disability regardless of whether or not any other group received the same accommodation.<sup>119</sup> The Federal Court of Appeal in *FN Caring Society* provided a helpful review of the current state of the law regarding comparator groups:

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

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<sup>115</sup> *Ibid* at para 49.

<sup>116</sup> Johnson, *supra* note 28 at 613 (with women and girls comprising 86% of those victimized according to Statistics Canada’s Uniform Reporting Survey 2007).

<sup>117</sup> *Moore*, *supra* note 75.

<sup>118</sup> Joanna Birenbaum and Kelly Gallagher-Mackay, “From Equal Access to Individual Exit: The Invisibility of Systemic Discrimination in *Moore*” (2013) 10 *JL & Equality* 93 at 93.

<sup>119</sup> Gwen Brodsky, “*Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong*” (2013) 10 *JL & Equality* 85 at 85.

31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).<sup>120</sup>

It would be very challenging to find a mirror comparator group with which to distinguish the adverse treatment of female sexual assault complainants. Male sexual assault complainants are not subject to application of female gender stereotypes, but they suffer the impact of other stereotypes as well as a lack of rights to service and participation. Victims of crime other than domestic or gendered violence are not subject to the same harm by participating in the criminal justice process, because the subject matter is not tied as closely to their personal privacy, dignity and integrity. Hence, female sexual assault complainants occupy a unique space in the justice system that is not easily subject to comparison. Such a situation was anticipated by the Supreme Court in *Withler v Canada (Attorney General)*, where it reasoned that: "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison."<sup>121</sup>

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

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

## VII. Exceptions to Liability

Starting with section 16, the *CHRA* specifies that it does not fall within the meaning of a 'discriminatory practice' to carry out 'special programs' designed to improve opportunities for members of groups who suffer disadvantages related to prohibited grounds. That provision is not

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<sup>120</sup> *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at para 18.

<sup>121</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 59.

applicable to the policies and practices regarding the treatment of complainants of sexual violence in the criminal justice system so nothing further need be said about it.

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

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

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

To understand the meaning of "*bona fide* justification" we can look to the Supreme Court in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*.<sup>122</sup> There, the Court held "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be *bona fide*."<sup>123</sup> Further, the Supreme Court expanded on the meaning of "undue hardship" in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*,<sup>124</sup> indicating that "impressionistic evidence of increased expense will not generally suffice."<sup>125</sup> Consequently, it is not available for the Canadian government to argue that it has a *bona fide* justification for not reforming its policies and practices because reasonable alternatives are available; for instance improving the content and enforceability of the CVBR and improving victim participation in the criminal process. Furthermore, an argument that policy reform would be too costly will not likely meet with success given the *Grismer* ruling.

The foregoing analysis demonstrates that a tribunal could, on a balance of probabilities, make a finding of systemic discrimination under the CHRA regarding Canadian policies and practices governing the treatment of female

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<sup>122</sup> *Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489, SCJ No 80.

<sup>123</sup> *Ibid* at 518.

<sup>124</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, SCJ No 73.

<sup>125</sup> *Ibid* at para 41.

sexual violence complainants in the criminal justice system. Once such finding is made, the crucial next step is the imposition of systemic remedies.

## VIII. Systemic Remedies

Canadian human rights legislation reflects Parliament's intention to support and encourage measures that ensure respectful and inclusive environments in which Canadians can live free from the restrictions, barriers and harm of discrimination.<sup>126</sup> The stated purpose of the *CHRA* is to

"give effect ...to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices..."<sup>127</sup>

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

Systemic remedies can be a means of reversing the change-resistant patterns of discrimination found in governmental, institutional and societal structures.<sup>128</sup> Many of these forms of discrimination are the result of historic practices, attitudes and stereotypes that have become entrenched and normalized within the institution in question. These practices are not necessarily the product of overt intention to discriminate, but individual remedies can no longer correct them; "[s]ystemic problems require systemic remedies."<sup>129</sup> Hence, it is crucial that the CHRT have systemic remedies available as a tool to achieve its legislative purpose, to overcome institutional barriers and to achieve its transformative goals.

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

- (a) ... cease the discriminatory practice and take measures ... to redress the practice or to prevent the same or similar practice from occurring in future ...

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<sup>126</sup> Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6 Can J of Human Rights 1 at 7.

<sup>127</sup> *CHRA*, *supra* note 2 at s 2.

<sup>128</sup> Brodsky, Day and Kelly, *supra* note 126 at 4.

<sup>129</sup> *Ibid.*

- (b) ... make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice..<sup>130</sup>

In *Action Travail des Femmes and Canadian Human Rights Commission v Canadian National Railway Co*, the Supreme Court of Canada indicated that in order to combat systemic discrimination, a purposive approach should be taken when imposing remedies.<sup>131</sup> The Court explained that: “[s]ystemic remedies must be built upon the experience of the past so as to prevent discrimination in the future.”<sup>132</sup>

That case also supports the imposition of positive obligations on parties found to be systemically discriminating. The CHRT followed *Action Travail* in *FN Caring Society*,<sup>133</sup> finding that the Tribunal is justified in imposing positive obligations on the federal government even when it requires the government to spend considerable funds to comply. The Tribunal held:

Consequently, any order made by the Tribunal, especially in systemic cases, has some level of impact on policy or spending of funds. To deny this power to the Tribunal by way of decisions from the executive would actually prevent the Tribunal from doing its duty under the Act which is quasi-constitutional in nature. Throughout its existence, the Tribunal has made orders on numerous occasions that affect spending of funds. Sometimes orders amounting to millions of dollars are made (see for example *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para.1023 affirmed by the Supreme Court of Canada, see *Public Service Alliance of Canada v. Canada Post Corp.*, [2011] 3 SCR 572, 2011 SCC 57).

In addition, specific remedies impacting policy are often made to remedy discrimination. This is particularly true of systemic cases. These remedies have been confirmed in *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)*, 1997 CanLII 1433 (CHRT), 28 CHRR 179 and *Action Travail des femmes*. **Moreover, remedial orders may impose positive obligations on a party.** Further, the orders must flow from the Tribunal’s findings and must be responsive to those findings.

Accordingly, the federal government could be ordered to develop policies that reduce systemic discrimination to complainants of sexual violence, even if those policies require spending significant funds, for instance to pay for legal representation of complainants.

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<sup>130</sup> CRHA, *supra* note 2 at s 53(2)(a)-(b).

<sup>131</sup> *Action Travail*, *supra* note 67 at 1138.

<sup>132</sup> *Ibid* at 1145.

<sup>133</sup> *FN Caring Society*, *supra* note 82 at paras 27-28.

Importantly, systemic remedies would help Canada meet its international human rights obligations, which include the duty to respect, protect and fulfill human rights.<sup>134</sup> As explained by the United Nations High Commissioner on Human Rights:

The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.<sup>135</sup>

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

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

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic

marginalization, measures of redress need to link individual reparation and structural transformation ... reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience.<sup>136</sup>

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

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<sup>134</sup> "International Human Rights Law", (last visited 27 February 2023), online: *Office of the High Commissioner for Human Rights* <[ohchr.org/en/instruments-and-mechanisms/international-human-rights-law](http://ohchr.org/en/instruments-and-mechanisms/international-human-rights-law)> [perma.cc/64EX-MKJS]

<sup>135</sup> *Ibid.*

<sup>136</sup> *Advancement of Women: Note by the Secretary-General*, UNGAOR, 6th Sess, UN Doc A/66/215 (2011) at para 71.

## A. State-Funded Legal Counsel for Sexual Assault Victims

Providing legal counsel to sexual assault complainants has been viewed as a means to increase fairness, dignity and respect for victims' privacy within the criminal justice process.<sup>137</sup> According to Garvin and Beloof:

Crime victim agency is akin to the concept of crime victim autonomy, and at its core is the right and power of individuals to make fundamental decisions about their lives. This is particularly important in a criminal justice setting, where failure to respect crime victim agency can lead to additional harms or secondary victimization.<sup>138</sup>

Having a means to exert power or influence is important. Research shows that victims who participate in the criminal justice process can experience benefits including a sense of validation, increased feelings of safety and protection, improvement in depression, and better quality of life.<sup>139</sup> Disempowerment can result in a loss of respect and confidence in the system and can cause victims to disengage in the criminal process or refrain from engaging in the first place.<sup>140</sup>

Those who advocate the merits of state-funded legal counsel for victims of sexual assault suggest that many objectives could be served by such representation at all stages of the proceedings,<sup>141</sup> and it would "make the process more humane."<sup>142</sup> Rather than a non-lawyer, legal counsel is best positioned to effectively assert victims' rights and best situated to interact with other stakeholders in the criminal justice system.

The benefits of legal counsel for sexual assault victims are supported by research. An Irish study comparing 15 European states' regarding their use of legal representation for victims of sexual crimes found that legally representation improved victims' experience of the justice process.<sup>143</sup> Having a lawyer allowed sexual violence victims to more easily obtain

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<sup>137</sup> Garvin and Beloof, *supra* note 33 at 67.

<sup>138</sup> *Ibid* at 68.

<sup>139</sup> *Ibid* at 70.

<sup>140</sup> *Ibid* at 71.

<sup>141</sup> Lucinda Vandervort, "Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 148.

<sup>142</sup> Craig, *supra* note 3 at 164.

<sup>143</sup> Ivana Bacik, Catherine Maunsell and Susan Gogan, "The Legal Process and Victims of Rape" (1998), online (pdf): [drcc.ie/assets/files/pdf/drcc\\_1998\\_analysis\\_legal\\_process\\_for\\_rape\\_vicims\\_1998.pdf](http://drcc.ie/assets/files/pdf/drcc_1998_analysis_legal_process_for_rape_vicims_1998.pdf) [perma.cc/DPK5-WHMS].



information regarding the investigation, bail, and trial process, and improved their level of confidence when testifying.<sup>144</sup>

Additionally, the US Military has made innovative reforms by utilizing a Special Victims' Counsel for members of the military who are victims of sexual assault. Senator Claire McCaskill touted the move as a way to "ramp up the protection, information, and deference they give to victims."<sup>145</sup> She described this initiative as crucial to encouraging the reporting of sexual violence in the military.<sup>146</sup>

In *R v JJ*,<sup>147</sup> the Supreme Court of Canada found the participation of complainant's counsel in sexual assault admissibility hearings for private records or for evidence of sexual activity other than that included in the allegations to be constitutional. The Court found that legal representation of complainants was justified because it allows the complainant's unique perspective to be heard. It explained:

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

There are other situations in which third parties are permitted to participate in criminal trials where they have interests at stake. For example, victims providing victim impact statements at sentencing hearings or media participants making submissions regarding publication bans both have participatory rights in the courtroom. These participatory rights do not distort the bipartite nature of the criminal proceeding.<sup>148</sup>

While this case only addresses complainants' counsel in the specific applications under section 278, the Court's rationale could be applied to new legislated procedures under the *Criminal Code* that expand the parameters under which legal representation would be permitted.

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<sup>144</sup> *Ibid*

<sup>145</sup> Erin Heuring, "'Til it Happens to You: Providing Victims of Sexual Assault their Own Legal Representative" (2017) 53 Idaho L Rev 689 at footnote 131.

<sup>146</sup> *Ibid*.

<sup>147</sup> *R v JJ*, 2022 SCC 28.

<sup>148</sup> *Ibid* at paras 179-80.

Funding of complainants' counsel is an obvious barrier to its imposition and is complicated by the fact that provinces and territories have jurisdiction for the administration of justice. However, an amendment to the *Criminal Code* imposing a requirement for state funded legal counsel for sexual violence complainants would be binding on provinces. Further, the federal government already transfers funds to provinces and territories for legal aid through its contribution agreements and Access to Justice Service Agreement.<sup>149</sup> Accordingly, one solution could be for the federal government to direct funds for complainants' counsel to the provinces and territories, similar to the manner they do for young persons facing prosecution under the *Youth Criminal Justice Act*.<sup>150</sup>

## B. Other Recommended Systemic Remedies

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

## IX. Conclusion

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

Uncovering systemic discrimination through a human rights claim by women who have experienced the harms of engaging the criminal justice system, presents an opportunity for change. By accepting that the criminal

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<sup>149</sup> "Legal Aid Program" (last modified 15 July 2022), online: *Government of Canada* <[justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html](https://justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html)> [perma.cc/7YVB-XBEP].

<sup>150</sup> *Youth Criminal Justice Act*, SC 2002, c 1.

process is discriminatory against women, that it results in harm to them, and may be at least in part responsible for women's resistance to engage the criminal system, the door is opened for positive reform. Systemic reform is not elusive. Concrete examples of effective victims' rights policies are operating in places such as England and Wales. Legal counsel for victims of sexual violence is provided in other countries and is already available in Canada for limited purposes ('private records' and 'other sexual activity' hearings). These reforms would not cause undue hardship for the Canadian government, nor their provincial counterparts. In fact Canada could be seen as a world leader in matching the legal reform started in the 1980s with the corresponding process reform necessary to pursue equality for women.

Sexual assault has been described as the most gendered crime and the most unreported. There are also intersecting inequalities that sexual violence complainants experience based on race, indigeneity, disability, etc. Adopting systemic remedies for discriminatory policies and practices in the criminal justice process could encourage more women to report to police and engage in the criminal process. That would be an important first step in combatting sexual violence against all women and gender diverse people. Alas, if unchecked violence against women persists, equality will never be achieved.