Reality Check

How rape mythology in the legal system undermines the equality rights of women who are sexual assault survivors

By Kathryn Penwill

For

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Their vision of how society functions is turned upside down. This experience demolishes their belief in the system, and their desire to be involved and participate in their community/society. It upsets the fundamental underpinning of how they believe society works.

INTRODUCTION

Sexual assault remains a widespread form of violence against women in Canadian society to date; it is a symptom and an enforcer of women's status in our society. As such, our society's response to sexual assault is a measure of its willingness and ability to counter and remedy women's inequality, and to pro-actively promote women's equality.

It can be argued that Canadian women have come a long way over the past 30 years, thanks largely to the efforts of the women's movement. Activists working in many areas and in many capacities have succeeded in improving the response of the legal system to violence against women and in establishing women's rights to equality in Canadian society.

Despite these and other gains, the history of the legal system's response to sexual assault reflects a struggle between those seeking equality and improved treatment for sexual assault survivors and those seeking to defend those who are accused of this crime. Low rates of reporting and conviction of sexual assault indicate there is still a large gap between the formal equality achieved by women through legal reform and the actual lived conditions and experiences of women who are sexually assaulted. They signal that women continue to encounter many barriers preventing their access to the legal system, or preventing them from obtaining the justice they seek when they do gain access to this system.

In the light of this reality, *Action ontarienne contre la violence faite aux femmes* (AOcVF) initiated a research project aimed at identifying existing barriers to the justice system currently facing women in Ontario who are sexually assaulted. The involvement of representatives from Metropolitan Action Committee on Violence Against Women and Children (METRAC) and the Ontario Coalition of Rape Crisis Centres (OCRCC) contributed to the body of knowledge and experience which forms the basis of this report. In addition, a number of service providers offering support services to survivors of sexual assault throughout the province were consulted[1] through a combination of group consultations, questionnaires and individual interviews (see Appendix 1, "Project Description").

The scope of this research project was relatively small and the results present certain limitations. They are anecdotal and qualitative in nature and are not intended to meet the criteria of objective, scientific and quantitative research. In addition, the focus of this research was to examine existing barriers from the perspective of those providing support services to sexual assault survivors. It was not intended as an overall evaluation of the legal system. As such, the impact of the improvements which have occurred in police and court practices was not explored.

The purpose of the research was to utilize the daily work experiences of front-line service providers as a springboard for an analysis and discussion of an already identified and existing problem, with reference to current research and theory in this area. A secondary purpose was to identify new and emerging trends in tactics adopted by defence lawyers. This report is intended to provide basic information to front-line workers providing support services to survivors of sexual assault regarding the current pitfalls for survivors who choose to enter the legal system.

We begin in Part 1 with a discussion of the unique nature of sexual assault as a crime and the impact of this on its treatment within the legal system. We explore the current legal context within which this

1 Four sexual assault survivors were consulted as well.

research is situated. In Part 2, an overview of the information gathered from the consultations of service providers is presented and some examples are provided in the text. In Part 3, this information is discussed and analysed from the perspective of women's constitutional rights to equality. And finally, Part 4 explores possible avenues for systemic and individual change, gleaned from the consultations with service providers, from discussions within the advisory committee and from the literature. Recommendations for action to bring about change for the consideration of women's groups in Ontario are included.

PART 1 – Sexual Assault and the Legal System

1.1. The Nature of the Crime

Sexual assault as a crime has several important distinguishing characteristics. It occurs with alarming frequency: statistics reveal that 1 in 4 Canadian women will be sexually assaulted during her lifetime[2]. It is clearly a masculine crime committed against women. This is immediately revealed by a glance at current statistics about who perpetrates sexual assault and against whom[3].

Other features of sexual assault indicate that the occurrence of this crime is not an anomaly; that is, it would appear to be woven into the fabric of male/female heterosexual relationships. This does not mean that sexual assault occurs in all heterosexual relationships; rather, it means that it is one of the existing norms for male behaviour within those relationships. This notion is supported by the following facts:

- Sexual assault occurs with great frequency (see previously stated statistic to this effect);
- The majority of sexual assaults are perpetrated by someone the woman knows[4];
- In one study, 60% of male college students admitted that they would sexually assault someone if they knew they would not get caught[5].

Sexual assault would appear to be a major social problem which affects most citizens, either directly or indirectly, and creates significant social distress.

A third feature of sexual assault distinguishes it as a crime. The circumstances surrounding a typical sexual assault has led METRAC to conclude that sexual assault is unique, a crime like no other. Specifically:

- Sexual assault involves an intimate act;
- There are seldom witnesses;
- As previously stated, the perpetrator is usually known to the victim;
- There are often no physical injuries and little, if any, forensic evidence;
- Victims of sexual assault are often reluctant to go to the police for a variety of reasons, related to the natural response to a traumatic experience, to commonly-held attitudes and beliefs about sexual assault in our society which may engender feelings of shame in the victim, and to the systemic barriers which diminish their access to the legal system. For these reasons, sexual assault is the most under-reported crime in this country.
- Because the context in which such a crime usually takes place is often complex, for all the reasons discussed so far, it is not uncommon for women to be unsure themselves about whether or not they are the victims of a crime.

These characteristics most commonly define sexual assault. As such, the success or failure of the legal system to respond to this crime must be discussed in relation to those cases which are its most typical manifestations.

2 Ontario Women's Directorate, 1995.
3 In Canada, in 1998, 82.6% of victims in reported cases of sexual assault were women; 98% of the accused were men. (Juristat, 1998).
4 Of the women who have been sexually assaulted, 69% knew the assailant. (Ontario Women's Directorate, 1995).
5 Ontario Women's Directorate, 1995.

The presence of clearly defined gender patterns in sexual assault situations underscores the need to view this crime through the lens of a gender and power-based analysis. Sexual assault is both a reflection and an instrument of women's social inequality in relation to men. It is an act which expresses hatred and disdain of women and which is motivated by a desire to dominate, humiliate and control another human being.

Sexual assault continues unabated in our society due in part to the pervasiveness of a range of myths related to its occurrence and stereotypes about its victims. Common examples are: 1. sexual assault is perpetrated by a deranged and mentally ill stranger; 2. victims of sexual assault are usually sexually experienced women who invite the attack in some way by their behaviour; 3. women often/usually lie about sexual assault; and, 4. victims of sexual assault usually resist their attacker in some way and will therefore be injured. Such myths and stereotypes persist in the public perception of sexual assault despite all the evidence to the contrary.

Sexual assault has certain inherent characteristics which distinguish it from all other crimes. It is also a social problem marked by a deep-rooted and pervasive mythology. These realities create challenges when the legal system attempts to respond to this crime, as illustrated by the recent evolution of legal reform and case law in relation to sexual assault.

1.2. The Current Legal Context

1.2.1. Legal Issues

Sexual assault cases are prosecuted within a legal system defined by a certain structure, and by certain processes and principles. Initially, when a report of a sexual assault is made, it is investigated by the police. Following the investigation, police have the responsibility to decide whether to arrest and charge the accused, leading to the prosecution of the accused in court. At this point, the file is handed over to the Crown Attorney's office, which handles the case from that point onward. The Crown has the authority to continue with the charges, to reduce the charges or to withdraw the charges at any point in the process. The police may also declare that there is not enough evidence to do so, in which instance the case is declared "unfounded" and no further action is taken.

The challenges inherent in prosecuting crimes of sexual assault have often been framed as a conflict between the constitutional right of the accused to a fair trial, on the one hand, and those of the victim-witness – who is usually a woman - to equal protection and treatment under the law. The individual charged with sexual assault risks stigmatization and possible severe consequences as a result of a guilty verdict. The stakes are high and it is the right of the accused to a full defence and the duty of the defence lawyer to defend their client vigorously and effectively[6]. This right to legal representation does not apply to the victim of sexual assault, whose status in a Criminal Court is that of witness to the crime.

The Criminal court also protects the rights of the accused through the presumption of innocence and by requiring a high standard of proof, that is, proof beyond a reasonable doubt[7]. In a sexual

6 Adapted from a statement from Catherine Kane, Senior Counsel in the Department of Justice's Policy Centre for Victim Issues, quoted in Nicole Baer, 2001.

7 Beyond a reasonable doubt: This is the standard of proof in criminal cases. Before an accused can be found guilty, the judge or jury must believe the case against him has been proved "beyond a reasonable doubt." This means that the judge or jury must believe there is no reasonable explanation for what took place other than that the accused person did whatever it was. This is the highest standard of proof in a court of law. Put informally, it means that before someone can be found guilty, the Judge or jury must be 99% sure it was the accused who committed the offence. In civil court, including family court, by comparison, the standard of proof is "on a balance of probabilities," which means the judge must believe it is more likely than

assault trial, this requirement plays itself out in a particular way. Once it has been proven that there was sexual contact between the accused and the victim-witness, the trial often focuses on the question of whether or not the victim-witness consented to this contact. Since there are usually no other witnesses in a sexual assault trial other than the victim, the question of whether or not there was consent often hinges on the credibility of the victim versus that of the accused. Other evidence may be submitted in an attempt to prove the existence or absence of consent; for example, if the victim's clothing was torn, it may be produced as evidence of a struggle.

Should the accused be found guilty, sentencing is based on the fundamental assumption of the justice system that punishment should be proportional to the seriousness of the offence, with seriousness defined by the harm done and the need for protection of the public against future acts.[8] Within this general guideline, as well as those laid out in the Criminal Code for the specific offence, the judge has a great deal of discretion in determining the severity of the sentence. In the case of sexual assault, the type of offence and the subsequent sentence prescribed by the Criminal Code are directly related to the level of violence used by the assailant.

In research conducted which compared sentencing patterns in cases of sexual assault, robbery and physical assault, three factors were identified which are usually taken into account by judges and lead to more lenient sentencing: firstly, when there is a relationship between the victim and the accused, since generally, the courts are more severe in cases which appear to be random acts of violence; secondly, whenever there is a lack of visible physical harm, or lack of a clear threat of physical harm; and thirdly, when the offender is not otherwise criminally dangerous[9].

The rights of the accused are protected by the Canadian Constitution and embedded in the practices, procedures and principles of the legal system. However, the legal system was not designed with any particular intent to protect the rights of the victim-witness. Over the years, many women's groups and others have made efforts to force the legal system to respect and adapt to the gendered and unique nature of sexual assault as a crime. Their arguments have largely been founded upon women's rights to privacy and equality, which are guaranteed through many Canadian laws and policies:

- Section 15 of the Canadian Charter of Rights and Freedoms guarantees that women will receive equal protection and equal benefit of the law. The purpose of the Charter is to ameliorate the position of groups who have suffered disadvantage.
- In 1995, the government adopted the Federal Plan for Gender Equality, and promised to do an analysis of the impact on women of all new laws and policies (a "gender-based analysis").

not that one side's argument is correct. Put informally, the judge must think one person's story is 51% more likely to be true than the other person's. It is important to have a very high standard of proof in criminal cases, because the outcome could result in the accused going to jail and losing his liberty. However, in cases of intimate violence, including sexual assault, it is a challenging standard to meet simply because usually there are only two witnesses to what happened – the accused and the victim. Often there is little or no other evidence. As a result, the judge or jury is often left having to decide which person is more credible, and they may choose to be cautious in convicting someone because the standard of proof is so high and there is so little evidence.

8 Canadian Sentencing Commission, 1987, in Renner *et al.*, 1997, p. 3.

9 Renner, 2002. pp. 135-153.

- In 1995, the federal government endorsed the Beijing Platform for Action at the Fourth World Conference on Women organized by the United Nations. In June 2001 it promised to take further actions towards women's equality and empowerment[10].
- The Canadian constitution guarantees the protection of all its citizens' rights to privacy.

In practice, the interplay between these two basic principles – the rights of the accused to a fair trial, and the rights of women to privacy and equality - creates a certain dynamic within the legal system in cases of sexual assault. As mentioned, the role of the defence is to protect the accused, and in a sexual assault trial, one of the primary ways of achieving this is through the cross-examination of the victim-witness in order to discredit her testimony. To this end, defence lawyers have continuously and with ever-increasing creativity developed new and emerging tactics aimed at destroying the credibility of the victim-witness and refuting the evidence she provides.

If limits are to be placed upon the scope of the tactics used by the Defence, it is the Crown and the Judge who have the responsibility to ensure that this occurs. Through the interventions of these parties, the Defence's tactics may be either encouraged – either tacitly or explicitly – or impeded within the courtroom. What takes place within individual courtrooms, in terms of what is permitted, what is successfully challenged and the outcome has an impact upon the broader legal system through the creation of legal precedents and common law practices that form the legal doctrine[11]. Movement or change within the legal system may also occur through legislative change and constitutional challenges. This occurs when the outcome of a particular case is challenged based upon its infringement of the constitutional rights (described above) of either the accused or the victim-witness.

The discourse and evolution of Canadian case law in sexual assault cases describe and reflect this tension between the principles of the rights of the accused to a fair trial and the rights of the victim-witness to privacy and to equal protection and treatment under the law.

1.2.2. Relevant Canadian Case Law[12]

In recent years, women have increasingly reported sexual assaults perpetrated by known offenders, often with whom they have had an ongoing relationship, as well as historical sexual assaults. While this is a positive evolution, since it reflects the reality of many women's experiences, it has resulted in an escalation of aggressive tactics and legal arguments used by defence lawyers.[13] Issues and tactics which have been the focal points of significant legal battles over the past 14 years are:

- the use of the victim's sexual history in order to portray her as promiscuous and provocative;
- the defence of "honest but mistaken belief in consent"; and,
- the disclosure of various types of private records, in search of possible evidence which refutes or contradicts the victim's testimony.

10 Ontario Women's Network on Child Custody and Access, 2002.
11 Renner, 2002, p.2.
12 This section is largely summarized from a series of articles written by Pamela Cross for METRAC and the Ontario Women's Justice Network
13 Cross, 2000a, p. 2.

Each of these defence strategies reposes upon common rape myths and strips the complainant of her rights to equality and privacy. The use of each of these strategies has been contested in court, and both parliament and the higher courts have responded with measures or decisions which increase protection for the complainant's rights to equality and privacy. These rights are increasingly established through jurisprudence and enshrined in the Criminal Code.

The protection of complainants' rights has been challenged by defence through the appeal process with varying results. While they are presented here in separate sections for the sake of clarity, the many processes and stages involved in challenging these different defence tactics have often occurred within the same timeframe and decision makers have been informed and influenced by the overlapping legal principles involved.

The Use of Sexual History and the Meaning of Consent

A common strategy traditionally used by defence lawyers was to attempt to undermine the credibility of the victim as a witness by introducing evidence related to her sexual history, in order to portray her as promiscuous. To this end, the defence lawyer would, for example, demonstrate that a woman had multiple sexual partners or wore seductive clothing or lingerie, or reveal intimate details about her preferred sexual practices. The goal was to demonstrate that: the woman was likely to have consented to sexual contact since she had in the past; the accused could easily have been misled by her behaviour or appearance into thinking that she had consented to sexual contact; and, that the complainant was not a credible witness since she was promiscuous. Such defences were based upon common rape myths, such as:

- Once a woman says yes to sexual contact, she is more likely to consent to any and all future sexual contact;
- Promiscuous women lie about sexual assault; and
- Women commonly agree to sexual contact, then regret their decision and lie about it afterwards.

Another common defence successfully used in favour of the accused was the defence of "honest but mistaken belief of consent". Here the underlying rape myth is that when women say no to sexual contact, they in fact mean yes or maybe.

In 1991, the Court's ruling in the case of *R. v. Seaboyer* prompted the drafting of Bill C-49, which was introduced in 1992 to bring amendments to the *Criminal Code*. As a result, changes were made to Section 276 of the *Criminal Code*, the guidelines which restrict the admissibility of evidence of sexual activity (including the sexual history of the complainant), the definition of consent to a sexual act was further clarified and restrictions were placed upon the defence that an accused had an honest but mistaken belief that the woman had consented to sexual activity.

These so-called "rape shield" amendments have been put to the test over the past 5 years. The case of *R. v. Ewanchuk* brought into question the Court's interpretation of certain aspects of the legal definition of consent and raised the issue of a new defence, that of "implied consent". This defence was proposed by the trial judge to justify the behaviour of the accused. The accused in this case had repeatedly initiated and persistently escalated sexual contact with the complainant in the face of her (so-called) ambiguous responses, which were a result of her fear of further violence.

The decision was appealed up to the Supreme Court, which upheld the appeal by the Crown and convicted the accused. The impact of the Supreme Court's decision was to reinforce the

message that “only a clear unequivocal yes, in words or action, can be taken as approval for an initiation or escalation of sexual contact.” This was accomplished when the Court “set out clearly that:

1. consent is to be determined from the perspective of the mind of the complainant;
2. there are many actions and words that can convey a lack of consent;
3. the responsibility rests with the person seeking the sexual contact to actively and positively determine that there is consent; and
4. the court without doubt rejects the possibility of the introduction of a defence of “implied consent” for the offence of sexual assault.”[14]

Another test of the 1992 changes to the *Criminal Code* focused on restrictions to the introduction of the victim’s sexual history as evidence. Bill C-49 modified the guidelines in Section 276 to require the defence to show that evidence of prior sexual activity on the part of the complainant has “significant probative value that is not substantially outweighed by the danger of unfair prejudice to the proper administration of justice.”[15] Sections 276.1 and 276.2 also lay out specific and detailed procedures which must be followed when the accused wishes to apply to have such evidence considered at trial.

In order to determine the value of such evidence, Subsection 3 of Section 276 requires that the following be considered:

a) the interests of justice, including the right of the accused to make a full answer and defence;
b) society’s interest in encouraging the reporting of sexual assault offences;
c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
d) the need to remove from the fact-finding process any discriminatory belief or bias;
e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
f) the potential prejudice to the complainant’s personal dignity and right of privacy;
g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
h) any other factor that the judge, provincial court judge or justice considers relevant.

This list brings nicely into balance the various rights, needs and interests of the accused, the complainant and society. The considerations listed in Subsection 3 succeed in addressing some of the systemic causes and discriminatory beliefs for the historically unfair treatment by the courts of women who have been sexually assaulted. It is clearly an addition to the Criminal Code which is beneficial to women.

In the case of *R. v. Darrach*, the accused applied to use the sexual history of the complainant as evidence and was refused by the trial judge, who convicted him and sentenced him to nine months’ imprisonment. The decision of the trial judge was appealed, based on the contention of the accused that the process to apply to submit evidence related to the complainant’s sexual history and the subsequent refusal to allow that evidence infringed upon his constitutional rights,

14 Cross, 2000b, p. 11.
15 Baer, 2001. p. 6.

notably, his right to make full answer and defence, his right not to be compelled to testify against himself, and his right to a fair trial. Both the Court of appeal and the Supreme Court found that the ruling of the trial judge did not violate the constitutional rights of the accused and his conviction was upheld.

The decision of the Supreme Court affirms the Seaboyer decision and reinforces the soundness of the principles and procedures outlined in the relevant sections of the Criminal Code. The rationale of the Court's decision highlights some important legal principles:

- there is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness … or whether she is more likely to have consented to an alleged assault[16];
- the concept of fairness applies more generally to the trial process as a whole and not solely to the treatment of the accused, such that the exclusion of misleading evidence may enhance fairness;
- the interests of the accused, the complainant and of justice itself must be seen as a balance to be achieved and not as a hierarchy.

Clearly, in the eyes of the Court the complainant's sexual history is private and the accused must meet a high standard in order to be allowed to introduce it as evidence.

We will see that in making its decision in the Darrach case, the Court drew upon the principles outlined in a decision related to another groundbreaking case - that of *R. v. Mills* - which had taken place in the previous year and had dealt with a different but related defence strategy.

The Disclosure of the Victim's Private Records

As the use of the victim's sexual history waned somewhat due to an increasing rejection of the practice by various levels of court, defence lawyers were at the same time casting about for new and untried methods of undermining the victim's credibility in order to defend their clients. In the mid-nineties, defence lawyers began conducting "fishing expeditions" in search of any and all personal records about the complainant.

To this end, defence lawyers applied for and were accorded subpoenas that obliged doctors, therapists, rape crisis counsellors and other third parties to disclose a wide range of private records about the complainant. The contents of these records were then used to castigate the victim-witness, through the exposure and distortion of records containing intensely private thoughts, actions and feelings. As a consequence, victims experienced additional humiliation and intimidation. For example:

> *In a case of historical sexual abuse, the defence asked the judge for permission to subpoena a spectrum of files and the judge allowed this. The defence gathered a number of files then left the judge to decide which were relevant. While none of the information gathered from the subpoenaed files was used in court, the process used to gather the files was invasive for the woman. The defence had the client/accused hire a private investigator to follow the woman around, without her knowledge. The woman found out because her supervisor at work was approached & asked questions, such as: is she a good employee? Does she work well? The employer refused to answer. The woman's employment records from her four current and past employers were subpoenaed, including her personnel records with her job*

16 Excerpts from Court decisions in the cases of Seaboyer and Darrach, quoted in Cross, 2000d, p. 9.

performance evaluations. Since the woman's statement was included in the subpoena, all people who were subpoenaed also got a copy of her statement. The woman was seeing a counsellor, and the counsellor was subpoenaed.[17]

The emergence of this tactic, known as "the sexual assault disclosure strategy", or "the production of third party records", can be traced to a case which, although unrelated to sexual assault, laid the necessary legal groundwork. In 1991, in the case of *R. v. Stinchcombe*, the Supreme Court of Canada ruled that, due to the constitutional right of the an accused to make "full answer and defence", to the charges against him, the Crown has a duty to disclose all relevant material to the accused. This duty exists whether or not the Crown intends to introduce this evidence at trial and whether or not the evidence is favourable to the accused. Thus, the automatic disclosure of records by the Crown became instituted as a norm.

In 1995, the first case to challenge the use of this strategy – *R. v. O'Connor* – reached the Supreme Court of Canada. While the accused in this case was accorded the right to seek production of the records in question, the Court established a two-stage test to determine this. In order to determine whether production of the records should be ordered, it was necessary to demonstrate that they were "likely relevant"; that is, that "there is a reasonable possibility that the information sought is logically probative on an issue at trial or the competence of a witness to testify." In addition, the Court stated that the burden on the accused to establish this should not be "onerous."

This decision can be considered a step forward, in that disclosure of records was no longer automatic, but needed to pass through a procedure and test. However, it can be argued that this decision sidestepped many of the basic issues at the heart of the unfair treatment of victim-witnesses of sexual assault, that is: the uniqueness of sexual assault as a crime, the tension between the rights of the accused and the rights of the victim-witness and the need to establish legal precedent which encourages victims of sexual assault to come forward and report such crimes.

For these reasons, it is perhaps not surprising that following the O'Connor case, as the test and procedure established by this decision were put into practice, it became evident that the majority of judges were likely to grant production of records in most situations. Over and over again, women's private and personal records were being dragged into the court and used against them in ways which were not directly rated to the accusation of sexual assault. During the same period following the O'Connor decision, public consultations initiated by the federal Ministry of Justice revealed the dissatisfaction of women's groups in relation to this decision, based on their observations of its negative impact on victim-witnesses in court.

As a result, in 1997 the federal government passed into law Bill C-46, which became Sections 278.1 to 278.9 of the *Criminal Code.* Most noteworthy about this measure is the Preamble to Bill C-46, which recognizes the historical inequality faced by women who report sexual assault as well as the role of myths and stereotypes about sexual assault in perpetuating this inequality. The Preamble also acknowledges that it is in society's best interests to encourage the reporting of sexual assault offences. The Preamble establishes in law the principle of equality rights in relation to the prosecution of sexual assault and the commitment of the Canadian government to

17 This example of the use of this strategy and its impact on women was gathered during research for this project. It is included in this section, rather than in Section 2 where the body of the research results are reported, because it took place prior to several important court decisions on this issue. As such, it can no longer be considered indicative of a current barrier (though other aspects of this woman's story reflect still current practices, and these are recorded elsewhere in Section 2). It is nonetheless included as it clearly evokes the devastating impact of this practice on women.

ensuring the protection of women's equality rights in such cases (see Appendix 2: Preamble to Bill C-46, for the exact wording of this excerpt from the legislation).

This represents a huge step forward for Canadian women and Canadian society. Women's advocates noted that following the entrenchment of these revised rules, "there was a dramatic decrease in the success rate of defence counsel in obtaining access to women's private records in sexual assault cases."[18] However, it was not long before the constitutionality of Sections 278.1 to 278.9 was challenged by defence counsel in the context of *R. v. Mills.* Defence argued that Bill C-46 denied the constitutional right of those accused of sexual assault to make full answer and defence to the crime(s) with which they are charged due to a lack of access to the private records in question.

In 1999, the Supreme Court of Canada made a decision in the case of *R. v. Mills* which upheld the constitutionality of sections 278.1 to 278.9. The Mills decision established that in the context of a sexual assault trial, the complainant's personal records must be considered private and the accused must meet a high standard of proof in order to have access to them.

The following sections of the *Canadian Charter of Rights and Freedoms* are relevant to the issue of the disclosure of private records:

> *Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> *Section 8: Everyone has the right to be secure against unreasonable search or seizure.*
>
> *Section 11: Anyone charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*
>
> *Section 15 (1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.*

The issues raised in this case stem directly from the tension or conflict which has been identified in the legal system in sexual assault cases between those Charter rights which apply to the accused and those which apply to the complainant. According to Cross, in the Mills decision the Court "*rejected a hierarchical approach, refusing to assert that one right is more important than any other…"* and affirming that *"…a balance must be struck among competing interests that fully respects the importance of all of them*."[19] Thus, it was established that the principles of fairness do not apply only to the accused, but also to the complainant and to society.

A number of other important legal principles informed the Court's decision in the Mills' case. The Court acknowledged that the manipulation of rape myths by defence lawyers can and have had the effect of distorting the truth, and that the right of the accused to "full answer and defence" does not encompass the introduction of evidence which would bolster this practice. Furthermore, the Court clearly framed its decision as an issue of women's right to equality and privacy.

18 Cross, 2003.
19 Cross, 2000a, p. 8.

For a significant period of time, it appeared that the decision in *R. v. Mills* had lain to rest the attacks on women's right to privacy and equality. The case of *R. v. Clifford* fine-tuned the application of the Mills decision. In this case, at issue was the question of whether the same level of confidentiality can be attributed to counselling and therapy records when a third party was present was raised. The Court of Appeal ruled that Section 278.1 applied to the records in question, and that the application by the Defence for production of those records did not meet the standard set out in section 278.1.

Recently, defence counsel has again brought this issue to the forefront through the case of *R. v. Shearing.* Defence in this case procured the private diary of the victim-witness through specific circumstances and without adherence to the correct procedures established in Sections 278.1 to 278.9. In this way, the case is rather exceptional; however, the decision in *R. v. Shearing* renders women vulnerable to a loss of privacy in certain situations.

This case went through an appeal process on a number of grounds at the levels of the trial court, the British Columbia Court of Appeal and the Supreme Court of Canada. On the issue of the complainant's diary, the Supreme Court of Canada allowed the appeal, giving the defence permission to question the complainant about specific issues related to the diary (i.e. the absence of references to the alleged sexual assaults in the diary). Justice Binnie argues that:

> *It cannot be said that there is no reasonable possibility that if the cross-examination had proceeded, the verdict on the KWG*[20] *charges would necessarily have been the same…The appeal is therefore allowed with respect to the counts pertaining to KWG.*[21]

It is noteworthy that the Court did not address issues of ownership of the diary, or of the methods used in obtaining the diary. The issue of privacy is raised, but the Court concludes that because the Complainant herself described the diary's contents as being "mundane", her privacy rights are somehow lessened by the fact that she does not view her diary as particularly intimate or private. Similarly, Justice Binnie refers in his decision to the importance of avoiding rape myths in dealing with sexual assault cases, but his decision to allow the Defence to cross-examine the Complainant on the absence of references to sexual assault in her diary reinforces these myths.

The Court's decision is based solely on discussion of whether and how the Defence can use the diary, now that it is in their possession. One judge, Madame Justice L'Heureux Dubé, dissented from the majority decision on the basis that the central issue was the fact that the usual, legal process of obtaining private records had been circumvented. This dissent underscores the danger that the decision in *R. v. Shearing* may be interpreted as a message to those accused of sexual assault that they may thwart legal procedures in order to obtain the personal records of sexual assault complainants with impunity. Most disturbingly, it ignores and even contradicts the principles of equality outlined in the Preamble of Sections 278.1 to 278.9 of the Criminal Code.

This summary of the most significant legislative changes and court decisions related to sexual assault which have occurred over the past 13 years illustrates that a key strategy in order to improve conditions for victims of sexual assault in the court system is the use of arguments and reasoning based upon the principles of equality outlined in the Canadian Charter of Rights and Freedoms. Through the use of this strategy, some important gains have been made. At the

20 KWG refers to the initials of one of the complainants in this case.
21 Cross, 2003. p. 10.

same time, these gains have been challenged with success and as a consequence, women remain vulnerable (though less so) to unfair and humiliating tactics by defence lawyers which deny their basic human rights.

The right to equality applies to all Canadian institutions and citizens, not only within the court system. In the case of Jane Doe, the court confirmed that Toronto Police Services are not immune from a requirement to adhere to Charter rights.

1.2.3. The Case of Jane Doe[22]

In August of 1986, a woman who later became publicly known as Jane Doe was raped by an intruder, who made his way via her balcony into her apartment while she was sleeping. The attack was one in a series of several which had taken place that summer.

Following the attack on Jane Doe, the rapist remained at large while police continued their investigation. The process of the investigation brought Jane Doe into conflict with the police on a number of levels. As a white, middle-class woman who had been raped by a stranger, she was perceived favourably by police, yet she nonetheless experienced paternalistic and sexist attitudes and beliefs. She was excluded and uninformed about the process of the investigation and she struggled to make police accountable to her. In addition, despite extensive police surveillance and presence in the neighbourhood and involvement in the case, Jane Doe and other women living in the area received no warning about the danger they were in. Police had chosen not to publish warnings, for fear that women in the neighbourhood would react with panic and fear and that the attacker would be scared off and never caught. Instead, they waited and watched for his next attack.

Jane Doe, a political woman actively involved in the feminist anti-violence movement, was outraged that police did not take action enabling women to take the necessary precautions in order to protect themselves. She and other activist women made up and distributed a warning poster with a description of the attacker in the neighbourhood. As a result of this measure, the probation officer of the man responsible for the attacks recognized his description and reported her suspicion to the police, resulting in his capture.

The case went to preliminary trial and Jane Doe and several of the women who were attacked gave testimony. During court proceedings, witnesses are normally excluded except during their testimony. Jane Doe hired a lawyer to demand for her to be included and allowed to attend all the proceedings of the trial. Her demand was accepted by the trial judge and she was able to be present for the duration of the trial.

Her presence during the trial enabled her to gain information about the police investigation of this case. For instance, when her own rape was deemed non-violent, because she “had not been cut or stabbed with the rapist’s knife, because he hadn’t beaten or mutilated or (most decisive of all) killed” her,[23] she became aware of the “the mindless mythology, held and practised by police, lawyers and judges, that a rape can be non-violent.”[24] She also learned that at the time she was raped, the police had begun to hone in on the “modus operandi” of the rapist. They knew that the attacks had all taken place against women with many traits in common. All of the women were single, lived in the same neighbourhood within a very limited geographical range, in high rise apartments on the second or third floor and shared certain

22 The information in this section is taken from: Doe, 2003.
23 Doe, 2003, p. 72
24 *Ibid*, p. 80.

physical characteristics. They had also been aware that he was about to attack again imminently. Jane Doe learned that she had been used as bait.

In 1987 the serial rapist known as the "balcony rapist" pled guilty and was sentenced to 20 years in jail. The resolution of the Criminal trial was only the beginning of the fallout from this case.

Jane Doe v. the Board of Commissioners of Police of Metropolitan Toronto[25]

In 1987, Jane Doe petitioned to sue the Board of Commissioners of Police of the then-Municipality of Metropolitan Toronto (now the City of Toronto) on the basis that she had been the victim of discrimination and negligence. Jane Doe claimed that she and other women had been used as bait in the police investigation and that police had a duty to warn and protect her from the violence they knew was a likely occurrence. Their failure to warn her was negligent and an abrogation of her rights as a citizen to equal protection and security, as guaranteed in the Canadian Charter of Rights and Freedoms. Furthermore, their reasons for not warning her were based upon sexist stereotypes about women.

Jane Doe's petition was accepted in 1989 and preparation for the trial took several years. According to Jane Doe, the delay was largely due to police creating obstacles making it difficult to gain access to notes and records, as a strategy to stall the proceedings. The case finally went to trial and in July of 1998, Madam Justice Jean MacFarland rendered her decision, finding the police liable for negligence and holding that they had breached sections 7 and 15 of the Charter, and that women's rights to equality and security had been violated. She held that, "as a public institution with a crucial role to play in the protection of all members of society, the police must act without discrimination in carrying out its duties and responsibilities and must ensure that its actions do not deprive individuals of their rights to security."[26]

The judge found that the police had made a conscious and deliberate decision not to warn women about the serial rapist in their neighbourhood and that this decision appeared to be based upon the sexist notion that the women might become "hysterical" and that this would somehow compromise the police investigation. The judge accepted Jane Doe's allegation that the women had been used as bait and concluded that had Jane Doe been aware of the danger she would have taken steps to protect herself and that would have prevented her rape. In this way and others, Judge MacFarland found that the police investigation of the Jane Doe case was irresponsible and grossly negligent and that police had failed utterly in their duty to protect women.

In her decision, Judge MacFarland identified numerous other shortcomings related to police conduct and general policies on investigating sexual assault cases, concluding that Jane Doe had experienced bureaucratic and systemic discrimination. Among the problems highlighted by the judge were the following:

- There is an absence of a coordinated approach to all instances of violence against women.
- There is a lack of continuity of officers involved in the investigation. As a consequence, the victim is often obliged to repeat her statement over and over to different officers.

25 The information in this section was taken from a review of Judge MacFarland's decision contained in the auditor's report, entitled "Review of the Investigation of Sexual Assaults: Toronto Police Service", by Jeffrey Griffiths, C.A., City Auditor, 1999.

26 Excerpt from "Review of the Investigation of Sexual Assaults: Toronto Police Services", Jeffrey Griffiths, C.A., City Auditor. Toronto Audit Services. October, 1999, p. 19.

- The victim is not provided with up-to-date information on the progress of the case involving her. As a result, women often feel powerless and their experience is one of re-victimization.
- Investigating officers are not readily available to women, to respond to their questions and concerns.

Judge MacFarland pointed out that many of these same problems were longstanding at the time of the trial, and had been exposed in a Report issued in 1975. While police claimed to have made changes in the way sexual assault cases are investigated, the judge concluded that police had engaged in "impression management" and that no substantial changes or improvements had been made. This indicated to the judge that the police do not take the crime of sexual assault seriously.

The outcome of this civil trial prompted a motion by the Toronto City Council to take action in order to prevent an appeal of Madam Justice MacFarland's decision. Toronto City Council also called for an audit and review of the practices of Toronto Police Services in investigations of sexual assault and domestic violence cases. As a result of demands by women's advocates, the focus of the social audit was later narrowed to a focus on investigations of sexual assaults of adults.

An Audit of the Toronto Police Service

By September 1998, the audit process was launched, with input from the City of Toronto Committee on the Status of Women. An Audit Reference Group, comprised of representatives from agencies serving women who have been sexually assaulted, was established. While the audit was an independent evaluation of police investigations of sexual assaults, the role of the Audit Reference Group was to act in an advisory capacity to the City Auditor.

The Audit report contains a comprehensive, critical exploration of many facets of police sexual assault investigations, and proposes a series of recommendations for improvement. Following are some highlights from the report.

The Sexual Assault Squad

The mandate of the Sexual Assault Squad at the time was limited to the investigation of stranger assaults or assaults by serial sexual predators which involve penetration. As such, they dealt with a minute proportion of actual sexual assaults against women (approximately 4%) and children.

Investigative process

The importance of balancing the need to gather evidence with an approach which minimizes the trauma to the woman and her family was highlighted and the relationship between the officer and the sexual assault victim was identified as a critical component of a successful investigation. The role of the primary response officer with a sexual assault victim was emphasized in this respect, since generally the woman's initial contact with official institutions has the most effect on her well-being. Directives to primary response officers to gather only basic information from the sexual assault victim (since she will be contacted later by other investigative officers for more in-depth information) are often not followed. First contact officers frequently go much further than directed into the investigation, asking detailed questions.

Generally, the report notes the need for clear, practical guidelines to ensure consistency in how first interviews with the sexual assault victim are conducted. Such guidelines should be adapted

to women with special needs, and take into account the fact that, in contrast to many other crimes, the victim's recall in sexual assault cases often comes gradually in stages some time after the event.

Police occurrence reports were found to contain problems which may be indicative of issues in the interview which takes place between the woman and the police officer, and therefore in the relationship between these two. Occurrence reports were found to be incomplete, conclusions with no basis were discovered and the use of inappropriate language was observed. The decision to conclude that a case is "unfounded" was often arrived at without sufficient information. This decision was often made by the first police officer to arrive at the scene, who often has insufficient training to enable her or him to arrive at such a decision. In some cases, a woman's refusal to proceed with the investigation resulted in that case being labelled as unfounded.

Other issues point to the lack of information available to women and the need for police officers to contact and update women at each step of the investigative process. Information and the availability and accessibility of police officers to women were seen as key components in minimizing victims' sense of powerlessness.

Barriers for marginalized women

The report identified the following specific barriers experienced by women from some marginalized groups: sex trade workers are often met with scepticism; women from minority cultural backgrounds experience language barriers and officers often lack experience in responding to their needs; sexual assault of homeless women is often minimized and an attitude of "what do you expect" prevails; women with disabilities experience disbelief that they would be sexually assaulted; and, women of colour are afraid of disbelief and there is a general mistrust of police officers.

Coordination

There is a need for improvement in coordination of investigations involving different forms of violence against women.

Training

There is a lack of coordination related to training in sexual assault investigations at various levels, as well as several gaps and inadequacies in current training course content. Little control is exercised over the selection process used to determine who will participate in training and there is little tracking of which and how many officers have received training, resulting in serious limitations around planning and predicting training needs, in evaluating the adequacy of training and in determining whether police officers are appropriately deployed.

It seems that current sensitivity training is successful, as younger police officers have been identified as having better attitudes and better approaches to handling sexual assault cases. The importance of including training offered by external organizations serving women was raised.

Community Relations

Generally, a lack of trust, cooperation and coordination characterizes the working relationship between Toronto Police Services and community-based agencies serving women. The report points out that building this relationship should be viewed by police as a process, not as a public relations exercise.

Feedback from Sexual Assault Care Centres

Many positive observations of current police practices and improvements in sexual assault investigations were noted by workers in Sexual Assault Care Centres. A need for further improvements was noted, for example in the following areas: the use of leading questions and judgments during interviews; a lack of continuity among investigative officers, lack of information about SACC services; the lack of information given to woman by police about the evidence kit; and, the lack of a formal written protocol for reporting and dealing with inappropriate behaviour by police.

The need to adapt police practices to the reality of trauma reactions typical of sexual assault survivors, and the need for anti-sexist, anti-racist sensitivity training were identified. Police officers' lack of support for young people with a history of conflict with the law was raised.

Recommendations

The report makes 57 recommendations for improvement (see Appendix 5 for the complete list of recommendations). The recommendations call upon the Toronto Police Services to focus on the following issues:

- a regular, structured reporting process regarding the evaluation and putting into effect of the full number of recommendations in this report;
- an independent follow-up evaluation of the actions taken in regard to the recommendations in this report;
- a widening of the mandate of the Sexual Assault Squad, and a review of its staffing to meet that new mandate;
- a re-evaluation of current training practices, including the provision of mandatory and regular refresher courses;
- improvements to the current case management information systems;
- improved communications with women who have been sexually assaulted;
- continuity of service to women who have been sexually assaulted;
- a requirement to create formal written procedures, prepared with assistance from the overall community, in regard to the reporting of activities of sexual predators; and
- improved communications and relations both within the police service itself and with outside community agencies.[27]

The report was concluded in October of 1999 and a follow-up report, expected from the auditor's office before the end of 2004.

Discussion

The case of Jane Doe precipitated many first steps aimed at improving the treatment of sexual assault within the legal system. Starting with the preliminary trial of the "balcony rapist", Jane Doe succeeded in securing legal representation for herself, a highly unusual step which in and of itself needed formal approval by the judge. Her subsequent success in obtaining permission to attend the entire criminal trial was another significant gain. While Jane Doe's actions and the judge's decision were seen as precedent-setting, other than the Globe and Mail article of

27 Griffiths, 1999, pp 2-3.

February 9, 1987, no record exists of this ruling: "It is not reflected in the legal transcripts of the preliminary trial or elsewhere documented. It cannot be used by lawyers or read by law students."[28] Moreover, Jane Doe points out that whenever women who are victims and witnesses attempt to obtain legal representation, they generally meet with resistance:

> *In Canada since 1987, more women have been successful in obtaining legal counsel when raped. However any standing granted to their lawyers is at the discretion of the presiding judge and is argued against by the Crown Attorney's Office and the lawyer representing the accused.*[29]

Legal representation is extremely costly and not covered by legal aid. Furthermore, "…the right of the woman to have her own legal counsel is not well-known in the first place. It's sort of a secret."[30] These many obstacles combine to make legal representation extremely inaccessible for most women.

The civil trial was also groundbreaking. The judge's findings in the civil trial were significant and extremely positive for women as a group, since they affirmed and strengthened women's basic rights to equality and security. They further recognized the failings and inadequacies of the Toronto Police Services in their treatment of sexual assault victims and their investigation of sexual assault cases.

And finally, the social audit was an important precedent as it represents the first audit of sexual assault investigations in a police department ever, anywhere. The process used to conduct the audit – in particular, the establishment of an Audit Reference Group – represents an interesting example of inter-sectorial collaboration and of collaboration between the auditor and community-based women's services and advocates.

While this case represents a number of significant triumphs, according to Jane Doe, it has also failed in many ways. Doe supports many of the recommendations, such as those which focus on the need to improve and increase officer training in sexual assault investigations, through training which is designed and delivered by women with expertise in the field; however, she is critical of others on a number of levels. She considers recommendations related to the increased purchase, use and development of computer profiling and forensic technology to investigate sexual assault to be potentially dangerous for women. She also notes the lack of attention to issues affecting marginalized groups of women. [The invisibility of certain marginalized groups, such as women in same sex relationships, should also be mentioned as an area of concern. (Author's note)]. Furthermore, Doe has been critical of the fact that police are directed to work with institutionalized victims' services, rather than autonomous, community-based women's groups, further contributing to the gradual erosion of these services.

The lack of an implementation mechanism is an omission that greatly weakens the power of the document as a whole. Toronto Police Services are under no obligation to act upon the auditor's recommendations and Doe points out that most institutions are resistant to change. The audit had the potential to bring the police to greater accountability, providing Toronto City Council with a channel for their potential influence over Toronto Police services.

> *The Jane Doe social audit ordered by Toronto City Council was the missing piece, the tool that could, conceivably, implement change in the policing of sexual assault. The*

28 Doe, 2003, p. 70.
29 *Ibid.*
30 *Ibid.*

city council controlled the police budget; it had the power to determine how much money police would receive and how it would be allocated. An audit, ordered and enforced by council, could do what other interventions (legal decisions, inquests, community activism) could not.[31]

However due to a lack of political will, police have not been obliged to implement the recommendations. In 2001, the Chief of police officially responded to social audit recommendations, indicating that the police were already doing the majority of the fifty-seven recommendations, that they disagreed with two or three of them and that there were items they wished to add.[32] According to Doe, the potential for real change has been lost.

Implementation is where city politicians are/were supposed to come in….unless they are invested in seeing their motion through to implementation, the social audit – so lovely to look at – is doomed to join other reports, decisions and inquest verdicts on the shelves of police bureaucrats and politicians.[33]

Doe contends that any process aimed at change is doomed to failure without close consultation and involvement of women's groups, [34] a demand which was clearly expressed by women's groups. The police chief chose to pursue an "alternative process" of consultation when developing his response to the recommendations, meeting with workers from youth services and agencies affiliated with law enforcement, the medical profession, government and religious institutions. He excluded and continues to exclude women's groups working in the area of rape and sexual assault.[35] This combination of circumstances has left Doe to conclude that "We are left with the impression of change".[36]

This summary of significant, high profile cases involving the civil and criminal courts constitute the legal backdrop to the current treatment of sexual assault cases in the legal system. It is to be hoped that they will gradually and positively influence the experience of women who are sexually assaulted and who choose to report the crime. The following section provides a snapshot of the impressions and opinions of service providers and advocates regarding barriers currently preventing sexually assaulted women from gaining meaningful access to and outcomes from the legal system.

31 Doe, 2003, p. 286.
32 *Ibid.*, p. 330.
33 *Ibid.*, p. 301.
34 *Ibid.*, p. 294.
35 *Ibid.*, p. 329.
36 *Ibid.*, p. 301.

PART 2 – An Overview of the Research

In an attempt to present the research data clearly and succinctly, it has been grouped into five sections, the first two of which distinguish between structural or systemic barriers and practices which create barriers. This method of categorizing the information is not meant to suggest that there is an absolute distinction between the two, since systemic or societal barriers influence the practices of individuals within the system. The third section presents barriers experienced by women in accessing non-criminal forms of redress, such as through the civil court system. The fourth section explores specific barriers experienced by marginalized groups of women and the last section summarizes comments or observations about the legal system which are of a general nature.[37]

2.1. Structural or Systemic Barriers

Structural or systemic barriers include those which are a logical outcome or consequence of principles, policies or larger societal issues at play in all sexual assault cases.

2.1.1. The Media

News reports of women's negative experiences with the legal system and portrayals through film and television of the legal process as extremely difficult and injurious to sexual assault survivors may inadvertently create barriers for women. Reports about current defence tactics are absorbed into the larger culture through the media and influence the decision-making of individual women who are sexually assaulted, dissuading them from reporting the crime to the police.

The idea that "it is not worth it to go through the system" is a barrier in itself.

Women are aware of the obstacles before they begin. Media exposure influences women's choice whether or not to report.

Reports of police officers accused of violence against women reinforce a perception of the legal system as untrustworthy.

When we read about officers accused of violence against women in the media, it affects the public, it influences how they see the system and whether they trust the system.

2.1.2. The Community

In smaller or rural communities, women may be shut down by the rejection or judgment of their community. Gossip, hearsay, or sympathy for the aggressor may create a hostile environment which discourages her from going forward with a police report of an assault.

Even if the abuser is convicted, the community may respond with "He has a family, now the children don't have their dad."

It is much more difficult to remain anonymous in such a context. Women often know individuals working within the legal system personally. If those individuals are likely to be unsympathetic, this may lessen or eliminate the likelihood that the woman will report.

In rural communities, everyone knows everyone. Women know that certain police officers won't be open to their story.

37 Throughout this document, sentences presented in italics without a reference are direct quotes or anecdotes provided by research participants.

2.1.3. Internal Barriers

Women internalize society's belief systems, reinforced by the media's portrayal of sexual assault, typically characterized by myths and stereotypes about the crime, the aggressor and the victim. They may struggle with feelings of shame related to the assault, and the belief that they are responsible (for example, if they wore a short skirt).

One woman didn't report (to police) because she was ashamed that she didn't fight back.

Known abusers are more difficult for women to report. Such situations are often more complicated personally and women often struggle with self-doubt and self-blame. They may not want to hurt the aggressor ("it'll ruin his life", "it was just sex"). Women are often more prepared to go through the system when the assault is perpetrated by a stranger; they are motivated because they want him caught.

Incest survivors may have difficulty recognizing the assault as abusive; given their experiences, abuse may seem normal. In cases of historical abuse, women know they will be interrogated and may fear they will lack credibility if their memory of the abuse is less than perfect.

2.1.4. The Complexity and Formality of the Court System

The atmosphere of formality in the courtroom during a trial is, in and of itself, a barrier for women. Rigid rules demonstrating respect for the court (e.g. no chewing gum, no leaning elbow on the back of the seat) all has the effect of intimidating women, especially on those who are most vulnerable in our society (e.g. newcomers, people with disabilities, people living in poverty, women with a history of abuse).

The Victorian atmosphere of formality, tradition and hierarchy makes it clear who's in charge – it's very controlling. It makes people feel small and stupid. This is an unspoken barrier.

2.1.5. Lack of Systemic Support for Women

Given its complexity and formality, most women have great difficulty understanding and accessing the legal system alone. This is exacerbated by the use of "legalese" and complex technical terms, and by the predominance of men in key roles within the legal system (e.g. police, judges, lawyers) while women are present in less powerful roles (e.g. secretary). These elements are extremely alienating and intimidating for many women. The presence of women in more powerful roles is, however, no guarantee in and of itself of better treatment and outcomes, since the problems are systemic.

Practically speaking, women without access to support services do not have access to the legal system. Funding cuts have resulted in a loss of advocacy services and overwhelmed community services. There is also a lack of coordinated services. This has further compromised access to the legal system for sexual assault survivors.

In rural communities, courts, police and other services are too far. Sometimes courts are located in different cities. This creates a feeling of disconnect and a psychological barrier. In all communities, lack of access to transportation and child care is highly problematic and obtrusive to justice for women.

Women experience a lack of sufficient and consistent access to the crown attorney throughout the trial.

2.1.6. Specialized Sexual Assault Squads

Assessments of Sexual Assault Squads were uneven. While Sexual Assault Squads are generally perceived as an improvement in police services, it was noted that the quality of officer training and service vary greatly and may be inadequate or nonexistent in some communities. The high turnover may impede consistent and adequate training of new recruits. Some said that investigative officers in specialized squads are more likely to follow established protocols than are front-line officers. A potential danger of specialized squads was mentioned: while women have no expectations of front-line officers, officers in specialized squads portray themselves as "experts", then use this to intimidate or pressure women.

In squads where cases involving both assault by a known aggressor and a stranger are dealt with, services are generally better in cases involving a stranger assault. Services in Specialized Domestic Violence Squads are usually faster and investigations proceed more pro-actively than in Sexual Assault Squads.

There is some variability in the services offered by sexual assault squads: they do not exist in all communities, and are organized according to different models, depending upon the community. For example, in some communities, the Squad is responsible for investigating sexual assault cases involving both children and adults. This brings certain disadvantages, as inevitably, comparisons are made and children are perceived as "more innocent" and as more worthy victims. Cases involving children tend to be seen as more serious and resources are siphoned off from cases of sexual assault against women.

2.1.7. Sex Offender Registry

The purpose of the recently-established sex offender registry is to record the identification of convicted sexual offenders. This facilitates the coordinated prosecution of an accused who has already been convicted of a sex offence in another jurisdiction. However, the registry may create a false sense of security, since most sexual assaults are never reported and therefore most abusers' names will never appear in the registry.

It also "ups the ante" for the accused by imposing a measure with far-reaching consequences for his life. For this reason, judges may be prone to be more lenient, for example, by giving the aggressor a discharge, a sentence which leaves him with no record.

2.1.8. High Standard of Proof

In Criminal Court there is a need for proof beyond a reasonable doubt. If there is a single doubt, the benefit must go to the accused. One worker stated:

There is no proof which is sufficient to remove their doubt.

The need for proof beyond a reasonable doubt can lead to outcomes with mixed messages:

A judge found the accused not guilty because of lack of proof, but told him "I never want to see you in my court again", indicating that he believed he had done it and might do it again.

Multiple aggressors pled not guilty to sexual assault. The defence lawyer made a deal with the Crown: if the witness withdraws her story, the abusers will apologize in court.

The concept of proof beyond a reasonable doubt is an important tenet. However, the mythology surrounding sexual assault makes it very difficult to attain this standard in sexual assault cases.

2.1.9. The Issue of Consent when the Accused is Known to the Victim

Generally, more stereotypes and myths come into play in the case of a known offender as these cases usually revolve around the issue of consent. These situations don't fit the image of a typical crime.

The police have more difficulty in cases involving a known offender. They feel bad but they have no evidence.

Physical evidence doesn't necessarily help; if it exists, the defence changes tactics and focuses on the issue of consent.

The victim had been a virgin before the assault. The evidence demonstrated injury and first time intercourse. The defence argued: "That's just what happens when it's the first time you have sex".

Difficulties in proving lack of consent occur when: there is a prior sexual history with the accused, there was engagement in some consensual sexual activity but the woman wanted the activity to stop at some point. This is especially difficult to prove in cases involving sado-masochistic sex or bondage.

By law, the partner initiating sexual contact is required to ask the other partner for their consent. Despite this, the focus in court is usually on whether she said no, not on whether he asked.

2.1.10. One-on-one Crime: Credibility

Because this crime takes place in isolation, usually in the presence of only the victim and the accused, the victim's credibility is usually a key focus of the defence.

During the preliminary trial, the defence was not interested in the incident, only in who the victim was. For example, the woman was asked questions such as: "What's your understanding of sexual assault?" "What books have you read?" (She was asked for a list of these) "What do you do at the sexual assault centre where you work?" She was also asked about her education. The defence was not trying to stop the trial; they knew there was enough evidence to proceed. They were trying to gain knowledge about who the woman was.

Credibility is largely a question of perception, and may be influenced by myths and stereotypes about women, about different groups of women and about sexual assault. Women have no control over these perceptions.

The lapse of time between the assault and the trial usually results in a certain amount of memory loss. If the woman changes small, often irrelevant details in her testimony, defence lawyers use this to attack the woman's credibility as a witness.

2.1.11. The Victim's Status as Witness

As a witness to the crime, the survivor loses control over the process once she enters the legal system. When she reports to the police, her choices become more limited. Some women may hesitate to report to police for this reason.

The victim has no legal representation, while the accused does, giving him an advantage. Crowns and police usually have extremely large workloads, while the defence lawyer's primary purpose is to focus time and resources on their client.

While the Crown must consult the victim on certain issues (e.g. the type of charges, negotiations around plea bargaining), there is no obligation to take her wishes into account.

2.1.12. The Rights of the Accused

The importance of protecting the rights of the accused within the legal system is unarguable. The accused, as an individual, is vulnerable when facing the power of the state, which is significantly greater than his own. This principle is therefore a question of human rights. However, the rights of the accused can sometimes have a negative impact on the experience of the complainant.

This is certainly true in sexual assault cases. For example, the right of the accused not to incriminate himself can decrease the level of public accountability for his actions.

In a case involving a police officer as the accused, the officer's defence was to offer no defence. The officer said as little as possible, then he could say to the Crown "you didn't prove your case". Technically, he never actually denied the assault in court.

The right of the accused to choose the language in which the trial is held may be intentionally manipulated by the accused in order to leave the woman at a disadvantage.

A francophone abuser, who had abused and isolated a francophone woman for years, requested that the trial be held in English because he knew that she spoke no English.

In an indictable case, the accused may choose a jury, which can slow the process and make it more intimidating for the woman.

2.1.13. Lack of Resources

In small communities, the practice of rotating judges, due to a lack of judges (known as "flying courts") causes delays. Judges wait to have 3 or 4 cases to try before going to a community. Women become discouraged in the face of such delays.

In one rural community, a young woman waited 3 years for the trial to occur.

In one community, an effort is made to ensure that the complainant does not have contact with the accused outside the courtroom. However, the lack of space in the courthouse sabotages that effort.

2.1.14. The Invisibility of Sexual Assault

Sexual assault is often minimized within the legal system. There is a resistance to acknowledging the seriousness of the problem, and it is often conflated and dismissed as domestic violence or "sex crimes", in a way which ignores that it is a specific form of violence against women.

Some participants identified a change in the trend of government funding. Whereas governments were funding sexual assault services 15 years ago, more recently, funding within the legal system has been focused on the issue of partner assault. As compared to the issue of domestic violence, little attention has been paid to improving the legal system and making it more responsive to sexual assault survivors. For example, specialized Domestic Violence Courts have designated Crown Prosecutors and judges who have more experience and information.

Relationships between women's services in the area of domestic violence and police are closer and more collaborative that those between sexual assault centres and police. Furthermore, as compared to Sexual Assault Squads, Partner Assault Squads are often faster, better and more proactive.

A woman was sexually assaulted by her ex-partner, who had never been abusive to her in the past. They'd broken up several years prior. The women's service wanted the assault coded as partner assault because they felt it would be better managed by the Partner Assault Squad. Police refused, argued that she wasn't physically hurt, and coded it as a sexual assault. When the woman asked if the assailant had been picked up, they told her that if the Sexual Assault Squad was dealing with it, it would be a couple of months.

In reality, these forms of violence against women are intimately connected, since most women are sexually assaulted by someone they know, often a partner. Furthermore, many women are physically assaulted with no evidence and may be both physically and sexually assaulted by a partner.

2.2. Practices Which Create Barriers

This section touches upon behaviours and practices of individuals or groups of individuals.

2.2.1. Police

Generally, research participants shared many concerns regarding police investigation of sexual assault cases.

A minority of participants expressed their belief that, while there is still room for improvement, police practices have improved greatly. In one small urban community, there has been an overall improvement in police practices and community relations since local women's services have begun participating in police training.

The following is a sample of various concerns as well as some positive observations provided by research participants.

Police attitudes and treatment of the victim

This was identified by a strong majority of research participants as being a significant problem.

They don't fundamentally believe it's a crime. They think it's about sex and fantasy, not about power and control.

Typically, the basic premise of the police is disbelief of the woman.

Their approach is to question the woman's credibility and break her if you can. Even "good cops" have trouble doing good work in this system.

A woman had been assaulted. She went home and called police at 2 AM. They told her to come in and make a report (did not offer to send a car). She said "I'll come tomorrow". Their attitude became more disbelieving after that.

The attitude of front-line officers is reflective of attitudes in society at large:

The front-line officer has the same ignorance as all of society.

Police attitudes can be summarized as: minimizing sexual assault as a crime, patronizing towards women, victim-blaming, biases related to the women's appearance or sexual history, perceiving women as hysterical, neurotic and hypochondriacs who are exaggerating (and treating them accordingly). Such attitudes are exacerbated if the woman is a member of a marginalized group (see also sub-section 2.4).

Sexual assault is more likely to be seen as a crime if you're a white, middle class, virgin. For many other women, it's not seen as a crime.

The police's credibility test is very difficult to pass because it is based on stereotypes, myths and judgements. If the assault falls outside of the "norm" in any way, police adopt these attitudes. For example, women fail the credibility test in the following situations: they have a criminal history; they have been involved in drinking or drugs; they are involved with the sex trade (e.g. as a dancer or a stripper); they have an existing relationship with the perpetrator (even a non-romantic relationship); sex toys are found in her home; she has reported a previous sexual assault; or, she is marginalized in any way and the aggressor has a high social status.

A young woman – a college student - was murdered following her return home from a club. She bled to death from vaginal lacerations. Her death was eventually ruled accidental, as police claimed she must have inflicted the injury upon herself. They justified this conclusion, in part, based on the fact that she had sex toys in her home. They informed the woman's parents of this, by way of "explanation" as to how this injury could have been self-inflicted.

In these situations, police are too willing to believe the man.

One officer stated: "He's a nice guy. He wouldn't do that."

The "norm" represents a limited number of assaults which are in fact the minority: a stranger assault against a woman who fits into the image of a "good victim".

Police attitudes vary with individual officers, resulting in a great deal of variability. This leaves women not knowing what to expect. The impact on women faced with police disbelief is traumatizing.

Their vision of how society functions is turned upside down. This experience demolishes their belief in the system, and their desire to be involved and participate in their community/society. It upsets the fundamental underpinning of how they believe society works.

Some participants noted a general improvement over the past 15 years. Police are better trained in sexual assault and demonstrate empathy toward the victim. This is particularly evident among younger officers, as new recruits have a higher level of education and are more culturally diverse.

Individual officers are a product of a society that understands gender better so they are less likely to stereotype women. Many now know what it's OK and not OK to say; there are fewer outrageous comments….Some things are better – others are not as good as they should be.

Resistance to proceeding with the investigation

Often, when women report a sexual assault to police, they are met with an attitude of scepticism and doubt from the beginning. Police are resistant to gathering information, opening a file and pressing charges.

In a typical process involving a young woman reporting a sexual assault, the young woman reports the assault to an officer, who informs her that a detective from the sexual assault unit will contact her. Often several days to a week elapse with no contact from the detective. Subsequently, when the detective does reach her, they claim that they will not be able to take the young woman's statement until sometime far in the future. This sends the woman a clear message that her assault is not considered important, and that the police would rather she just go away or drop the matter. This behaviour places complainants in the position of having to pursue the police in order to be allowed the opportunity to report their crime. This appears to be happening more frequently, with both adult and young women.

One woman had been assaulted seven weeks earlier. She was still waiting for the detective to be available to take her statement. She was becoming discouraged and disillusioned to the point that she was unlikely to pursue the matter.

There may be less resistance when women are assisted by an advocate.

A woman and a child were being stalked by a stranger. The woman called and the police did nothing. When a social worker called for the woman, she spoke to three people, each of whom passed her file on to someone else. Finally, someone opened a file for her.

It is often the front-line officer who has first contact with the woman who makes the decision to press charges. Often, no charges are laid even after repeat offences.

A young Mohawk woman was sexually assaulted on her reserve by another native man. She tried to report the assault to the OPP, who didn't want to make a report. The OPP officer said to the girl's mom, "All girls lie about these things". People from the community had evidence and had nowhere to bring it. A demonstration was organized with a press conference and pressure was brought to bear. The OPP ended up opening the case. This is typical of what Native women face, and indicative of attitudes to VAW in general. It so often rests with the front-line officer to make the decision.

There is no systematic assessment of cases which justifies decisions around laying charges and no logic to these decisions, which are erratic. Police share the rationale for their decisions and

their inconsistent behaviour in this regard leaves women not knowing what to expect.

The sexual assault centre is always surprised – the result is never what we expected.

Officers typically justify the decision to close the case by claiming that there "is not enough evidence". The decision not to proceed may be based solely upon the woman's statement, which they do not find convincing. Police are also reluctant to proceed with an investigation when the details are unclear, for example, if the woman is ambivalent, or if there is alcohol involved. They know the case will be difficult to investigate. Police make little attempt to seek other evidence.

There was some divergence of opinion regarding the proportion of reported sexual assaults which make it to court. Most felt that workers in direct services, including the hospital-based Sexual Assault Treatment Centres, have little contact with the court system because so few cases make it to court.

So few cases go to court, our service does nearly all its work with police. We never see judges. In the four years I've been working in a sexual assault service, there hasn't been one case where charges against the perpetrator were subsequently filed.

Others felt that there has been an increase over the years in the numbers of cases which go to court.

Investigative techniques

Sexual assault investigations are usually short, cursory and inadequate.

Police make little effort to find the perpetrator, then say the perpetrator cannot be located, even though they have his work number, though not his home number…. Police may decide that there is not enough evidence without speaking to him. If they do speak to him and he says the woman is lying, that is sufficient for them to say there is not enough evidence.

Police often communicate evident disbelief in the woman's story throughout the process. Women's sexual histories are regularly used by investigating officers to discredit their stories. Officers claim that the sex was consensual and they assess the woman's statement as "unconvincing". In such cases, few resources are allocated to the investigation, police make little effort to find the aggressor and dispose of the report before charges are ever laid.

Police are less effective when investigating an assault involving a known abuser for a number of reasons. They have less proof and greater difficulty investigating these assaults. They also have greater difficulty perceiving sexual assaults by a known aggressor as a crime. Police may make assumptions about the motivation of the woman in reporting such an assault, based on myths about rape victims, such as the notion that women lie about rape to get revenge on men.

In situations involving a known aggressor sexually assaulting a young woman, police assume there's something personal going on. They believe that she has a personal motivation of some sort, for example, that she's got it in for him, or that she does crime with him and she's not telling.

Stranger assaults tend to be higher profile and are a higher priority.

Inappropriate and intimidating interviewing techniques used with the complainant have been reported.

Two officers play good cop, bad cop roles during the woman's interview. One officer is empathic, while the other communicates he doesn't believe her.

Family members and friends are questioned without informing the woman. Informal comments made "off the record" may be coercive, threatening and abusive.

Due to pressure and coercion by police officers in the interview room, the survivor gave a statement according to what the police wanted her to say in order to flee the room.

One survivor went through an intense and very long interview by police – it took hours.

A technique known as statement analysis has been used by police in some communities to determine a woman's credibility. The technique is used to analyze the woman's statement in search of patterns which indicate she is lying. While it was designed for use with those accused of a crime, it is being used with crime victims. Concerns were raised about the scientific basis of the technique.

Multiple statements are required of the woman. Front-line officers gather far more detailed information than necessary, then the woman speaks to the investigator, then she does a videotaped statement. When there are inevitable discrepancies, they are used against the woman.

In a typical example of a statement procedure, the survivor's statement is first audio recorded. Subsequently, a videotaped statement is made. Then an unrecorded statement may follow. There are most likely discrepancies because several statements have been made. The survivor is then accused of lying.

One research participant noted that in her community, new protocols have improved this situation, reducing the need for the woman to repeat her statement.

Now the front-line officer asks for minimal information and no details about the assault, gets the information as soon as possible to the investigator and prioritizes the woman's safety. The woman is immediately referred to the specialized sexual assault unit.

There was some ambivalence among those consulted about the use of videotaped recordings of women's statements. Some were in favour of this practice, finding it useful when there are obvious and visible physical injuries. Others noted that physical injuries such as bruises are often more visible several days after the assault. In some cases, a videotaped statement can be used against the woman.

A woman's videotaped statement was used against her in court because she didn't have any bruises.

Women do not feel comfortable giving their statement in front of a video camera; they feel observed, self-conscious and afraid to say the wrong thing. Some women are so conscious of being taped that they may appear less credible. Sometimes, videotaped statements are used to assess the woman's demeanour.

Furthermore, this practice is not well suited to trauma survivors, who are known to retrieve their memory of the traumatic event gradually over time. When they change their story as their memory of the assault evolves, what they recount in later versions is more accurate than what they initially report. It is difficult to convince police of this.

On a positive note, in a small number of cases, the use of DNA evidence has helped to bring some cases to court and may help to bring unresolved cases from 15 years ago to court. Police have more success finding the accused in certain cases due to this new technology.

The abuser is a police officer or a friend or associate of police

Participants spoke of situations in which police officers perpetrated an assault or were complicit with the assailant.

A woman called police to report a childhood rape she had experienced, perpetrated by a police officer who was also a friend of the family. Four officers responded to her call. The woman was extremely upset and yelled that she had been raped by a police officer, while pointing at one of them [not saying that he was the aggressor but only pointing at him]*. The response from this officer was physical abuse: he twisted her arm, doing long-term damage to it. He spoke to her aggressively and disrespectfully, and told her to "shut up about the rape". Police took her to a hospital for her arm, where she was seated and attached to a wheelchair. They then took her to the police station where she was interrogated while tied to a chair. They took her fingerprints and a mug shot. She was then charged with assault against the officer who had assaulted her. They kept her overnight in prison. The charges against the woman were eventually dropped*.

A woman was threatened with a gun by her husband, who was a police officer.

Many knew of police officers who were directly or indirectly involved in cases of sexual assault or domestic violence.

An officer was accused of sexually assaulting a woman twice. He was also involved in investigating her abuse in a domestic violence case.

In one community, there has been an increase since 2000 in the numbers of officers charged with either sexual assault or domestic violence. A CBC-TV report noted higher rates of partner assault among police officers.[38]

When the abuser is a member of organized crime (for example, Hells Angels), to go ahead with accusations can increase the risks to a woman's safety. Some women believe that some gang members have succeeded in corrupting police officers or court officials. For these reasons, many victims choose not to report the sexual assault to police. In other instances, the aggressor is a close associate of the police, for example, a former officer, a fire fighter or a police trainer.

One abuser played hockey with police officers. They didn't believe he was offending because he portrayed the woman as crazy to them.

In the case of ritual abuse, police may be involved in a network of abusers who are well-placed and respected within the community, for example, judges, police officers, and lawyers. This more often takes place in rural communities, forcing women to rely on services in large cities.

Certain groups of women were identified as being particularly vulnerable to assault by a police officer: women involved in the sex trade, women on probation and women with a history of conflict with the law.

Police may show up at the home of a sex trade worker and intimidate her, make covert, subtle threats and abuse his power and authority.

38 Aired on "Disclosure" on March 12, 2002.

If the woman is on probation or serving a conditional sentence, the officer has the power to arrest her for breach of conditions and she will be charged or sent to jail. In these circumstances, women have no power to either refuse or report the assault.

Officers at a police station hired a stripper to come to the station. One of the officers hit her.

Aboriginal women on reserves may experience this type of situation frequently since the reserve is often a small, tightly-knit community. The abuser who is an officer may also be a friend or family member.

Police services treat police officers charged with assault differently. There is an internal culture of strong loyalty. Fellow officers may hesitate to report their co-workers and supervisors may be reluctant to take action. The treatment of the officer by police services depends upon the opinion held by the chief and the upper brass about this individual and whether or not they believe the charges. Those officers who are well-liked and successful within the force are more likely to get off. If there is any reason to discredit the woman they will be less likely to prosecute.

In one situation, where the officer was well-liked, the chief made public statements which discredited the woman and reinforced an image of her as a liar (see example 4 appendix 2). *In another situation, where the officer was not liked, police were very supportive of the complainant. In this situation, the officer's bail hearing lasted 4 days and he was denied bail at first, which is very unusual for a police officer.*

The officers involved may be transferred to a different region or station when they are charged with sexual assault. Women who experience assault by a police officer are very alone, as no one believes them and they have no resources.

Lack of police protection

Women's fear of reprisal by the abuser following a report is a significant factor preventing women from reporting assault, or experienced by them after they report it. This fear is especially prevalent among women in remote northern and other isolated communities, where the abuser is often in the same house, is related, or has a large family. Women are also particularly fearful when they continue to have contact with the abuser after they have reported.

Women's fear of reprisal by the aggressor is exacerbated when police do not enforce Restraining Orders or other non-communication orders. When women call for help in such matters, police respond by minimizing the danger and not taking it seriously, or by saying she needs a witness in order for them to take action. Often, they do not document the woman's calls.

In one community, follow-up by police on breaches of non-communication orders was reported to be excellent.

Charges laid against the woman

Several communities in Ontario – both urban and rural - have noticed an emerging trend of police laying charges of public mischief against women who report assault, under the guise of assessing the credibility of the person reporting sexual assault. Women may also be charged with public mischief if they report a sexual assault, then recant.

A woman reported a sexual assault to police, who initially believed her. The police then went to talk to the accused. Following this, the police no longer believed her. The woman was a

survivor of war and had been raped by police in her country of origin. She felt intimidated and recanted. Police pressed charges against her for public mischief. The man sued her in Civil Court. The woman now owes the man $5,000.

More often, police use the threat of charges to intimidate the woman into "confessing" that she is lying.

…following the initial interview, police told her they needed to speak with her and brought her to interrogation room where she was alone with one officer. He told her "You're lying". He pointed to a videotape on the table and said that the incident had been recorded on a security camera, and "What's on that tape was not a rape". The police officer then laid out a theory regarding her reasons for lying. He pointed out that she'd called her mother before calling 911: "If you were really raped, you'd call 911 first". Then he said, "I don't want to have to charge you, you're a nice girl. We know you want to go to college. What will we tell your professors when they call us?" During the course of the interrogation the young woman was asked by the detective if she had "ever walked the streets". She decided to tell them what they wanted to hear believing that the interview was being videotaped and that people watching it later would see she was mirroring back information under duress. She said "You're right, I lied". They asked why. She listed all the reasons they'd given.

Police may also threaten to lay such charges just before the woman's statement is recorded.

Women are being told they could get 14 years for perjury just before the video cameras are turned on.

This is particularly disturbing because the woman has no rights as a person accused of a crime until charges are laid. Police appear to be questioning women as suspects (i.e. for the crime of public mischief, perjury, etc.) without informing them of their rights or giving them the benefit of counsel. This situation is extremely intimidating for women and consequently, many withdraw their complaint.

Police make comments such as: "You know it's very important to tell the truth". "You know what could happen if you don't tell the truth: we could lay a charge, you could get a criminal record". Then the woman withdraws her story.

Some officers realize that this practice is harmful, and that when women change their story they do so for self-protection and not out of malicious intent. These officers are working from within to prevent this from happening. However, it was noted that the system is set up in such a way that even "good cops" cannot be allies to women.

Concerns were expressed that an increase in the number of complaint withdrawals has an impact on the individual woman as well as women as a group. Collectively, it influences statistics in a way that reinforces the stereotype that women lie about sexual assault.

<u>Tense relations between police and community-based women's organizations</u>

Difficulties in the relationships between sexual assault centres (SACs) and police departments were reported in several communities.

Police are so focussed on supporting each other that we can't have dialogue with them.

SACs in some communities receive few if any referrals from police services.

In the 3.5 years I've been here, the SAC has received no referrals from police at all.

The support and presence of a women's advocate is often actively discouraged by police, though they are more likely to accept the presence of the woman's friends and family members. If the woman goes into the police station with an advocate, she is told she cannot have anyone in the investigation room and the advocate is told to wait outside.

The woman ends up by herself in front of a video camera being grilled by the investigator.

If the woman herself asks for an advocate to be present and insists, they will let someone in. The interview is markedly different when workers are present: police are very careful about what they are saying.

Police in some communities have told workers that they are not allowed to advocate around investigations procedures because they are not investigators. For example, workers would not be allowed to question police for not interviewing a particular individual in the course of an investigation.

Some advocates have encountered situations where they are blocked from obtaining information about a woman's case by police citing restrictions to the Access to Information Act.

Even though the woman signed a release of information form, permitting police to release information to the worker, police countered by saying that as long as the case is under investigation, they are not required to supply any information.

One worker pointed out that this is evidence of a lack of collaboration and a one-sided relationship:

The SACC is required to give and record information in the evidence kit when the woman signs the form, but there is no 2-way obligation to share information.

2.2.2. Specific Issues in the Court System

Disclosure of private records

Research participants consistently reported that women's private records are rarely subpoenaed anymore. Women's services have observed a drop in this practice.

The SAC used to track the number of subpoenas… Now it no longer needs to.

Now [if the defence attempts to obtain access to the woman's records], *the judge holds a mini-hearing and scoops out the relevant information.*

However, it was noted that women still often fear that this will occur.

Slander lawsuit brought against the complainant by the accused

While it is still uncommon, some research participants reported that slander lawsuits brought against the complainant by the accused is occurring or being used as a threat in their community more frequently than before.

A woman reported her sexual assault to the police, who laid a charge. The case proceeded to a preliminary hearing and has been held over for a trial. The victim has now been served by the accused's lawyer with a slander lawsuit claiming hundreds of thousands of dollars from her. The woman hired a criminal defence lawyer. He met

with the offender's lawyer, who indicated that if she would ask the Crown to drop the criminal charge against his client, the civil suit will "go away".[39]

I was sexually assaulted by my family doctor since age 12. I spoke to a lawyer who cautioned me the doctor had more power and might sue me. The lawyer was concerned the doctor could afford the best legal representation and could smear me with suggestions I had a sleazy job. I worked in a massage clinic not the sex trade but the risk was still high I would be seen as not credible.

As seen in the example in the above section ("Charges laid against the woman"), if the woman has been charged with public mischief, she may then be more vulnerable to a slander lawsuit by the accused.

Use of the woman's sexual history

It was reported that the defence still uses the woman's sexual history in court to undermine her credibility. While the existing jurisprudence would enable the Crown to object, this does not always occur.

A woman's sexual history was allowed by the judge to be used in court, possibly because she had a psychiatric history. This is more likely to happen if the perpetrator is known to the woman – because he knows about her past sexual history.

Women's sexual history is still raised by the defence; the Crown has to remind the court that it's not appropriate.

In a recent case in Saskatchewan, reported in the media, the possibility of child sexual abuse was argued as evidence that the 12-year-old victim was likely to be "sexually aggressive". Her attacker received a reduced, conditional sentence on these grounds.

Justice Fred Kovach said he couldn't ignore allegations the girl had been raised in an abusive home. That evidence, he said, supports the defence theory that the girl was the sexual aggressor. Based on the circumstances, Kovatch ruled that jail time would not be appropriate.[40]

Another defence based upon historical abuse was reported in this research.

In a case of marital rape, the defence brought in the woman's books about incest. He tried to argue that she was confusing her father for her husband.

Despite the requirement that judges hold mini-hearings to allow this information to be used, the defence is more likely to find ways to work this in subtly and unofficially, through inferences and innuendo, rather than bringing it up explicitly. For example, defence might make oblique references to the woman's underwear or behaviour in order to paint a certain portrait of the woman and the assault. Again, if the Crown does not object, this is allowed.

The defence characterized the woman using all stereotypes possible. The defence asked the woman to set up her day by having her dress herself in front of the court. At another point, the defence summarized what happened after the woman left the bar by saying: "You left the bar, and crossed the parking lot, wearing a chiffon dress, panty hose and thong underwear. Is that right?" In his summation, the judge mentioned the thong underwear.

39 Cross, 2001, pp.1-2.
40 Posted on the website of CBC Saskatchewan, September 5, 2003.

Women often do not know that this practice is not allowed, except under specific circumstances. The actual use of the woman's sexual history in court, or the threat that this may occur and the woman's fear of it, may act as a barrier to the woman.

Screening and exclusion of potential jurors who are sexual assault survivors

This seems to be rare, but one example of such an occurrence was provided. The following is an excerpt from a proceeding which occurred in a Hamilton court on November 28, 2001:

> *As I have indicated, the charges in this case involve sexual touching, invitation to touching and sexual assault, father upon his daughters. If you, or someone you know, has ever been accused of any offence of this nature, or is a victim of such an offence, or otherwise involved in a similar offence or experience, please raise your hand and come to the front of the courtroom. We do not wish to embarrass anyone by asking questions about personal matters but at the same time we need to know about these things because they may make it too difficult for you to perform jury duty in this case. If you come forward I will discuss your situation with you.*

Cross-examination of the victim by the accused

Despite a recent case in Nova Scotia,[41] no examples of victims being cross-examined by the accused in criminal courts in Ontario were reported by research participants. One such incident was cited as having occurred in a family court. More commonly, the word is getting around that this could occur and women are afraid.

Victim Impact Statement

This statement is often requested of women too early in the process, often before her testimony. This eliminates her ability to comment upon the impact of the legal process and it makes the woman more vulnerable since she can be cross-examined on this statement.

Women are not always informed that they have the choice not to complete this statement. This is important, since there may be certain risks associated with it. For example, the Victim Impact Statement can be used by an abuser against a woman in Family Court during a custody hearing to demonstrate that the woman is unable to care for her children due to her traumatized condition.

The Victim Impact Statement is somewhat limited in its use. It cannot speak to or make any recommendations around sentencing and it may not enable a woman to voice what she wishes to express.

2.2.3. Key players in the Court System

Individuals can make an important difference to a sexual assault survivor's experience in the legal system.

> *The success or failure of a case often depends entirely upon the individuals involved (police officer, crown prosecutor, judge, victim-witness).*

Each has a key role to play, and barriers created by their behaviour and practices vary according to that role.

41 Foot, Richard and Vallis, Mary. Rape case suspect quizzes accuser: Six-hour ordeal leads to demands for stricter rules. National Post. January 17, 2003.

Defence lawyers

Barriers for women created by the practices of defence lawyers are many, including: mocking and disrespectful attitudes, innuendo and insinuations to destroy the woman's credibility, harassment and intimidation, abusive and traumatizing tactics, bullying behaviour.

A woman who had reported partner assault had been cross-examined by the defence lawyer. It was such a negative and intimidating experience for her that she decided not to report the man who had abused her as a child.

The goal of this behaviour seems to be to demolish the woman.

During the trial, the defence lawyer approached the woman while she was on the stand. The woman was very nervous and her hands were shaking. The defence lawyer asked her to pour some water, in order to force her to display her shaking hands. He then attempted to discredit her because of her nervousness, saying that she couldn't concentrate or remember accurately.

The behaviour of the defence is often so extreme that it causes many to question the essential integrity of a system which allows such treatment of sexual assault survivors to occur.

Cases can get thrown out on a technicality. It often seems as though the victim is often on trial, not the accused. The goal of the defence seems to be to break down the will of the survivor. The judge lets that happen. Is the justice system about finding out the truth?

The defence uses various tactics to delay the process, for up to 18 to 24 months in some cases. As a consequence, women become discouraged and the man may be acquitted.

Crown Prosecutors

The most frequently cited concern regarding Crown Prosecutors was their inaction and passivity, as well as the inconsistency in the vigour of prosecution, particularly in cases where the complainant is a woman from a marginalized group.

He brought a videotaped statement into court in which he very clearly said he didn't do it. The Crown didn't object and didn't cross-examine him.

Crowns do not raise objections to the use of inappropriate language and action by the defence and often do not make use of established case law and jurisprudence to protect women from certain tactics and behaviour on the part of the defence. Crown prosecutors do not consistently object to arguments based upon myths and stereotypes around sexual assault.

A woman's entire sexual history was brought up in court. Neither the judge nor the Crown objected…

Crowns generally remain neutral and do not show support for the woman. In one case, the Crown was antagonistic and sceptical.

The Crown Prosecutor was biased and judgmental with a woman. The woman was Eastern European, and language and culture were issues affecting her ability to tell her story. The Crown questioned the woman sceptically about her story, as though she didn't believe her.

The Crown's lack of availability to complainants was also raised as a major problem.

Women get little time to prepare with the Crown. They often meet the Crown the day before or the day of the trial.

Judges

Two main problems related to judges were identified as being their attitude and their lack of sensitivity and accountability.

A woman had 3 letters which supported her story. During the court process there was a change in Crown Prosecutors and not all of the letters were passed on to new Crown. When the woman told the Crown Attorney that there were three letters, the judge wouldn't let them bring forward the other two letters, saying "I won't have Ms. X running my court." At one point, the woman made a very slight face, expressing exasperation. The judge sent the jury out and reprimanded the woman in front of the whole court. Every time the Crown brought forward case law, the judge would turn to the defence lawyer and ask her how he should rule, and he would follow what she told him to do (see example 1, appendix 2).

Generally, many judges display attitudes based upon myths and stereotypes about women and sexual assault.

A young girl was anally assaulted. The judge said "At least she didn't lose her virginity. In her culture, it's her virginity that counts."

Judges rarely intervene to correct disrespectful or demeaning behaviour or practices on the part of the defence.

Judges participate in training on a voluntary basis only, and there is a perception among judges that training in sexual assault or other forms of violence against women may create bias. They have a great deal of power and little accountability. Only an internal process, through the Judicial Council, exists to deal with complaints.

Concerns were also raised about sentencing, which tends to be overly light, such as house arrest and conditional sentences. The aggressor may be found guilty, yet receive a conditional discharge. The length of sentences is not sufficient to enable women to establish a new life and support system separate from the abuser, in cases where the assault was perpetrated by a known aggressor.

Victim Witness Assistance Program (VWAP)

While this service plays a positive role in many communities, it also has serious limitations. One worker commented that VWAP increases women's access to the legal system, and that its services are useful both to complainants and to workers. Others noted that VWAP provides internal advocacy, which is limited since it is not completely autonomous.

VWAP calls the sexual assault centre when there is something controversial to comment upon, to be active about. SAC workers are the outspoken ones in the community.

As workers within the legal system, VWAP is obliged to share relevant information disclosed by the woman with the Crown, which then has an ongoing duty to disclose such information to the Defence. This is indicative of a relationship which is perhaps too close to allow VWAP workers to freely advocate in women's best interests.

There has been a shift towards internal advocacy. This means support and a little bit of advocacy. VWAP is so close to the Crown it's not objective support and advocacy.

Increasingly, VWAP services are replacing the advocacy services of community-based Sexual Assault Centres (SAC), as police tend to refer women to institutionalized services such as the VWAP rather than to community-based services such as the SACs. Some SACs are experiencing a decrease in the demand for their advocacy services, leading to a decrease in SAC workers in the courtroom.

2.3. Barriers within Non-Criminal Options

Outside of the Criminal Courts, women who have been sexually assaulted have several options for redress. Certain barriers commonly experienced by women were identified in each of these.

2.3.1. Civil Suits

In order to win a civil suit in a case of sexual assault, the woman must prove that the assault took place, that the defendant committed the assault, and that the assault harmed her. While the standard of proof is not as high in civil court, being based upon a "balance of probabilities", the harm caused by the assault may nonetheless be difficult to establish. This option is only worth pursuing if the man has the financial resources to make it worthwhile, since financial compensation is the only outcome of a civil suit.

Civil suits present a number of other challenges and risks. The defence may seek access to the woman's private records, and the protections which exist in Criminal Court do not exist in Civil Court. The man may bring a "counter-suit" against her, which can be intimidating and stressful. He may sue her for slander or claim false memory recovery. While the woman may choose to drop her suit to avoid this, there is no guarantee that the man will then drop his counter-suit.

2.3.2. Criminal Injuries Compensation Board (CICB)

Women who submit a claim to the CICB may receive monetary compensation for emotional and physical harm; however, if a woman is involved in illegal activity that appears to have contributed to the assault taking place, a claim cannot be made.

There have been significant decreases in the amounts accorded for compensation since 1993. Some women have been emotionally devastated by the small amounts of compensation which minimize the harm that was done to them.

2.3.3. Institutional abuse

There has been a trend over the past 5 to 10 years in institutions toward using internal complaints processes in dealing with sexual assault complaints. Institutions - including universities, workplaces, institutions for people with disabilities, psychiatric institutions and residential institutions - may actively discourage women from reporting sexual assault to the police.

Part of this process used may include mediation between the victim and the abuser. Internal complaints processes involving unions may produce a situation where the complainant and the accused have the same party advocating for them. This is a conflict of interest.

2.4. Barriers Experienced by Specific Groups of Women

In addition to the barriers preventing all women from gaining access and experiencing justice within the legal system which are described above, certain groups of women experience additional

barriers, often due to their marginalized status within society. Some of those barriers are common to many women who experience marginalization, while others are specific to particular groups.

In order to structure this section, information has been organized in categories pertaining to each group which was identified as experiencing barriers. In reality, no such clear, neat categories exist, and there is much crossover between types and manifestations of marginalization and barriers in women's lived experiences.

2.4.1. Barriers commonly experienced by women from marginalized communities

Women from marginalized communities often experience discrimination due to the attitudes – often based upon stereotypes, prejudice and ignorance - of service providers. There is often a perception or belief that women who are not from the dominant community are "abnormal".

As a result of such attitudes and beliefs, marginalized women often have less credibility and less status than women from the dominant culture. They and their safety may be less valued. They frequently lack information about the law and the legal system. Legal jargon and language, which is intimidating for all laypeople, may be especially intimidating, overwhelming and alienating for many women from marginalized communities.

Women from marginalized communities may not have access to information about the services available to them. They often are very isolated and lack access to services, including support services.

Certain barriers may be internal to their community. For example, sexual assault may be extremely taboo and they may face stigmatization from other members of their community if they disclose assault. Therefore, they don't want anyone, especially from their community to know because they are expecting blame.

In general, and for all of the above reasons, women from marginalized groups are less comfortable interacting with the system. They seldom report sexual assault and make very little if any use of services for sexual assault survivors and the legal system.

I work mostly with white women around sexual assault. Other women are not coming forward.

2.4.2. Groups experiencing specific barriers

Barriers specific to particular groups of women, and which are not mentioned above, are described in this section.

<u>Aboriginal women</u>

Many aboriginal women live in small, close-knit communities and the abuser is often well-known in the community and may hold a position of authority. Aboriginal women may meet with more resistance to laying charges for sexual assault from police on native reserves than from local community police. On some federal reserves, police are refusing to enforce any provincial orders, including restraining orders and child protection orders.

Both urban aboriginal women and those living on a reserve fear racism on the part of the police. Many young, aboriginal women report having witnessed or experienced significant racism and antagonism by police towards their friends, family members and communities. This experience

leads many to view the police as biased against aboriginal people, and to expect persecution, disbelief or racism at their hands, should they attempt to report assault.

Furthermore, aboriginal men experience oppression and racism within the legal system and are more likely to be convicted due to their marginalized status. Aboriginal women are often aware of this and it may create an additional barrier, as the women may feel protective of men from their community.

Some young native women have expressed that, regardless of their assault, giving that information to the police is tantamount to "ratting". This could lead one to conclude that, in some areas, police treatment of the community is seen as so poor that a rapist or abuser may even be seen as the lesser of two evils.

Immigrant and refugee women

Immigration status is one of the primary barriers for women from this group, particularly if they are sponsored by the abuser or if they are domestic workers whose presence in the country is dependent upon their employment.

The culture may encourage the woman's submission to her husband, even when there is violence. When the woman's community does not support and may actively impede her efforts to obtain justice, this operates as a significant barrier.

The marginalized status of immigrant and refugee men within the legal system may lead immigrant and refugee women to avoid reporting out of a desire to protect the men from their community. Women who are immigrants and refugees may also be afraid that their partners or other men from their community will be deported should they report a sexual assault. There are indications that women themselves may face the risk of deportation should they report an assault to police.

A 19-year-old woman without immigration status reported a sexual assault to the police. They checked her status and she was detained and eventually served with a deportation order to leave the country. That meant she would not have been able to testify at the trial. Because of public attention brought to the situation, the Ministry granted her a protective stay status.[42]

Immigrant and refugee women may experience marked fear of the police, the system and any form of authority. They have an expectation that they will not be believed. This may be due to negative experiences in their country of origin or experiences of racism and discrimination here in Canada. Not only racism, but also the expectation of racism, operates as a barrier.

Inadequate or inappropriate interpretation services are also a significant barrier.

The defence lawyer accused the complainant of reporting assault just to help her civil case. Because of a bad interpretation, the woman agreed. The man was found not guilty.

Women may fear that reporting assault will have negative repercussions such as shame or rejection for their family here or in their country.

42 This situation was shared in July 2004, following the conclusion of the consultations. It was nonetheless included due to the importance of the issue.

Women of colour and racialized women

Women who belong to a group which is racialized face a host of systemic barriers related to racism.

Increasingly, those who live with an inadequate income are proportionately more often people of colour.

There is more stigma now to being poor; poverty has become racialized.

As with aboriginal women and women who are immigrants and refugees, the marginalized status of men of colour and racialized men within the legal system may lead women to avoid reporting out of a desire to protect the men from their community.

Women living in poverty

Women living in poverty face many practical barriers, such as a lack of or inadequate transportation, childcare, or acceptable wardrobe (by court standards). When they enter the legal system, they engage with a system which is dominated by middle class culture. This gives some women more credibility than others, based on the way they act, walk and talk. Classism is a significant and ever-present barrier which is largely unnamed, invisible and unacknowledged.

Homeless women

A lack of adequate shelter creates many barriers for women. Homeless women tend to live a transitory existence, with many changes and much instability, and usually cannot provide a permanent address. This means that sexual assault workers cannot provide sustained and coherent support, and police cannot follow-up with the woman after the initial report.

Because women who lack shelter are often in crisis, they usually have other more pressing priorities linked to their survival than the assault. When those issues are settled, only then will they be able to come forward to report an assault. This may affect their credibility, as they will be questioned about why they took so long to come forward.

Women who are lesbian, bi-sexual and trans-gendered

Women who are marginalized due to their sexual orientation face homophobia and discrimination when they report a sexual assault. Police may hold beliefs and attitudes about lesbians and about sexual assault which create barriers, such as: lesbianism is sexy and kinky, so you should have liked that. They are likely not to be believed due to myths and stereotypes about lesbians, bisexuals and trans-gendered people. Trans-gendered women particularly lack credibility.

These women risk rejection from their community if they report their same-sex partner. Due to homophobia and other forms of discrimination, the community may feel the need to protect itself from exposing such crimes.

A woman may not have access to support services, as her abuser may use the same services as she does. Women who are lesbian, bi-sexual or trans-gendered may be “outed” by their partner if they report sexual assault which occurred within the relationship. Information regarding women’s sexual orientation is not necessarily kept confidential in court.

A woman was a complainant in a case of historical abuse. This period was a difficult one in her marriage, and while she was still with her husband at the time of the preliminary hearing, she

was separated and involved in a same sex relationship when the trial began. On the first day in court, the first question asked of her by the defence was: Are you currently married?

Women from ethno-cultural and religious minorities

In addition to external barriers common to many marginalized groups, women from ethno-cultural and religious minorities may face barriers which are internal to their community, such as ignorance, or an abuser who is a member of and protected by the community.

Some communities may practice and/or condone certain forms of sexual assault, including genital mutilation. There may be ignorance on the part of the authorities related to such issues.

Police questioned a woman's sexual assault because she was infibulated. They assumed that there should be more damage if an infibulated woman was sexually assaulted.

Young women

Young women are often blocked from judicial routes of protection in that they are not believed from the outset, and charges are rarely laid. Stereotypes and images of young people as being liars, manipulative, attention-seeking, untrustworthy, selfish, and teen-aged girls in particular as being melodramatic, self-involved, hysterical, histrionic and emotionally unreliable, all result in young women not being believed or taken seriously by police.

Young women report being treated very poorly from the outset by investigating officers, being repeatedly admonished that they "had better be sure this really was non-consensual" and being repeatedly told the penalties for lying, having their own criminal records mentioned to them in a suggestion that they cannot be considered credible, etc…

Young women may have inadequate information about what constitutes sexual assault, making it difficult for them to identify that they have experienced assault.

Young women may say they've never experienced sexual assault, but when you explore, you find they have.

The *Criminal Code's* limited definition of incest excludes many perpetrators (e.g. cousins, aunts and uncles), and therefore many forms of sexual abuse experienced by young women. While other sexual assault charges could still be laid, the penalties would be less serious.

Date rape drugs are used most commonly with young women in the college milieu. This form of sexual assault impedes women's access to the legal system, they cannot be a witness and there is a limited window during which there is still time to test for the drug, which leaves the system quickly, eliminating the evidence.

A number of women were given a date rape drug, then sexually assaulted and videotaped. One woman went to the police and said "I feel like I was raped but I have no memory of it".

There is a lack of access to adequate testing for drugs in rape cases, and a need for more extensive reporting of the use of date rape drugs.

For girls 15 years and under, if the abuse comes to the attention of the Children's Aid Society (CAS), the case automatically goes through the legal system without regard to the girl's choice. However, there are few support services available to girls in this age category outside of CAS if the abuser is not their caregiver. Support services within the legal system are inappropriate for girls of this age. Few services are available for the parent or caregiver of a young girl who has

been sexually abused by a third party. Girls in this age group are often afraid of being apprehended by the CAS.

If the young woman is 16 years old or older, she has a choice around whether to report. However, young women rarely report sexual assault as they are often extremely distrusting of the legal system, especially if they have a history of abuse, contact with social services due to family or behavioural problems, or conflict with the law.

The confidentiality of young women's personal information is frequently not protected. If the girl is under 16 years, CAS is automatically notified that she has made a report, and that information is then recorded in her record, which is permanent and to which many workers have and will continue to have access. For young women in conflict with the law, information about child sexual abuse or sexual assault is documented in pre-sentence reports as part of her history, and presented to the courts upon her sentencing for probation breaches. The pre-sentence report is subsequently made available to a range of professionals she may come into contact with throughout her life prior to turning 18, for example: probation officers, staff at custodial facilities, staff in group residences, psychiatrists, therapists and social workers, the crown, the defence, the judge, any spectators in the courtroom present when the pre-sentence report is read (including members of her peer group, community or family, and in some cases the abuser), and her parents.

Young women often discover, upon reporting a sexual assault, that their friends, family and current and ex-boyfriends have been contacted by police without their consent and given information about the assault.

Women with disabilities

One of the most significant barriers for women with physical disabilities is the inaccessibility of public buildings. Women with physical and intellectual disabilities are prevented from accessing services which are not adapted to their needs. For example, the woman may be prevented from adequately expressing herself if insufficient time is spent taking her statement.

> *A young girl with an intellectual disability was sexually assaulted. Because of her disability, she has difficulty telling a story in order, sequencing the events. Initially, the girl's mother spent much time helping her daughter tell her story, being careful not to lead her on. When the assault was reported, the police presence intimidated her daughter (the size of the officer, his gun, his uniform) though he tried to be gentle. He asked lots of questions, and the girl had trouble remembering and ordering the details. The girl was then asked to tell her story to others – the police and the CAS. She was required to do a 10 minute interview with strangers, then to have the story videotaped, without her mother in the room. Given her disability and her age, she had a great deal of difficulty. They took the videotape to the Crown, who felt the case would not go anywhere – that the videotape was useless. The mother was approached by police who said they'd press charges if she wanted, but girl would have to testify in court. The woman knew her daughter had been traumatized by the statements she'd already given and didn't want her to go through more. The case was not pursued.*

Institutional abuse – perpetrated either by a fellow resident or by a caregiver – is a reality. When the abuser also has a disability, stereotypes and misinformation about people with disabilities may impede successful prosecution. For example, there may be lower expectations of the abuser because he has a disability, he may be perceived as innocent and childlike, his power over the woman he assaulted, and the assault itself, may be minimized. Generally, when a woman with a disability is assaulted, she may have less credibility because we don't want or

expect people with disabilities to be sexual, and don't believe anyone would be sexual with them.

When the abuser is a caregiver, this is often very complex and confusing for the woman, who may have no other sources of touch in her life.

Women who are developmentally challenged often have no credibility with police.

> *The police said of a woman with an intellectual disability: "If she doesn't know the difference between yesterday and today, between Tuesday and Thursday, how can we believe her?"*

Their credibility is easily destroyed by defence lawyers.

Women with disabilities are treated with disrespect when they encounter people in the legal system who have a habit of speaking about them to others in their presence, rather than directing questions directly to the woman herself.

Deaf women

For deaf women, a range of problems with interpretation services constitute a major and essential barrier to the legal system. Interpretation services are often unavailable, inaccessible, inadequate or inappropriate. There are often significant delays when interpretation services are requested. When they are available, the quality is inadequate, or they are not adapted to the woman's language, language level, or culture, for example, in the case of an immigrant or refugee woman who is deaf.

> *I witnessed a case being heard in criminal court where the ASL[43] interpreter for the deaf perpetrator was interpreting at a high ASL level when the victim could not understand what was going on. Clearly, preference was given to the needs of the accused over the needs of the victim in this case. The lawyers and judge argued for two and a half hours about how it should be dealt with (the victim understanding none of what was being said and the court not having a clue what they were talking about). A pathetic waste of time, energy and resources—when these needs should have been ascertained and addressed by police, victim witness services and the crown prior to the court proceedings.*

The same interpreter may be used for the victim and the perpetrator, or a family member may be asked to interpret, both of which are inappropriate situations. TTY services may not exist, or if they do exist, they are not publicized.

The basic needs of deaf women may not be respected in court, for example, the need for eye breaks for women who must watch ASL interpreters for hours at a time.

Psychiatrized women

A high proportion of psychiatrized women are survivors of child sexual abuse. Going through the legal system may be traumatic for them. They may experience and have to deal with "flashbacks" to the sexual assault during court. Accommodations to the needs of psychiatrized women can enable them to participate more fully.

43 American Sign Language (ASL) is the dominant sign language of the Deaf community in the English-speaking parts of Canada. The *Langue des signes québécoise* (LSQ) is the language used by most Deaf Francophone Canadians, especially in the province of Quebec.

Luckily, one time, a woman judge let me sit beside the victim so that I could reassure her by my presence and be alert and ready in case she should begin to dissociate (in order to help her "come back" more quickly). This judge was very understanding and helpful. Unfortunately, she got sick and never returned to our court.

Distinguishing between flashbacks to current and historical abuse may be challenging, requiring adequate time for an in-depth, comprehensive and safe assessment.

In the case of psychiatrized women with a history of childhood sexual abuse, it can be difficult to sort out if it's a flashback – a current or past assault. This confusion makes them vulnerable and they can be exploited. This occurred in the case of a doctor who had sex with his patients then claimed they were making it up.

Institutional abuse, and abuse perpetrated by caregivers or service providers are a reality for psychiatrized women.

Francophone women

Francophone women face barriers when they cannot avail themselves of their legal right to obtain adequate services in French. Sometimes these services are simply unavailable, sometimes they are available only through an interpreter, and sometimes they are provided by someone who does not speak adequate French.

A woman requesting legal information in French had to speak to someone from another department. Her contact person was a secretary.

When women request services in French, this often slows down the process, exacerbating the delays already experienced by many women in the legal system. In Civil Court, there is a lack of lawyers who are able to express themselves in French.

Sex trade and strip club workers

Women working in these areas are often afraid of police and the legal system. Many have had experiences of abuse at the hands of police. They fear negative attitudes, not being believed and having charges laid against them if they report a sexual assault.

A lawyer dissuaded a woman from reporting a sexual assault because the accused might smear her due to her "sleazy job". The woman was working in a massage parlour – not as a sex trade worker – but she was told the risk was high that she would not be seen as credible because of her employment.

The case of women in Vancouver who went missing off the streets for 19 years was raised as an example of the way the legal system is less likely to respond to sexual assault against sex trade workers. Police neglected the cases of the Vancouver women and ignored evidence that a serial killer was at work.[44]

The myth that sex trade workers cannot be assaulted is a common barrier.

One judge explicitly said that he was giving an abuser a lesser sentence because the victim was a dancer.

44 Saunders and Thompson, 2004.

Sex trade workers may have definitions of assault which are different from the mainstream and specific to their work.

If the woman agrees to a particular kind of sexual act, and a different sexual act is demanded of her, they see this as a sexual assault: "I didn't agree to this kind of sex."

While many of those consulted spoke of current problems in police treatment of and attitudes towards sex trade workers, a minority felt that there has been much improvement over the past 20 years. Sensitization work done by SACs may be a factor influencing this improvement. Police are now more likely to take action in cases of sexual assault of sex trade workers.

A sex trade worker was murdered. Another woman encountered this man, who sexually assaulted and attempted to murder her. She got free and went to the hospital. The police agreed to accept the lab test with his sperm [as evidence in the murder case]. *The man pleaded guilty to the murder of the first woman and the sexual assault of the second woman.*

Ritual abuse survivors

This group of survivors has unique needs that the legal system is not set up to meet. Ritual abuse survivors often live a very transient existence, making it difficult to offer them sustained support and advocacy. Getting them to safety is the priority over accessing the legal system.

Abusers are well-organized, have developed interconnecting systems of abuse, and their activities are shrouded in secrecy.

A woman was abused by her father and brother on a regular basis, with ritualized aspects. Police went to speak to the brother. He told them she was lying and was so convincing they charged her with public mischief.

Contact with police, who represent and display power and authority, often triggers flashback for ritual abuse survivors. They may be unable to maintain boundaries and a sense of their separateness. In such situations, survivors may say whatever they think police want to hear.

Survivors and others in their circle are often in grave danger after reporting ritual abuse. Once a survivor reaches adulthood, there is little protection available to them, since lack of consent is extremely difficult to prove and force used by the abuser is based upon a lifetime of conditioning. Survivors will recant before putting others, with whom they have experienced abuse, in danger. They may have been threatened: "If you tell, I'll kill or hurt you or someone else."

Survivors of multiple victimizations

Women who have experienced a number of assaults throughout their lives lack credibility from the perspective of police.

If the woman has any previous sexual assault, police automatically assume she's lying. So women with greater vulnerability have no protection in the law.

The impact of sexual assault on women who are survivors of multiple victimizations is different, and their response to the legal system may be different. For example, a woman may react more negatively to being videotaped.

Survivors of multiple victimizations may frequently be in crisis. The most recent sexual assault may not be their priority, and they may have a tendency to minimize it. With support, a woman may be able to reflect upon why she is minimizing it, but this can take a long time.

Women living on a military base

Women living in such a setting experience a great deal of isolation, from support services, from each other and from the larger society. The use of rape drugs has occurred on military bases.

Women with low levels of literacy

Women lacking literacy skills have a great deal of difficulty successfully navigating the system.

Women who are in conflict with the law

This group is broadly disbelieved when reporting sexual assault.

Women with drug and alcohol addictions

Women who have addictions to drug and alcohol correspond to the stereotype of the sexual assault victim, causing them to be blamed for their victimization ("she brought it on herself").

2.5. General Comments

Participants in the consultations made some general comments summarizing their overall assessment of the legal system and its impact on women who report sexual assault. Some view the situation as primarily negative, with few benefits for women who utilize the system.

> *It is not worth it for women to go through the system. If there is a conviction, painful and hurtful things have been said about the woman, divisions have often been created in the family, the sentence is low and the abuser continues to deny his responsibility. If there is no conviction, this is de-validating for women. Either way, the woman loses and suffers again.*

Others see the ways in which the system hurts sexually assaulted women who seek justice, and are aware of the system's structural and intrinsic limitations. They remain convinced that it is possible, though difficult, for women to successfully use the legal system and obtain justice.

> *Our system is better than most with all its imperfections. Sexual assault is a particularly difficult crime to prove.*

A minority of respondents were primarily optimistic about improvements which have occurred and their positive impact on women's experience.

> *Overall, there seem to be more cases getting to court and I can't say with the same assurance that it will be a disaster, as I could 15 years ago. Jurisprudence can help improve the situation.*

This summary of the results of consultations held with front-line sexual assault workers within Ontario sexual assault indicates that, despite some improvements, there remain many significant barriers impeding women's meaningful access to the legal system. This raises the question: what factors are preventing the practical application of women's Charter-based equality rights throughout the legal system?

PART 3 – The Principle Versus the Practice of Equality

The goal of this research was to identify ongoing and emerging barriers preventing women from obtaining meaningful access to the legal system. While the scope of this research does not permit any definitive conclusions, participants' comments and observations provide a general sense of common problems experienced by women during police investigations of sexual assault cases. The results of the consultations also hint at the influence on the lower courts of the most significant jurisprudence in the area of sexual assault.

Some important inroads have been made towards ensuring that the principle of women's rights to equality and privacy in sexual assault cases is established in legislation and case law. There remain many gaps between women's formal equality achieved through legislation, the Charter and Charter-based decisions, and our substantive equality; that is, the way in which equality principles are or are not applied in practice. We turn now to a discussion of some possible reasons for the gaps between the principle and the practice of women's equality rights within the legal system.

3.1. Gatekeepers to the Criminal System

As the gatekeepers to the legal system[45], police play a crucial role in aiding or impeding women's access to the legal system. Furthermore, as an institution within Canadian society, police services fall within the purview of the Canadian Charter of Rights and Freedoms. This was definitively demonstrated by Justice Jean MacFarland's decision in the civil trial of Jane Doe v. the Toronto Police Services Board.

Yet women's advocates and front-line support workers who were consulted for this project overwhelmingly expressed grave concerns about the investigation of sexual assault cases by police, concerns which echoed the findings of the social audit conducted on Toronto Police Services. Positive changes and improvements which have occurred were also acknowledged. While some issues which were identified have recently emerged as areas of concern, other issues are longstanding.

The problems identified were most often related to police behaviours which reveal attitudes and beliefs founded upon stereotypes about women and myths about sexual assault. In other words, police treatment of sexual assault survivors raises concerns for women's advocates when it is informed by, and reinforces women's inequality within our society.

3.1.1. Ongoing Issues

Resistance to Advocacy

Resistance by police to the presence of an advocate is not new. While the presence of an advocate has been found to improve women's treatment by police, police have argued that the support person could be subpoenaed if they attend at the interview. Other issues are likely involved, as police no doubt prefer to retain complete control over the interview process, and may wish to avoid scrutiny. However, it is also true that if a support person comes into the interview, the officer will record who was present, and the information goes to the defence. This draws attention to the fact that there is a professional involved, whereas if there is no visible support person, it may not occur to the defence. Thus, the potential for the advocate to be

45 This term was shared by Pam Cross, legal services coordinator of METRAC, during an informal conversation.

subpoenaed is there, and the risk is increased by the presence of an advocate. However, this is one instance in which progress for women in the courts may influence policing. Since the Mills decision, the rate of success for production of records appears to have decreased, and this may in turn significantly decrease the risk that an advocate will be subpoenaed if she is present while the woman gives her statement.

Selection of Sexual Assault Cases

As noted, statistics indicate that the minority of reported sexual assault cases result in charges being laid and a trial. Many research participants expressed concern regarding the infrequency and inconsistency with which police lay charges when sexual assault is reported. Unlike domestic violence cases, there is no provincial mandatory charging policy in cases of sexual assault. In some communities, such a policy is in place and put into practice while in others it is not. This means that police officers have a great deal of discretion on this question.

The selection of sexual assault cases for court actually takes place in two steps: firstly, when police decide whether or not to lay charges; and secondly, when the Crown Prosecutor decides whether or not to proceed to trial. Furthermore, what may appear to be inconsistent and unpredictable may actually be governed by discernible patterns.

Through extensive research and analysis of court documents taking place over a period of 10 years, Renner[46] has identified a process of selectivity, operating through decisions made by police and Crown Prosecutors, which acts to discount the seriousness of sexual assault against women. The most typical cases of sexual assault against women are selected out of the system when the defining characteristics of male sexual violence against women are confounded with the very characteristics used to determine that a case is not severe. Whereas the vast majority of sexual assaults are perpetrated by an assailant known to the victim who is often part of her family and social network, and there is seldom visible physical harm caused to the victim, these very factors cause police and Crown Prosecutors to determine that a case is less serious. As Renner argues:

> *When the existence of a relationship, lack of physical harm, and the fact that the accused is not seen as "criminally dangerous", are used as the basis for selectivity to access to justice, fundamental rights are being denied. Because of the confounding of these two concepts by the legal process, typical victims of sexual assault are selected out of the legal process. For a typical case, it is unlikely that charges will be laid or that the Prosecutor will take the case to trial.*[47]

These three factors which are most commonly linked to the likelihood that a case would be selected out of the system are also common myths about sexual assault. Given that police negligence in the case of Jane Doe was found to be predicated upon myths about rape, Renner contends that "the police and the Prosecutors are exposing themselves to potential civil actions for failure to provide due and full protection of the law to women." He further asserts that "the excuse that 'it's hard to get a conviction in these cases' is no excuse, but rather a self-fulfilling prophecy that ensures perpetuation of the problem."[48] The most compelling argument against such selectivity based upon myths about rape, however, is that it denies women's basic rights to equal protection and security.

46 Renner, 2002a.
47 *Ibid*, p. 2.
48 *Ibid*, p. 2.

Lack of Adequate Training and Protocols

The lack of consistency in the quality of various aspects of police services is another ongoing issue raised by advocates. It was reported that officers demonstrate a range of attitudes, with some officers (mainly younger ones) showing respect and openness to sexual assault complainants, while others display patronizing, sceptical and disrespectful attitudes clearly influenced by myths and stereotypes. If the audit of Toronto Police Services is any indication of the quality of police training programs in police departments across Ontario, this problem is likely linked to a need for improved training, particularly of front-line officers.

Generally, inconsistency in the calibre of police services and in the treatment of sexual assault survivors led to a sense among research participants that the service received depends entirely on the individual providing the service. This speaks either to a lack of clear, concrete protocols which guide behaviour and ensure consistency, and to a lack of monitoring of police practices to ensure that existing protocols are followed.

Lack of Public Accountability

At many levels, the institution of policing lacks public accountability. This appears to be true in terms of procedures in place for lodging complaints against the police. Police investigate complaints against themselves internally, for example, in the case of police officers who violate established procedures. In order to lodge a complaint, it is usually necessary to speak first with the staff sergeant. This is a delicate situation, since the staff sergeant needs to maintain a tight, cohesive unit. He needs to be certain of his staff's loyalty in order to maintain his command. His daily working relationship with his staff makes it difficult for him to effectively deal with complaints against them.

The next step is to a lodge a Professional Standards Complaint (the correct step to take when an officer has failed to do their duty). Advocates claim that this process is slow, cumbersome, intimidating and weighted against the complainant. Following this, the next level in the complaints procedure is the Ontario Civilian Commission on Police Services, which is supposed to be an arms' length agency to review Professional Standards decisions. According to those who have supported women to use this system, it is unaccountable, does not make its policy and operating procedures publicly available and very rarely reverses any decision made by an individual police service. Overall, the complaints process is very long, requiring a great deal of perseverance. There are significant issues of access, right to complaint and modes of redress.

> *We need access to some way to contest what's happening that doesn't take a year. The complaints process is a totally inaccessible process for anyone who's not equipped to persevere.*

In addition to problems with the complaints process, there are few effective, autonomous systems and processes in place to oversee police services with community involvement. For example, in most communities there is no process in place – such as monthly case reviews - to monitor police investigations of sexual assault on an ongoing basis and allow for the exchange of feedback between police and the community. It is often difficult to obtain detailed statistics and information concerning sexual assault cases.

> *When a charge isn't laid, when a case is closed, there's no way to know if this was a case that was turned back on the victim. The case falls into the cracks once it's closed. There is a need for detailed scrutiny of police records.*

Police services boards, mandated to ensure civilian oversight of police services, exist in every community that has its own police force. They are comprised of city counsellors and appointees by the government and their effectiveness varies depending upon the individuals in place. A research participant gave an example of this: In recent years, in one municipality, a city councillor known to question decisions and lobby for progressive change was expelled from that police services board. The political nature of such a board makes it less trustworthy from the point of view of the community.

Community members need to know there's a non-political body unconnected to the police to ensure civilian oversight.

This body has influence on policy development, but not on policy operationalization, which is the purview of the chief of police in a particular service. This distinction is key and according to one worker interviewed:

The effectiveness of the development of policy all depends on the good will of the people in place to "operationalize it" in the spirit intended.

While the audit into the investigation of sexual assault cases by Toronto Police Service was an extremely important and groundbreaking initiative, as mentioned, the police are under no obligation to act on its recommendations and Toronto City Council has not involved itself in the implementation phase. Clearly, this has weakened the extent of its impact in Toronto. Furthermore, many of the concerns expressed by advocates and service providers from different communities in Ontario echo the issues raised by the social audit, indicating that the problems identified are common to police services in many communities in the province. Despite this fact, it does not appear that the results of this audit will benefit other police forces, for example, through some form of province-wide initiative to evaluate and improve upon current police practices and to pool best practices in the investigation of the sexual assault cases.

The judgement of Justice MacFarland in the case of the civil trial involving Jane Doe has shed light on the duties and obligations of police in Ontario to provide services which respect the equality rights of women. The audit into the investigation of sexual assault cases by Toronto Police services has provided the public with valuable information regarding the pitfalls of the current system, at least for the Toronto community. The process used for the audit, despite its shortcomings, established an interesting precedent of active community involvement in assessing the effectiveness of police services. Furthermore, the report and many of the recommendations produced by the audit offer useful and practical information and guidelines for constructive change.

This research indicates that those who work closely with women who have been sexually assaulted and choose to report the crime have a wealth of information and expertise to share. Clearly, there is a great deal of knowledge and potential for positive change. Community involvement, political will and systems for public accountability are needed to ensure that the opportunity is not lost.

3.1.2. Emerging Issues

<u>Investigative and Interviewing Techniques</u>

According to this research, many women reporting sexual assault are required to prove their credibility to police. Approaching women who report sexual assault as though they are probably

lying and using tactics in order to trick them into admitting it is discriminatory. It is based upon the myth that women frequently lie about sexual assault. It is unlikely that such an assumption and approach would be used with a robbery victim. This highlights an emerging trend identified by the research which threatens women's equality rights: the use of questionable investigative techniques by police, particularly techniques used to interview complainants.

The use of statement analysis in assessing the credibility of women's statement is particularly disturbing, and raises several questions. This technique was developed for use with those accused of a crime, usually male; in sexual assault cases, it is being used with the complainant, who is usually female. It would be important to verify the scientific validity of this technique, and particularly when it is applied differently than the way it was initially developed to be used. Given the apparent gender patterns which govern its use, the issue of discrimination and equality rights must also be explored. And finally, it would be interesting to explore whether this technique is being used for the investigation of other crimes, or solely for the crime of sexual assault. If the technique is applied only to sexual assault cases, a justification is necessary.

Overall, the development of standards for techniques used in interviewing sexual assault complainants and investigating sexual assault complaints is necessary. Police must be held to account for the techniques they are currently using.

Public Mischief Charges

Another emerging trend of concern to women and their advocates is the laying of public mischief charges when women report sexual assault, or when they report and then recant their story. This is extremely dangerous for women, as it creates a climate in which they place themselves at risk by reporting sexual assault. Women come to the police believing themselves to be victims but may be viewed by the police as suspects. They are then trapped in a Catch-22 situation: they are accused of lying and pressured by threats of public mischief charges to withdraw their stories; then if they do recant, they can be accused of public mischief or perjury for lying in the first place. Furthermore, treating women as "suspects" for the charge of public mischief places them in a vulnerable situation. As the suspect of a crime, a woman has few rights, and police are permitted to use interviewing techniques which could trick or intimidate the woman. Once charges are laid, and the woman is officially accused of a crime, she has more rights, such as the right to legal counsel.

Notwithstanding the increasing acknowledgment that it is in society's best interests to encourage the reporting of sexual assault offences (for example, in the preamble to Bill C-46), such principles do not appear to have filtered down to police services, either in theory or in practice. The emergence of increasingly intimidating and dissuasive interviewing and investigative techniques reported from some communities, and of public mischief charges laid against the complainant, could lead one to speculate that we may be seeing a backlash to the civil trial involving Jane Doe.

A research participant was wondering if as a result of the court's decision in this case, police may be reacting to their perception of increased liability by seeking a clear resolution of all cases and acting to ensure that no cases are left open. They may be hoping that this would absolve them of liability in the event that they do not charge or apprehend a perpetrator, who then re-offends?

3.2. Successes and Limitations of Jurisprudence as a Remedy

While the scope and methodology of this research do not lend themselves to any definite conclusions, the comments, examples and observations of those front-line workers and women's advocates consulted suggest that some recent legal decisions may be having an influence in the lower courts. The jurisprudence is having a positive impact, though the issues identified as problematic have not been completely resolved.

The successful application for the disclosure of women's private records appears to be decreasing; however, the risk and threat are still there, as demonstrated by the Shearing case. Advocates report that women are still afraid of such practices, and this fear in itself may act as a barrier. Women's sexual history is still being raised in some cases by the defence, both explicitly and implicitly, with little or no reaction from the Crown and the Judge. Further research is needed to determine how and why it occurs, despite the guidelines which have been established to restrict this practice.

Recent case law has established important equality principles, which serve as useful precedent for the defence of women's equality. However, this research indicates that women's equality is still frequently violated in the court system, largely due to subtle, longstanding practices based on attitudes and beliefs which are so entrenched in the legal system that they often remain invisible, as well as the emergence of some troubling new practices by the defence.

3.2.1. Ongoing Issues

Many of the barriers experienced by women in the court system, as described in this research, are longstanding and have to do with disrespectful, indifferent or uninformed attitudes and behaviours demonstrated by the primary actors in that system, as well as the dynamic between them during court proceedings.

The previously mentioned analysis and research conducted by Renner and his associates has exposed the degree to which myths about rape and stereotypes about rape victims comprise the underpinning of what goes on in sexual assault trials. As described, Renner has studied the effect on the process and outcome of sexual assault trials when the defining characteristics of male sexual violence against women are confounded with the very characteristics used to determine that a case is not severe. We have seen that this distortion of reality acts to discount the most typical cases of sexual assault so that they are selected out of the system (see Section 3, part 3.1).

Renner's research has also shown that this conceptualization of sexual assault further discounts the seriousness of sexual assault through a process of disparity in terms of the way in which those found guilty of sexual assault are sentenced. Those cases in which the accused is known to the victim, in which the victim has experienced no visible, physical harm, and in which the accused is not otherwise criminally dangerous, are the cases which are dealt with most leniently. Cases in which these three factors are present result in a higher acquittal rate, or a lighter sentence for the accused, so that:

> *In practice, the very factors which characterize most sexual assaults also serve to discount how seriously they will be treated by the legal system.*[49]

49 Parriag and Renner, 1998.

This body of research provides a detailed analysis of the actual content and dynamics of sexual assault trials. The nature of the judicial process in sexual assault trials has been quantified and catalogued through the analysis of court records and court transcripts, using a coding system. Both the content (i.e. the substance of the trial) and the legal processes through which this substance is introduced into sexual assault trials are analysed. The results of the research show that the three factors which are responsible for discounting the seriousness of sexual assault also dictate the content of the trial. Rape myths are used extensively to form the content of questions victims are asked in the courtroom, by both the Crown and the defence. Normal social situations for heterosexual women are treated as the precursor to the probable outcome of consensual sex. What is expected of women as normal social behaviour is used to infer consent to sex, something Renner and his associates consider to be illogical and unjust.

The content put forward during the trial is a foregone conclusion and the courtroom dialogue is a predictable script. The research has produced a simple, descriptive, statistical picture of these aspects of a sexual assault trial, revealing 16 categories based on themes which reflect socially accepted myths and stereotypes about sexual assault. Examples of myths underlying content categories are: the presence of torn clothing, who removed the victim's clothing, physical signs of injury, the victim's emotional state when reporting the assault, and whether the victim experienced emotional problems following the assault. Additional myths and social expectations which legitimize the victim's status include: not initiating the encounter, no prior knowledge of the accused and resistance to the sexual demands.[50]

The dynamic between the Crown and the defence is complementary and non-conflictual. Each ignores or raises content depending upon if it is advantageous or disadvantageous for the victim (i.e. the Crown raises content that is advantageous for the victim, and the defence raises content that is considered disadvantageous), based on identical premises, founded on the same rape mythology, which remains unchallenged. The result is the construction of sexual assault within the courtroom in a way which is alienating for the victim and completely unrelated to her actual experience. Each of the actors in the court system is complicit in this outcome in their own way, depending upon their role in the system.

Unethical Practices by Defence Lawyers

Participants in this research identified that defence lawyers frequently use tactics which victims experience as humiliating and intimidating. Renner's analysis has uncovered the use by defence lawyers of known means of distortion of the truth, some of which are used in propaganda and in advertising. Defence lawyers frequently use word pictures to convey an image which has surplus meaning that is damaging to the victim and favourable to the accused. The language of consensual sex is used, sanitizing the sexual assault (e.g. the use of phrases such as "made love" or "had sex with").

Other tactics used by the Defence which deliberately distort reality are: the incorporation of false premises within arguments having correct formal structure, the use of arguments based on errors of logic, and impeachment – setting the woman up to make mistakes in her testimony about irrelevant details, in order to undermine her credibility. The analysis conducted upon courtroom content, process and outcome demonstrated that the aggressive use of such tactics affects the outcome, having as much impact as the facts of the case upon the outcome.

50 Parriag and Renner, 1998.

While acknowledging that the role of the defence is to provide the best possible legal defence for the accused, and that it is usual for the defence to be given much latitude to this end, Renner points out that there are ethical and legal limits to how far the defence may go in order to play this role. He contends that this use of tactics which are known means of distortion of the truth is unethical – similar to tampering with evidence. While the use of such tactics in advertising is regulated under "truth in advertising" legislation, it is unregulated within the court system, except to the extent that the Crown and the judge fulfill their roles.[51] The reason they pass unchallenged in the courtroom is because of the broad acceptance and absorption of socially-based myths and stereotypes about sexual assault into the legal system.

Passivity of Crown Prosecutors

Crown Prosecutors contribute to the unjust process and outcome which are common in sexual assault trials through their passivity. By not challenging the basic myths, stereotypes and assumptions underlying the arguments of the defence, and through their acceptance of unreasonable logic, the Crown fails in its central role and responsibility to prevent any miscarriage of justice. The Crown is limited to three roles in order to achieve this end:

- anticipate what the Defence will ask and inoculate against these questions by asking them before the Defence has a chance to do so;
- raising objections to inappropriate lines of questions asked by the Defence;
- re-examine the witness when the Defence is finished and ask further questions by any issues brought up by the Defence.[52]

By actively fulfilling these three roles, the Crown has ample opportunity to challenge the intrusion of rape mythology into the judicial process. However, Renner's research demonstrated that the Crown seldom takes advantage of all the tactics at their disposal to counter the damage done by the Defence. According to Renner, the Crown must help the victim tell her story as she experienced it in order to ensure that sexual assault trials deal with typical sexual assaults, and that typically, women who are sexually assaulted have access to justice.[53]

Judges Perpetuate Myths and Stereotypes through Sentencing

Technically, judges are in charge of the court process; however, Renner's research reveals that there is seldom any direct involvement on the part of judges apart from procedural arrangements. Judges' contribution to the injustice that often occurs during and as a result of sexual assault trials is most evident at the time of sentencing.

The three factors related to sexual assault being discounted as a serious crime (the existence of a relationship, the lack of physical harm, and the fact that the offender is of good reputation) comprise the criteria for leniency in sentencing. If only atypical cases of sexual assault are seen as serious, by definition, all typical cases are seen as not serious. When judges justify their reasons for sentencing, the same set of content categories based on myths and stereotypes inform those decisions.[54]

Many participants in this research stressed the need for training for judges. Fraser supports this contention, and explores the widely recognized need as well as many of the barriers to judicial

51 Renner and Parriag, 2002b, p. 2.
52 Parriag and Renner, 1998.
53 Renner and Parriag, 2002a.
54 Parriag and Renner, 1998.

social context education.[55] A common argument against the training of judges is the risk that it will undermine their impartiality. However, Abella argues that:

> *Weighing values and taking public policy into account does not impair judicial neutrality or impartiality. Pretending we do not take them into account, and refusing to confront our personal views and be open in spite of them, may be the bigger risk to impartiality.*[56]

Fraser points out that in 1994, the Canadian Judicial Council committed itself to the concept of social context education for Canadian judges, a commitment which is currently being realized by the National Judicial Institute. However, since such education is not mandatory, there is no guarantee that judges presiding over sexual assault trials have received the necessary training enabling them to make well-informed decisions. While this type of education is now becoming more common in law schools, "the fact is that the judges of today did not receive the kind of social context education that law schools and the public now believe is an important component of a lawyer's education."[57]

Renner's work provides concrete evidence bolstering the observations of those consulted for this research, exposing a fundamental, systemic problem with the legal process. In reality, most sexual assaults are comprised of three essential factors which are the very factors used to systematically exclude them from the legal system, and to excuse those that do make it into the system. Furthermore, this construction of sexual assault within the courtroom based on socially accepted myths and stereotypes and the distortion of the rules of reason denies the reality of women's experience and re-victimizes them.

3.2.2. Emerging Issues

Through this research, and through recent media reports, some new and emerging issues of concern were identified.

<u>The Complainant's History of Childhood Sexual Abuse</u>

As described earlier, the recent case of a 12-year-old girl whose attacker was found guilty, but given a two-year conditional sentence rather than being sent to jail, on the basis that the child was likely to have been the sexual aggressor since she had a history of sexual abuse, is an extremely disturbing, unacceptable and dangerous precedent for all women.

Given that the complainant in this case is below the legal age of consent, and that the law strictly limits the ways in which a complainant's sexual history may be brought up in a sexual assault case, it is unclear why this child's past experience of sexual abuse was allowed to be raised by the judge, without an appeal by the Crown. This case strikingly demonstrates the gap which exists between the principle and the practice of equality for women and children, especially those who belong to further marginalized groups, within the court system.

55 The Honourable Justice Catherine A. Fraser, Chief Justice of Alberta Canada. Creating Access to Justice through Judicial Education: Correcting the Blindness. First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 2002.

56 Abella, J.A., in The Honourable Justice Catherine A. Fraser, Chief Justice of Alberta Canada. Creating Access to Justice, p. 11.

57 The Honourable Justice Catherine A. Fraser, Chief Justice of Alberta Canada. Creating Access to Justice, p. 15

Slander Lawsuit Brought Against the Complainant by the Accused

This practice jeopardizes the complainant's rights as well as several principles of Canadian law. When a woman reports a sexual assault, she becomes the witness to a crime. The decision as to whether or not to proceed to trial is not hers. The use of such intimidation tactics to influence the way in which a crime is dealt with is a serious abrogation of criminal law. Furthermore, such a tactic has serious consequences for the complainant at many levels:

> *If the woman in this situation were to retract her original statement to the police, she makes herself vulnerable to possible criminal charges such as mischief and perjury, among others. She will need to incur legal costs in consulting with a lawyer. She has no particular reason to believe that the accused will keep his word; so she could find herself in a situation where she has convinced the Crown Attorney to drop the charge but still faces a civil lawsuit.*[58]

To the extent that such a tactic dissuades women from reporting sexual assault and proceeding through the legal system, it contradicts current legislation and it is an attack on women's equality rights.

Screening jurors who are survivors

While only two examples of such a practice were identified by this research, it alerts women's advocates to a potential problem. Such a practice is problematic on many levels. Firstly, it compels women jurors to disclose that they have been sexually assaulted. Secondly, the range of people to be excluded from jury duty includes not only people with direct experience of sexual abuse, either as victim or aggressor, but also those who know someone with such experience. Given the number of women who either have themselves been sexually assaulted, or who know a friend or family member who has been sexually assaulted, this effectively excludes the vast majority of women from sitting as a juror. And lastly, the judge in this case is making an assumption that sexual abuse survivors would be less capable of judging such a case.

Because of the overwhelming disproportion of women as compared to men who have experienced sexual assault, this type of practice is discriminatory towards women. Furthermore, forcing women to reveal such personal information is an infringement of women's right to privacy.

3.3. The Construction of Sexual Assault as a Medical, Legal, or Private Problem

A common theme underlying many of the comments and examples shared by women's advocates and front-line workers during the course of this research was the observation that systems and institutions often respond to sexual assault survivors in a way which does not correspond to the reality of their experience. Services and procedures are designed to respond to a certain kind of rape, rather than the most typical kinds of rape experienced by most women, and to meet the needs of the system which created them, rather than the needs of the woman who has been sexually assaulted. In many instances, sexual assault survivors are re-victimized by difficult and intimidating procedures, and frequently encounter the common myths and stereotypes about who is most likely to be assaulted, by whom and how.

58 Cross, 2001, p. 2.

3.3.1. Sexual Assault as a Medical Problem

The experience of sexual assault has been constructed as a medical problem through an alliance between the medical and legal institutions.[59] Women's response to sexual assault has been pathologized through the DSM-IV, which has established "Post Traumatic Stress Disorder" as a diagnosis. The symptoms which serve as the criteria for this diagnosis have become a standard for how a woman must act following a rape in order to be a credible victim. The absence of evidence of Rape Trauma Syndrome may be used by the defence as evidence that sexual assault did not occur.

> *…if the woman needs counselling after the assault, the prosecution introduces this as evidence, if she does not, the defence claims the absence of the rape trauma syndrome is evidence against a sexual assault….To be a credible victim, the woman must be a physical and emotional wreck, and show it.*[60]

The establishment of hospital-based Sexual Assault Care Centres (SACCs) in Ontario places the care of sexual assault survivors under the purview of the medical establishment. While hospital-based sexual assault care centres offer counselling and health care to sexually assaulted women as well as men and children, women who use their services may feel pressured to use the sexual assault evidence kit, which, according to Jane Doe and many other women who have used it, is an invasive and intrusive procedure, as well as being inaccessible for many women due to geographic distances combined with time limits (the test must be performed within 72 hours to be effective) - certainly the last thing a recently sexually assaulted woman would wish to undergo.

Within such a context, "health care" for survivors is conflated with procedures which aim to find evidence in order to establish the victim's credibility. Since sexual assaults are mainly perpetrated by a known aggressor, it is unlikely that establishing the aggressor's identity is the purpose of this evidence-gathering in most cases. The legal system requires medical verification of the sexual assault in order to proceed with the investigation.

> *I believe that the overriding purpose of forensic testing is not to collect evidence to catch the rapist but to validate a woman's claim that she has been raped. Her story is not believed by investigating officers until a medical professional confirms it verbally and in writing. The case is then opened. Without that medical verification, the already slim chances of founding the case become minute.*[61]

The need for such verification has as its premise the myths that most sexual assaults are accompanied by physical evidence such as cuts and bruising, and that if such evidence is not present, the woman is lying. While women are offered a choice as to whether or not to undergo these tests, police often say they are necessary in order to proceed with an investigation, which is not true. Furthermore, the evidence gathered is not used in 90% of the cases which go to court.[62]

Hospital-based services for women are subject to bureaucracy and hospital regulations. Service providers cannot freely advocate for women as they must work within the hospital hierarchy. In Ontario, there is some concern that there is a government agenda aimed at moving towards a "one-stop shopping" model of services for survivors.

59 Doe, 2003.
60 Renner, 2002, p. 7.
61 Doe, 2003, p. 305.
62 *Ibid.*

Existing government agendas encourage a one-stop shopping program that will see the amalgamation of community-based rape crisis centres and hospital-based sexual –assault care centres under one hospital roof.[63]

The loss of community-based sexual assault centres providing feminist counselling in favour of a medical approach to care would mean the loss of autonomous advocacy services for survivors. Given the many pitfalls for sexual assault survivors inherent in the medical and legal systems, this would clearly be a devastating loss.

3.3.2. Sexual Assault as a Legal Problem

Sexual assault can also be constructed as a strictly legal problem such that the reality of sexual assault as a social problem and the perspective of the victim's experience are ignored in favour of legal concepts, definitions and solutions. According to Renner, the Mills decision is an example of the way in which legal decisions are based upon legalistic concepts which render invisible the needs of the victim, as a traumatized human being. While the Mills decision is arguably an extremely favourable one for women, Renner contends that it is based on a faulty premise.

Following any type of traumatic experience, self-blame, guilt and depression are normal, common human reactions. Crisis intervention is an approach which has been developed in response to the medical needs of trauma survivors. Crisis intervention immediately and effectively addresses such feelings, in an effort to prevent them from surfacing later. As such, addressing such feelings can be argued to be part of a medical best practice to which all trauma survivors have a right.

A skilled crisis worker will always cover this ground of self-doubt and self-blame. This is the preferred treatment; it is the best medical practice… Any record of good crisis intervention will include countless references to self-doubt and self-blame.[64]

The Mills decision was framed in terms of balancing the right of the accused to a fair trial versus the right of the complainant to privacy. Renner argues that the danger of framing an issue in terms of competing rights is that the rights of the accused will most frequently be given precedence. Instead, the legal system must be pushed to incorporate notions which reflect the real nature of sexual assault and its impact upon victims. In the case of the disclosure of private records, the issue is one of fundamental justice which the courts must uphold.

Equal protection of the law requires that a victim should not have to choose between treatment and prosecution. The means used by the defence must be legitimate, otherwise justice is compromised. Just as threatening a witness is not a legitimate means of defence, neither is withholding or distorting best medical practices justified.[65]

Renner's argument that the principle of fundamental justice, based on women's actual experience of sexual assault, as a guideline for defending or attacking legal arguments is a sound one. However, it is important to recognize the broad diversity of women's experience, rather than limiting this in any way by medical definitions of trauma and traumatized individuals.

63 Doe, 2003, p. 305.
64 Renner, no date, p. 2.
65 *Ibid.*p. 3.

Legal definitions of a sexual assault contribute to alienating survivors from their own lived experiences. Jane Doe describes the way in which her rape was defined in civil court as "non-violent" according to prevailing police definitions. Based upon a tool developed in the 70's, which profiles different categories of stranger rapists, the rapist who attacked Jane Doe was described as non-violent. Police attempted to justify their failure to warn Jane Doe because of this categorization of the rapist.[66] This argument was made despite the fact that Jane Doe was raped while a knife was held against her throat.

The Criminal Code definitions of sexual assault, developed as a result of the legislative reform of 1983, contribute to the discounting of the most typical forms of sexual assault discussed earlier. This is another instance where legal definitions take precedence over women's lived experiences. Sexual assault is separated into three categories, with increasing levels of overt, explicit violence used to determine the increasing seriousness of the offences. The subtle, pernicious threat inherent in sexual assault is rendered invisible and insignificant.

> *Ultimately, this "new" legislation has allowed the police, lawyers and judges to decide the level or degree to which your specific forced penetration belongs, outside of an understanding of the act of rape itself and often contrary to how you experienced it. The current definition places acts of unwanted touching, molestation and other assaultive or degrading sexual behaviour that women experience solely because of their gender at the bottom of a hierarchy under the rubric of sexual assault.*[67]

Renner contends that such a conceptualization of sexual assault is predicated upon male relationships, in which mild versions of violence between men who try to dominate one another in the context of a competitive relationship are not only allowed, but even encouraged, as demonstrated in many popular sports. While his intent is not to condone such relationships between men, he suggests that such a framework is not appropriate when applied to heterosexual social relationships:

> *…this standard for "acceptable" aggression is simply not applicable to heterosexual social relationships if social justice is to be served.*[68]

More generally, sexual assault is increasingly constructed as a legal problem for which solutions lying within the purview of the legal system are prioritized. This belies the social nature of the problem of sexual assault, and the necessity of identifying solutions which address the social source of the problem, and its impact on all of us, especially survivors.

> *Rape is a social crime. Solutions based on militaristic strategies that call for increased police presence and control, bigger prisons and longer incarcerations, which occasionally punish or make examples of individual offenders, deny the social and economic roots of male sexual violence. To isolate one series of rapes, one sensational case and conviction, and claim justice when countless more go unreported, fortifies people's desperate need to believe that rape and sexual assault are episodic – when it is justice that is episodic.*[69]

The establishment and expansion of the Victim Witness Assistance Program (VWAP) and Victim's Services, both services for victims of crime which are part of the legal system, are part

66 Doe, 2003, pp. 262-264.
67 *Ibid.,* p. 114
68 Renner *et al.* 1997, p. 9.
69 Doe, 2003, p. 77.

of this "law and order" approach to dealing with sexual assault. Like the expansion of hospital-based SACCs, VWAP is part of the increasing institutionalization of services for sexual assault centre, and may signal the demise of autonomous, feminist-based advocacy and counselling for survivors of sexual assault.

3.3.3. Sexual Assault as a Private Problem

And finally, sexual assault is constructed as a private, individualized problem when institutions and professional associations respond to reports of this crime with internal investigations. Sexual assault is not only a crime committed against one individual. As a criminal offence, it is a crime committed against Canadian society. This tendency towards internal investigations represents a decriminalization of violence against women, and, some would argue, a cooptation of First Nations practices and traditions.

The issue of decriminalization of crimes against the person and the development of alternative forms of justice such as restorative justice is a complex one which is beyond the scope of this research. However, whatever the value of such an approach to justice, in order to be effective it must take place within the context of a system which is designed to accommodate it on many levels, not in order to permit an institution to avoid exposing a problem.

3.3.4. Sexual Assault as a Social Problem

These constructions of sexual assault as a medical, legal and personal problem result in services and systems which alienate women who have been sexually assaulted. They are predicated upon a denial of the reality of what is essentially a social problem, which has an impact on all citizens, and on the very fabric of our society.

> *Social distress results when a social problem undermines the psychological and social well being of a significant number of people, and becomes so pervasive that it distorts the personal, social and political levels of the society. When this happens, the effects are felt by everyone, even those not directly involved in any specific manifestation….Sexual assault and child sexual abuse are social problems, responsible for considerable social distress.*[70]

This is not to say that sexual assault survivors are not private individuals with medical and legal needs, and that those systems do not operate in ways that must be somewhat accommodated. However, in the current context, sexual assault survivors are forced to deny the reality of what they have experienced in order to accommodate those systems, while there is little opportunity for the experiences of sexual assault survivors to influence those systems. As Jane Doe suggests:

> *Here's a thought: Hire those women [community-based sexual assault workers] full-time to teach doctors and nurses in medical school. Or increase community-based services for women who experience these crimes so that we can better heal ourselves. Redefine the crime of rape itself as a disorder or syndrome and the reactions of the woman who has been raped as normal reactions or even coping mechanisms to the violence that has changed her life. Revisit the intrinsic harm of rape and the nature of that harm, and provide women with options and services to take care of ourselves. And do no harm. Focus instead on the socialising and*

70 Renner, 2001, p.1.

pathology of male perpetrators and the codes and systems that perpetuate their behaviour.[71]

3.4. Discussion

Women's experience of sexual assault is obfuscated by the way in which sexual assault is constructed according to myths and stereotypes and as a medical, legal or private problem. The practices established for responding to sexual assault survivors often have nothing to do with their needs, nor with the reality of what they have typically experienced. This is very alienating for women.

Furthermore, while important principles of equality have been established in legislation and case law, sexually assaulted women's rights to equality remain tenuous in practice and are often disregarded and violated within the legal system as a whole. Despite the Charter, women's equality is far from guaranteed to survivors of sexual assault who turn to the legal system seeking justice.

The legal system is a part and a product of our society, and is permeated by the very culture associated with the social conditions of inequality for women. Inequality produces and is reinforced by the behavioural norms, myths and the stereotypes which cause sexual assault. It is therefore not surprising to find evidence that sexual assault trials are imbued with these assumptions and belief systems, such that they contribute to perpetuating women's inequality.

Perhaps the ultimate measure of the legal system's success or failure in protecting women's right to live free of sexual assault is the number of women who successfully seek redress for the crimes committed against them. It is important to underline that after four decades of reform efforts, a large proportion of sexual assault cases are still classified as unfounded by police and are not charged by the Crown, and a large proportion of those accused of sexual assault are not convicted by the courts

The vast majority - 94% - of women who are sexually assaulted do not report it to the police. Of the 6% that are reported, only 40% result in charges being laid. Of those cases where charges are laid, two-thirds result in convictions, but only one-half of those who are convicted receive a jail term. That means that a minute 0.8% of all assailants receive a jail term.[72] This means that sexual assault remains largely outside of the effective jurisdiction of the criminal justice process. Renner contends that currently, legal precedents and common law practices often contribute to the problem.[73]

Jane Doe argues that legal decisions are limited as a route to social change:

> *The courts are reluctant to become involved in the mechanics of implementing their judgment….Legal decisions are simply one move to effect change in a much larger political game. Unless politicians are prepared to force the moral weight of a legal decision, little of a substantive nature is likely to be done.*[74]

These circumstances point both to the significance and the limitations of the legal system. Only sexual assault cases which are officially reported receive (occasional) media coverage, contributing to and reinforcing myths about what constitutes a "real" sexual assault. Sexual assault

71 Doe, 2003, p. 310.
72 Statistics Canada (1993). The violence against women survey. Ottawa: Statistics Canada. Gregory & Lees, 1994; Yurchesyn, Keith & Renner, 1992, in Renner, 1998, p.1
73 Renner, 2002.
74 Doe, 2003, p. 286.

cases which go to trial and lead to a conviction in court define what society considers a legitimate victim. Legal outcomes are important because they are society's "official" record of the crime of sexual assault, and they send a message to all members of society about the meaning of justice. Legal reform can ensure that the system does not contribute to perpetuating sexual assault and re-victimizing women; however, it cannot eliminate sexual assault, nor change the attitudes and beliefs which cause sexual assault.[75] Sexual assault is a social problem with legal aspects.

According to Renner, the legal doctrine has established sexual offences by definition as "not serious". This failure of social justice is due to the influence of the social context on legal doctrine, and not to a lack of clarity in the law, nor to a conflict between the rights of the accused and the rights of the victim, which he considers to be a "false dilemma":

> *The primary effect of the redefinition of the legal issues is to avoid a false dilemma of viewing law reform as an issue of victim versus offender rights. Offender rights are no different for sexual offences than for any other offence, including the right to a fair trial and a full defence. However, this basic right of the accused does not extend to… the denial of access to justice for women. The ideal is to achieve fairness and social justice.* [76]

The problem is caused by a fundamental flaw in the legal process, requiring the reform of the way existing laws are administered. Renner believes this is correctible without the massive social and political effort required for legislative change. What is needed is primarily interpretative clarification in order to extend full and equal protection of the existing law to women and children.[77] Fraser agrees that there is a gap between the theory and the reality of legal equality caused by myths and stereotypes which influence the way the law is applied by individuals:

> *Today in Canada the most egregious laws and common law principles have been abrogated. But it is not that easy to eliminate a number of the myths and misconceptions surrounding sexual offences. And these can trap not only judges and lawyers but of equal importance, members of the jury. After all, in assessing the credibility of a complainant's allegations, triers of fact will necessarily test that evidence against what they consider to be "credible" and "probable" in the circumstances. It is here that the theory of the non-gender-biased law and the reality of its application may well part ways.*[78]

Without equal protection by the legal system, women become disillusioned, their rights are compromised and future victims will continue to avoid the legal process. The message is sent to the public that sexual assault is tried and punished differently than other crimes. A fundamental condition of a democratic society is undermined, with serious consequences:

> *If the public's expectations for fair and equal justice do not match the reality of the delivery of justice and the gap between the two cannot be explained on some credible basis, then we risk a loss of confidence and trust. And without public confidence and trust in the administration of justice, who will accede to the rule of law?*[79]

These perspectives highlight the importance of developing a vision and strategies for change.

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75 Renner, 2001.
76 *Ibid.,* p. 10.
77 *Ibid.*
78 The Honourable Justice Catherine A. Fraser, Chief Justice of Alberta Canada. Creating Access to Justice through Judicial Education: Correcting the Blindness. First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 2002.
79 *Ibid*, p.1.

PART 4 – Strategies for change

Many of the women's advocates and front-line workers who were consulted for this research were asked to describe strategies and approaches they use when working with women individually to enable them to make decisions about reporting a sexual assault to the police, and to effectively navigate the legal system. They were also asked to provide ideas for short-term and long-term strategies for systemic change.

This section summarizes responses provided by those consulted, as well as strategies for change which were identified in the literature, and concludes with a list of recommendations for action intended for women's groups.

4.1. Support

Providing support was viewed as an effective means to facilitate women's decision making around whether or not to report a sexual assault to police. Support was also perceived as an indirect way of strengthening those women who chose to enter the legal system, preparing and enabling them to assert their rights. All workers who were consulted emphasized the importance of respecting women's choices and supporting them throughout the process, whatever their decision.

4.1.1. Approaches

Within that general approach, three basic tendencies around providing support in decision making were identified.

- *Encouragement:* A few workers actively encourage women to report sexual assault, stressing the woman's right to do so. They point out that doing so helps to protect other women from the aggressor, and that it is important to ensure that the aggressor is accountable for his actions.
- *Discouragement:* Other workers actively discourage women from reporting sexual assault, highlighting the male-dominated and patriarchal nature of the system. These workers tend to warn women that the experience is likely to re-traumatize them.
- *Realistic information:* The majority of workers underlined the importance of not influencing the woman's choice, while giving her realistic and truthful information about the system and what she is likely to experience.

4.1.2. Portrayal of the system

Workers perceive the legal system in different ways, as reflected by the portrait of the system they communicate to women. Their perception of the legal system will inevitably influence what kind of information they determine to be "realistic", and therefore choose to share with women.

> *Obviously I don't tell women what to do. I always frame it that the woman has every right to see justice after what happened to her, but I don't mislead her. I tell her what I see.*

Generally, workers convey to women their own observations of the legal system, based on their experience. Workers inform women about what to expect, letting them know that their control over the process decreases the further they progress through the system. They have the most control at the time when they decide whether or not to report to police. Women may be warned that the process is likely to be long and arduous, and the outcome is impossible to predict, since

the judges have an enormous amount of discretional power. There will likely be no explanation or justification of the results of their case.

Workers may share their assessment of the legal system, letting women know that it is unlikely they will experience justice through the system. They characterize the system as essentially created for and by male, white and middle to upper class citizens. They warn women that they will experience sexist and misogynistic attitudes and treatment, that they will be asked insensitive and irrelevant questions, and that the basic question at issue in court will be around their credibility versus the aggressor's credibility.

Workers may also attempt to ensure that their description of the legal system is relatively neutral. In order to give women a sense of what to expect while remaining neutral in their presentation, they provide women with statistics, for example, numbers of conviction rates. Some workers present the legal system and its challenges for sexual assault survivors from the point of view of its inherent principles or internal rationale. For example, workers explain to women that the system attempts to achieve justice based upon evidence beyond a reasonable doubt that the accused is guilty. Workers acknowledge that this standard of justice may be difficult to live up to, though it is not impossible to do so.

Most workers make sure to let women know that their status as witness means that they will have no legal representation.

4.1.3. Strategies

Workers shared a number of strategies they use when supporting women to make a decision about reporting. They explore the woman's motivation with her, and help her to clarify this for herself. For example, to what extent does the woman have specific expectations of the process, and how attached is she to a particular outcome? How will she feel if that outcome is not realized? The goal is to ensure that the woman has realistic expectations, and that she is choosing to report because she believes it is best for her.

It's important to make sure she knows it's not her responsibility to protect other women.

Some workers stated that they provide examples – both positive and negative - of what other women have experienced. Some workers refrain from doing this, citing that the process and outcome are totally unpredictable and vary according to each individual woman, making this a less useful strategy. Other workers present a range of general, fictional, non-specific scenarios and possible outcomes.

It was suggested that workers could record the factual description of the legal system while presenting this to the woman, ensuring that there are no details about her specific case in the recording. This enables the woman to listen to it again at a later date.

Once women have made the decision to report to police, workers may suggest that they write down their account of the assault prior to going to police in order to ensure consistency. Most workers provide court preparation for women who have decided to report. This involves familiarizing the woman with the roles and responsibilities of each player and ensuring that the woman knows that the crown prosecutor is not her advocate.
Workers inform women of the need to gain and maintain their credibility, and suggest strategies for achieving this.

When testifying, it's better to be more cautious. The judge will be swayed by someone who comes across as thoughtful.

Court preparation entails pragmatically explaining to women the many stereotypes and expectations of a "good witness", including: not showing anger, although it is alright to cry, not swearing, not chewing gum, how to fit in, for example, by dressing a certain way. Workers advise women to be polite and respectful, only saying what they know. Workers may suggest practical methods which will help women to remain present and grounded while testifying.

I suggest to women to have a stone in her pocket, to help her feel grounded. Remember to feel herself planted in her chair, with her feet on the ground.

And finally, workers stressed the importance of verifying the woman's level of support, as this is an important predictor of her ability to successfully withstand the process. Workers may put the woman in contact with other resource people who can provide her with additional support and information.

4.1.4. Dilemma for Feminist Counsellors

This brief description of the strategies and approaches utilized by women's advocates and front-line workers when supporting women in making a decision around reporting a sexual assault reveals that most are highly aware of the potential harm the legal system can inflict upon women who are already psychically injured.

Workers face a difficult dilemma. On the one hand, as feminist counsellors and advocates they believe in the principle of respecting the woman's free and informed choice. They wish to provide women with realistic information so that they can make a fully informed decision, without being influenced by the counsellor's perspective.

We don't want the service provider acting as a gatekeeper, by dissuading women from reporting.

On the other hand, for many workers, their experiences observing women's treatment within the legal system are negative and this has coloured their perception of what can be considered "realistic information". How can they provide this information in a way which leaves the woman room to consider all options, yet still prepares her for what she will encounter by providing her with accurate information about what to expect?

The previously mentioned body of research conducted by Renner and his associates has codified the courtroom process and dynamics in a way which provides factual and objective evidence confirming the observations and experiences of these advocates. It shows that, far from being unpredictable and widely variant, the content and process of sexual assault trials play themselves out like a script. This means that women can be provided with factual information in a way which is "neutral" and may be less overwhelming since the content, process and dynamics which she can expect to encounter have been systematically coded, dissected and organized.

Should a woman make the choice to report her sexual assault to police, and should the case go to trial, these social science researchers have developed methods and guidelines to help workers demystify the predictable courtroom script for women and help prepare them to present

themselves more effectively.[80] This may help the woman inoculate herself against the tactics of the defence lawyer, even in a situation where the Crown Prosecutor and Judge are relatively inactive.

4.2. Advocacy

Given the critical impact of individuals upon women's experience in the legal system noted by the research participants, and emphasized in the research conducted by Renner and his associates, advocacy plays a crucial role in ensuring that those individuals encountered by a woman throughout the process are doing everything in their power to ensure that her rights and needs are respected.

The term advocacy is defined here as acting to ensure that a system accommodates an individual's needs and respects that person's rights in accordance with its own policies and procedures. Sometimes, it can also mean pushing a system to improvise, to extend itself beyond its policies and procedures in order to accommodate a person's special needs. For example,

In a situation involving a police officer accused of sexual assault, the woman felt intimidated in court by the sea of police officers in uniform. The advocate from the sexual assault centre asked that police not wear their uniforms, and this request was granted.

4.2.1 General Advocacy Strategies

Generally, accompaniment is viewed as an excellent advocacy strategy in and of itself. The presence of an advocate often improves the way a woman is treated, though some limitations to the use of this strategy with police were discussed in the research. Advocacy can mean actively ensuring that the system meets the woman's practical needs, such as transportation, childcare, interpretation, or accessibility.

In order to reach those women who are most vulnerable to violence, and least likely to access the legal system, the best advocacy strategy is to do outreach to marginalized communities and provide the types of services they are requesting. When workers engage these communities, and establish themselves as credible, reliable and trustworthy support people, this increases the likelihood that when individual women from these communities experience violence, they will turn to support services which can offer the option of reporting.

Advocacy is more effective when workers develop positive working relationships with individuals within the system, though this may be easier in smaller communities. When referring a woman to another service or system, it is important to refer her as much as possible to an individual and not to an institution. When speaking to their contact person, workers can do some groundwork by humanizing the woman, and ensuring that the person does not see the woman as "just a case".

In order to effectively complain about an unsatisfactory situation, it is important to begin by directing the complaint to the person involved, then proceeding through the hierarchy, to progressively higher levels as needed. Advocates can become informed in advance of the formal complaints procedure and the many levels of an institution which deal with complaints for each of the systems with which they work. This information is often available on the website of a particular institution. Advocates may also support a woman in writing a letter to the board of directors of the offending institution or agency.

80 Renner and Parriag, 2002c.

This is important since procedures may vary from community to community. For example, some OPP departments have “abuse issues co-ordinators” to whom complaints, including those concerning OPP officer misconduct, may be directed. However, this protocol has not been established in all communities served by the OPP.

One advocate pointed out that the goal is not necessarily to increase women’s access to the legal system. It is not advisable to increase or decrease women’s access to the system until it is certain that that system will serve them well.

4.2.2. Advocacy Strategies with Police

When working with women who have reported sexual assault to the police, advocates in one community advise them never to be alone with the police. Advocates may specifically recommend the presence of an advocate and/or a friend or family member, given the treatment women have encountered in some communities when reporting sexual assault. Furthermore, they suggest that women obtain copies of their statement, and keep a log of all their contacts – both in person and over the telephone - with police, including the names of all police officers with whom they speak. If they perceive a woman to be particularly vulnerable, they may also remind a woman to stick to the truth, to never tell police what she “thinks they want to hear” no matter what they tell her, even if they suggest it will be to her detriment if she does not change her story.

Workers may decide to advocate, if the woman so chooses, when there is an unreasonable delay in taking a woman’s statement, or when a decision is made by police not to press charges. In such situations, the advocate would call the officer or his or her supervisor. However, there has been little success in this area.

4.2.3. Advocacy Strategies in the Court System

Advocacy strategies for use in the court system which were identified by research participants dealt with two issues: record-keeping and assisting women in preparing a Victim Impact Statement.

Although requests for disclosure of private records are increasingly refused since the Mills decision, those accused of sexual assault remain free to bring such applications forward and those working with sexual assault survivors need to prepare themselves for such an eventuality. This defence tactic has had a profound impact upon the recordkeeping practices of sexual assault centres.

Sexual assault centres may be faced with an order to release records not only in the context of a criminal case. In family court as well, a judge could sanction the release of a woman’s records in order to determine “the best interests of the child”. Requests for information-sharing may also originate from other social service agencies, such as Children’s Aid Societies (CAS), and sexual assault centre’s policies on record-keeping need to encompass a broad range of possible scenarios. In the case of court-mandated release of records, workers have found that the range of records which may be subpoenaed is broad, including notes of counselling sessions as well as artefacts such as agendas and logbooks.

Sexual assault workers face a difficult dilemma when determining how to keep records of services provided to sexual assault survivors. On the one hand, they may wish to protect women’s private information by putting as little information as possible in records of counselling

sessions, with the risk that they will leave out helpful information. On the other hand, they want to ensure that all information which could potentially be of assistance in building a woman's case is included, such as information which conveys the seriousness of the assault's impact on the woman. Comprehensive notes may also enable the worker to provide a better service. The risk is that some information will be used against the woman, and the difficulty is that it is not possible to predict which information will hurt women and which will help them. Some strategies for dealing with this difficult issue were identified by research participants, and a more complete discussion of the issue as well as suggested strategies for dealing with it are included in an excerpt from a METRAC document in Annex 4, entitled "Guidelines for Record holders".

While it is a serious breach to destroy records after the receipt of a subpoena or an order to release records, some agencies have a protocol directing workers to destroy all records at the end of each day. The destruction of the records is clearly documented. However, some agencies may be limited in the strategies they can employ to protect women's records, as they are required by funders to retain these records. It was suggested that workers use a mini-calendar to document events and interactions with the woman. This minimizes the amount of information recorded. To avoid stigmatizing incest survivors who have a psychiatric diagnosis, some workers avoid the use of psychiatric language when taking notes. They may frame the woman's psychiatric symptoms in terms of the consequences of her abuse.

Centres which adopt a position of refusing to release records under any circumstances may be held in contempt of court, or may face fines or other consequences; however, centres may have an overall "no release" policy for any record requests other than subpoenas and orders. Women may not be aware of the potential risk to them of possessing or providing access to such records, and of the ways in which their records may be used against them. They may request copies of their records or consent to release of their records, for example, to the CAS.

Workers stressed the importance of informing women of the risks involved if they possess copies of their counselling records or if they keep a private journal, and of agreeing to release such records. Women need to know that journals which seem to prove abuse have been used against women; for example, journal entries have been used to make a woman look "crazy". It may be useful to suggest to women who choose to keep a journal that they avoid mixing facts and feelings. Women should know that they don't need to freely disclose that they keep a journal.

Despite the efforts of sexual assault workers to find ways of keeping records which do not present a risk for women, there are no foolproof strategies and no way of ensuring with certainty that information included will not be used against women. Once this information is in the hands of defence lawyers, it has the potential to be used to attack women's credibility. Furthermore, workers highlighted that this is also an issue of professional boundaries, and it is important to protect and defend an agency's ability to ensure that its workers are able to do their job properly.

When assisting women in their preparation of their Victim Impact Statement (VIS), the following guidelines and information were identified as important to convey to women:

1. they have a *choice* whether or not to fill out a VIS;
2. the VIS must be disclosed to the defence, which means that the aggressor has access to it;
3. women may have to be cross-examined on their VIS;
4. the VIS is used by Crown at sentencing;

5. the VIS should not be completed until a guilty verdict is reached, since the woman may wish to comment upon the impact of the legal system upon her, and because she may give information in her VIS which could have an impact upon the case;
6. the VIS may be used by the aggressor against the woman in family court or by the CAS.

Advocacy may also be directed at individuals within the court system who play a key role in a case. One worker pointed out that Crown Prosecutors may be the most accessible participants in the legal system for advocacy:

There are more accountability mechanisms for the Crown: manuals, directives and training.

The coding system and the categories of themes and tactics identified by the body of research developed by Renner and his associates provide advocates with concrete evidence of existing problems and clear expectations for change from participants in the court system. The presence of even one advocate in the courtroom, observing and documenting the process and outcome based upon the previously mentioned coding system, can provide results which serve as a powerful tool for advocacy.

By linking outcomes of individual cases to the underlying myths and stereotypes which operate to discount the seriousness of the most typical sexual assault cases, and by noting the use of illogical arguments and unethical tactics by the defence as well as the enabling inaction of the judge and crown prosecutor, local advocates can expose the underlying systemic problems in the way individual cases are dealt with. A formalized Courtwatch[81] programme with volunteers and staff who are trained to utilize the coding system can ensure that such observation and documentation occurs on a regular basis.

Pressure can also be brought to bear by attracting public attention and involving the media in exposing the systemic problems currently inherent in most sexual assault trials. Renner highlights the challenges in attracting the sustained attention of the larger-scale media on the issue of sexual assault, rather than on the more sensationalistic cases of assault which tend to be reported. By talking to local media about local cases, it may be possible to overcome this obstacle to increasing public awareness of this systemic problem. The key is to talk to local media about the categories, not the cases. Once the issues have been clearly identified and documented, advocating on a local level is likely to be very effective:

…it is specific people, who have names and who hold local offices of public trust, who can have their judgment processes respectfully questioned, and who can be called upon to do better. This is the power of local actions, they need not wait for legislation or the Supreme Court, they can start tomorrow with as few as one person sitting in the local courtroom with a clip board.[82]

4.3. Coordinated Community Responses

Workers and advocates reported having achieved some positive results through efforts to coordinate their community's responses to sexual assault. The presence of representatives from women's groups in the community, for example, on coordinating committees, increases the accountability of all participants in the legal system. This accountability is increased when workers proactively seek feedback from women regarding the services they receive and share this with

81 A model of a Courtwatch program, focusing on the treatment of domestic violence cases within the specialized domestic violence courts, exists in Toronto. It is coordinated by the Women Abuse Council of Toronto.
82 Renner, 2002, p. 10.

representatives on the committee. In order to develop collaboration, there must be a commitment from all participants to respond to complaints.

> *There is responsiveness on all sides to complaints. For example, SAC responds if they receive a complaint from police.*

It also provides women's advocates with opportunities for networking, and improving communication between services in community.

The heavy demand for services and the inadequate resources of front-line agencies creates an obstacle preventing overstretched workers from participating in such community development initiatives.

One worker spoke of the process used in her community to improve the response of the legal system to partner assault cases. Through a set of meetings held between police and community partners, they were able to address a range of issues. The result is a system which responds better to assaulted women than was the case a few years ago.

Women's advocates in this community hope to engage police in a similar process on the issue of sexual assault. Another worker suggested looking to the process used to develop specialized services in domestic violence in order to develop a collaborative model to improve the way the system deals with sexual assault.

> *The domestic violence template/framework is working well. VAW services have a better relationship with police than SACs. SACs want to set up a system that parallels this structure. They want to develop a closer relationship with police, so they can come together if there are particular issues, conflicts or problems to work them out. The adversarial relationship is not working; we need to change this.*

The need for clear, concrete protocols which guide behaviour and create consistency was highlighted, as well as the importance of involving women's services in protocol development. The development of protocols between police and women's services has improved their working relationship as well as the way in which police respond to women who are sexual assaulted in some communities. For example, in one community, a protocol was established for cases involving sexual assault perpetrated by a police officer. While this protocol is effective, it remains the chief's decision as to which of the conditions will be implemented. Some of the steps included in this protocol are the following:

1. Police inform women's services of the case;
2. Police get input and consult with women's services on what should happen with the officer while the process unfolds;
3. The officer is transferred out of the realm of public duty.

Strategies to increase police accountability are needed. Accountability could be increased by making regional statistics available for all police services in a centralized point of access. Such information gathering could be extended to include statistics concerning charges laid by Crown Attorneys. Detailed information concerning specific issues could be included, such as:

- the number of sexual charges laid;
- the number of sexual assault cases closed and the reasons given;

- the number of sexual assault cases in which women recant or withdraw their statement and the reasons given;
- the number of cases which resulted in charges being laid;
- the number of times complainants were charged.

There is a need for sexual assault centres (SACs) to network with universities and colleges and to ensure a strong presence in these institutions. In this way, SACs can attempt to counter the tendency towards the use of internal complaints procedures in sexual assault cases within these institutions.

There was consensus among research participants as to the urgent need for coordinated training on issues related to sexual assault and respect for diversity for all participants in the legal system, including judges, investigative and front-line police officers, and crown prosecutors. Training of all service providers in the legal system related to access to the legal system for women with disabilities and deaf women who are sexually assaulted is necessary to ensure the accommodation of the needs of these women. Such training should be provided by women with expertise in providing front-line services to sexual assault survivors.

One women's advocate pointed out that in order to be effective, training needs to focus less on changing attitudes, which is a long-term goal and process, and more on changing behaviour and doing one's job correctly, a realizable short-term goal. She suggested that the Attorney General's sexual assault protocol, a directive to police services around the province, could be adapted for use as a training tool. In this way, training would be linked to clear behavioural expectations and job requirements.

Given the key role played by the Crown Prosecutor, Renner proposes lobbying locally for a single prosecutor who specializes in sexual assault cases. In this way, their experience and training can prepare them to play a more active role in challenging defence tactics of distortion and the myths and stereotypes at play in sexual assault trials. A more active, trained and experienced Crown Prosecutor can be expected to:

- raise formal objections throughout the trial, based on the categories of themes and tactics identified in the research,
- conduct extensive re-direct examination of the witness following every incident of the use of typical defence tactics which distort the victim's story,
- use their closing statements as an opportunity to explain how the common defence arguments are based on errors of logic and false premises,
- appeal the case based upon the identification of underlying systemic problems.

By appealing a case which is conducted based upon myths, stereotypes and faulty reasoning, Crown Prosecutors have a mechanism with which to keep judges accountable:

> *The Prosecutor is the accountable professional for aggressively insuring that the court itself is not an agent of harm, and the Judge has the responsibility to enforce these actions, or face the certainty of appeal. The duty to protect the integrity of the justice*

process can not be stronger or clearer than to ensure that decisions are based on reason and that reaching for the ideal of justice is the outcome.[83]

4.4. Lobbying and Reform

A women's advocate made the following comment, which identifies an important gap in efforts made by those working within the legal system to improve the treatment of sexual assault survivors.

Sexual assault as a crime is minimized and rendered invisible within the criminal justice system. While there has been some focus on improving the system's response in cases of domestic violence (e.g. specialized court system), little attention has been paid to the development of alternatives and improvements in the system's response to sexual assault.

This speaks to the need to develop an overall vision of ways of ensuring that the legal system functions in a manner which responds to the needs of sexual assault survivors. While there is now greater awareness of the problem, there is little vision regarding what to change:

What has changed…is the level of awareness of the problem and a sense of urgency over the need for a solution. What is lacking is a conceptualization of what specific changes are required and how to accomplish them.[84]

As previously discussed, Renner believes that improvement in the court system does not require fundamental change. The basis for positive change has been established in the Criminal Code and in landmark jurisprudence. What is necessary is to find ways of ensuring that those principles filter down to legal practice and influence the way that individuals working within the legal system do their jobs.

One participant spoke of the need to develop innovative approaches to research which go beyond gathering anecdotal evidence. An example was provided of innovative research methodology focused on police practices was a project which gathered sworn affidavits from 100 people regarding their experiences with police in their community. Since an affidavit is a legal document, the report which is issued has more weight than research using questionnaires. It was noted that there may be challenges related to protecting the confidentiality and the safety of women who make such claims in cases of sexual assault. Renner concurs that effective research is an important component of change:

Accountability of institutional practices requires a continuous examination of outcomes and the processes responsible for them. This task must combine critical legal analysis and scholarship with empirical social science evaluation research in order to achieve greater social justice.[85]

Renner[86] has attempted to concretely apply his research in order to work towards greater social justice. With the goal of involving local communities in bringing about systemic change, Renner has developed a threefold national social action program, accessible through the Internet[87], aimed at creating a new vocabulary for redefining the central problem as a failure of social justice and a

83 Renner and Parriag, 2002a, p.10.
84 Renner, 2002, p.1.
85 Renner *et al.* 1997, p.14.
86 Renner, 2002.
87 The francophone component of this national social action plan is housed within the website of the *Centre d'aide et de lutte contre les agressions à caractère sexuel Chaudière-Appalaches* at www.calacsca.qc.ca

common conceptual framework with practical, concrete evidence of this problem. Renner's three-prong approach[88] functions at a national and a local level and aims to mobilize communities to:

1. document the outrageous;
2. challenge the legal system, and
3. support victims.

Renner believes that the public documentation of these problems and the accumulated results of such documentation in a range of communities will demonstrate the existence of a systemic problem, leading to media exposure and broad-based public awareness of the issue. Such awareness will also help to make the principle participants in the legal system aware of and accountable for the problems they are creating, putting pressure on them to change the way they practice.

In the long-term, a wave of appeals instigated by proactive Crown Prosecutors challenging the unjust application of the law, or even by defence lawyers protesting the actions of judges and Crown Prosecutors seeking increased justice for women, will draw judicial attention and the attention of legal scholars, placing the focus on the systemic problem and on the interpretative process of the law. Eventually, as these notions of fundamental justice are increasingly accepted and integrated, this will result in an accumulation of case law which supports just outcomes:

> *If this process of pointing out illogical arguments is repeated often enough, critical thinking about faulty reasoning will become part of a larger legal consciousness, and will help in the long run if not in the initial cases. Sooner or later, judges will start to pick up the language in their instructions to juries or in their own statements and the necessary case law will start to accumulate.*[89]

This optimistic vision of social change requires the sustained attention and action of local, autonomous, equality-seeking women's groups, most of which are already overburdened by the demands for direct services. According to one research participant, under-resourced women's services experiencing a high demand for services, combined with a political climate which discourages activism on the part of front-line agencies, has led to a de-politicization of community-based women's services.

> *The women's anti-violence movement has become an institution, a set of services. When there are problems, women's services don't come out. They are so busy fundraising they don't have time. And they may be afraid of their funder. Often there is little or no feminist analysis within an organization.*

Community-based activism, such as the ability to consistently observe and document court processes requires the commitment of adequate funding and resources on the part of the public sector. It may also be the most viable way of ensuring that the principles of women's equality enshrined in the constitution and the legislation are applied in practice. However, such local efforts are most effective when they are connected to and inform the work of a broad-based, coordinated women's movement to ensure that women's equality rights are respected within the legal system:

A financial commitment on the part of the provincial and federal governments to equality-seeking women's groups, enabling them to monitor the application of the law and to challenge sexual

88 It is important to note that the work of Renner and his associates focuses on children as well as adult women who are victims of sexual assault and abuse. However, this aspect of Renner's work is beyond the scope of this paper.
89 Renner and Parriag, 2002a, p. 6.

assault cases which compromise women's equality rights is a crucial component of efforts to decrease the gap between the principles and the practice of equality in the legal system.

4.5. Recommendations

The following recommendations are intended for equality-seeking women's groups. Some, but not all of these initiatives would require additional resources in order for implementation to be possible.

4.5.1 General

1. Set up a provincial committee, comprised of local activists, representing diverse women's communities, which can tap into local initiatives on an ongoing basis in order to keep abreast of what is emerging around the province on issues related to sexual assault and the legal system.
2. Lobby funders at all levels to include disability-related accommodations in budget allocations for funding criteria.
3. Lobby funders at all levels to make a financial commitment to autonomous legal advocacy services for sexual assault survivors.
4. Seek funding to undertake an in-depth evaluation and analysis of the legal system's response to sexual assault survivors and treatment of sexual assault cases, involving front-line community-based sexual assault workers as well as sexual assault survivors. This research would include the identification of alternative models which have been developed nationally and internationally and the proposal of a vision of a model for effective response by the legal system to sexual assault. Such a project would explore the feasibility of models which provide legal representation to victim-witnesses.

4.5.2. Police services

1. Lobby the Attorney General of Ontario for a review of investigative techniques and to develop provincial standards for the investigation of sexual assault cases for all Ontario police services.
2. Lobby for a province-wide initiative to evaluate and improve upon current police practices and to pool best practices in the investigation of the sexual assault cases.
3. Strike a provincial committee comprised of women's advocates and sexual assault survivors aimed at developing strategies to increase police accountability.
4. Lobby the appropriate governmental bodies to create a position of Ombudsman, or for a position of liaison person to be created within each police department, enabling citizens to lodge a complaint against a police officer with someone who does not have a direct, daily working relationship with those against whom the complaint is lodged.
5. Assess the feasibility and strategic impact of lobbying for a provincial mandatory charging policy in cases of sexual assault.

4.5.3. Court system

1. Seek funding to develop pilot Courtwatch projects in 4 geographically distinct regions in Ontario, aimed at training staff and volunteers to observe and document the content and process of sexual assault trials.

2. Lobby for the availability of provincial funding for specialized Crown Prosecutors for communities which are interested in pursuing such an initiative.
3. Examine the services and initiatives developed within the legal system for dealing with domestic violence (e.g. specialized domestic violence courts) in order to determine if any innovations are transferable to sexual assault.
4. Develop guidelines to help prepare counsellors for testifying in court, outlining different ways of answering questions.
5. Assess the feasibility and strategic impact of participating in the “National Action Plan Against Sexual Assault” developed by Renner and his associates.
6. Coordinate a province-wide exchange and sharing of policies and procedures on record-keeping developed by sexual assault centres in Ontario.

CONCLUSION

Research conducted for this project suggests that despite the entrenchment of women's equality rights in principle through the Canadian Charter of Rights and Freedoms, through legislation and through case law, women continue to experience the infringement of those rights in practice.

This leads to the observation that ultimately, a law and order approach to resolving what is essentially a social problem is inherently inadequate. The factors which cause and perpetuate a social problem of the magnitude of sexual assault are varied, pervasive and extremely complex. They are part of the fabric of our everyday life and belief systems. The legal system will change and evolve to the extent that the individuals which make up our society at large change and evolve.

This underscores the importance of addressing beliefs and attitudes which perpetuate sexual assault and other forms of injustice through prevention and education, as well as the need to address gender, race and class inequities in our larger society. On the other hand, we cannot wait for inequality to be eradicated before improving the way the legal system responds to survivors of sexual assault.

Perhaps the key to successful legal reform is to ensure that it is always firmly rooted in a clear understanding of the reality of sexual assault as a social problem and a crime, and of women's inequality within Canadian society.

For nearly thirty years, sexual assault centres in Canada have been fulfilling just such a crucial role, consistently speaking out – against all odds - about an issue which even now remains taboo in our society, and about the difficulties experienced by the women they serve. Sexual assault centres are committed to providing politically informed, autonomous and pro-active advocacy and support for individual women who are sexual assault survivors and who choose to engage with the legal system. Despite the overwhelming need and demand for such services, most sexual assault centres combine such front-line services with educational services and political activism to prevent sexual assault and to bring about social change aimed at ending women's inequality.

The challenge for these struggling, under-funded, grassroots, community-based women's services is as enormous as the breadth of their vision of long-term social change. Front-line women working in these services are primarily responsible for identifying and exposing the age-old problems for women who are sexual assault survivors which are inherent in the legal system. Sexual assault centres are a valuable tool for social change for Canadian women. The active involvement of community-based sexual assault centres is crucial if we are to ensure that responsive, effective reform rooted in the reality of sexual assault takes place in our legal system.

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APPENDIX 1: Project Description and Questionnaire

Goal: to produce a report which will serve as a useful tool enabling women's advocates and front-line workers to mobilize and lobby for changes in the way the legal system responds to sexual assault and women who are sexual assault survivors.

Objectives:

- to identify current legal issues and obstacles - both new and ongoing – which discourage women from reporting sexual assault to the police and prevent their meaningful access to the legal system;
- to examine the impact of these obstacles on the way in which service providers give information about the justice system to women;
- to identify and gather examples of successful advocacy strategies which have helped individual women to gain better access to, and treatment by the legal system; and
- to identify lobbying strategies, measures and actions which have been or are likely to be successful in bringing about systemic change.

Methodology:

Participants in the research project were consulted in one or a combination of three ways:

- group consultation for service providers
- questionnaire for service providers
- telephone interview (for service providers or survivors)

Telephone interviews were structured by the questionnaire.

Process:

The *Barriers to Justice* research project was initiated by *Action ontarienne contre la violence faite aux femmes* (AOcVF). Two Anglophone women's groups, active in the area of sexual assault and the legal system, were approached and invited to be involved in the project. An advisory committee, comprised of representatives from *Action ontarienne contre la violence faite aux femmes*, METRAC and the *Ontario Coalition of Rape Crisis Centres*, was formed in order to provide consultation and feedback throughout the project.

Group consultations of sexual assault service providers took place in the context of a southern Ontario training session offered by METRAC and a provincial meeting of Francophone service providers. A questionnaire was developed, a 1-800 line was set up and in operation from July to November, 2003, and the telephone number was included on the questionnaire. The questionnaire was distributed to participants at the two provincial meetings described above and at another Northern Ontario training session offered by METRAC in Thunder Bay[90], and participants were asked to distribute the questionnaire to other service providers in their networks, and to give the 1-800 number to any survivors who might wish to be consulted. Anyone who had received the questionnaire and who wished to provide a more in-depth interview was invited to communicate with the project coordinator by calling the 1-800 number. The questionnaire was also distributed to the

90 The questionnaire distributed during the METRAC training session held in Northern Ontario did not include the number of the 1-800 line, which had not yet been set up at that time.

network of francophone service providers regrouped by AOcVF. Additional service providers and survivors identified for consultation by members of the Advisory Committee were contacted by telephone and those who agreed were either interviewed or filled out the questionnaire.

A Summary of the Consultations:

Method of consultation	Questionnaire	Interview	Group	E-mail response
Number consulted	20	14	50	1

Service providers: 71

Survivors: 3

Both service provider and survivor: 1

The total number of people consulted was: 75[91]

91 Three questionnaires were submitted anonymously and may have been filled out by people who were already consulted by another method (e.g. group consultation). If this were the case, the total number of people consulted would be 72 rather than 75.

Obstacles to Justice - Research Project

Questionnaire for service providers

Thank you for taking the time to participate in the Obstacles to Justice Research Project by answering this questionnaire.

About the project : This project was initiated by several francophone and anglophone women's groups[92] working in the area of violence against women in Ontario, and concerned about women's negative experiences with the legal system when they report a sexual assault. Representatives of these groups are participating in a steering committee which provides direction for this project.

The goal of the project is to identify current legal issues and obstacles discouraging women from reporting sexual assault to the police, and preventing their access to the justice system.

The focus will be both new and ongoing problems encountered by women. The project will also look at the impact of these obstacles on the way in which service providers give information about the justice system to women. For example, is there a bias in the way information is presented that influences women in their choice of whether or not to report to the police? And finally, the committee will identify and gather examples of successful lobbying strategies which have helped individual women to obtain better access to, and treatment by, the justice system, as well as collective strategies, measures and actions to bring about systemic change for all women. The report will then be used to mobilize women and their advocates to develop and implement a long-term action plan for change.

Confidentiality: No names or specific regions or communities will be mentioned in our report. However, we assume that we may use any information or examples provided to us during an interview or in a questionnaire. Therefore, should you describe any specific situations experienced by women, please ensure that all identifying information has been omitted, or please let us know when you are giving us information that is confidential.

Please return this completed questionnaire, either by e-mail, or by mail to:

E-mail: aocvf@francofemmes.org
(Please title your e-mail message: "Obstacles to Justice Project")

Mail to: AOcVF: "Obstacles to Justice Project"
288 Dalhousie St., Suite E, Ottawa, Ont., K1N 7E6

Your participation in this project is essential to its success;
Thanks once again!

92 Organizations represented on the steering committee are : the Ontario Coalition of Rape Crisis Centres; METRAC; and Action ontarienne contre la violence faite aux femmes.

Please tell us what region you live in, by circling whatever applies to you:

Region: North North-West North-East South Centre

Centre-South Central Ontario East

Community: Urban Rural

Questions

1. What are women saying about: i) why they do not want to call the police following a sexual assault; and/or ii) what their experiences with the police are like? For example, have women experienced any of the following :

   a) Police resistance to taking information & opening a file: _____

   b) The abuser is a police officer: _____

   c) Fear of reprisal by the offender following a report: _____

   d) Police history of not responding or following up when Restraining Orders (or other non-communication orders) are breached: _____

   e) Attitudes towards, and treatment of the victim by police officers: _____

   f) Charges are laid against the woman by the police (e.g. public mischief): _____

   g) Other: _____

2. When women choose to report a sexual assault, what kinds of practices, attitudes or actions on the part of key players in the legal system (for example, judges & defence lawyers), negatively affect their experience with the legal system, and the outcome of their case? For example, have women experienced any of the following (please elaborate, and indicate if the situation took place in family or criminal court):

   a) Disclosure of the woman's private records: _____

   b) Slander lawsuit brought against the women by the accused: _____

   c) Use of the woman's sexual history: _____

   d) Cross-examination of the victim by the accused: _____

   f) Evidence of bias or negative attitudes towards the victim: _____

   g) Screening and exclusion of potential jurors who may be sexual assault survivors: _____

   h) Other: _____

3. Have you noted any obstacles being experienced by particular groups of women, such as:

   a) Native women (including women on reserves): _____

   b) Women who are immigrants or refugees: _____

   c) Women of colour or racialized women: _____

   d) Francophone women: _____

e) Women living in poverty: _____

f) Homeless women: _____

g) Women who are lesbian, bisexual or transgendered: _____

h) Women belonging to ethnocultural or religious minorities: _____

i) Young women: _____

j) Women with disabilities (e.g. physical or intellectual): _____

k) Deaf women: _____

l) Psychiatrized women: _____

m) Women who are sex-trade workers: _____

n) Other: _____

4. When you are describing the legal system to a women who is considering reporting a sexual assault to the police:

a) What is the key message you hope to communicate? _____

b) How do you communicate this message? What kind of information do you give (e.g. stories and examples of other women's experiences; a neutral description of the legal system; etc.) and

how do you frame it? _____

c) In what form is the information given? (e.g. verbal, written): _____

5. Please tell us about any advocacy strategies you have identified and successfully used:

   a) to push the legal system to better accommodate an individual woman's needs: _____

   b) to increase individual women's access to the legal system. _____

6. Please tell us about any short-term and long-term lobbying strategies you have identified and which have been successfully used to bring about change to the legal system for all women. If you have any ideas of lobbying strategies for change, please share them as well. _____

7. Is there anything else you think is important concerning women's experiences in the legal system after they report sexual assault? _____

Thank-you!

APPENDIX 2: Preamble to Bill C-46

CHAPTER 30
(Bill C-46)

An Act to amend the Criminal Code (production of records in sexual offence proceedings)

[*Assented to 25th April, 1997*]

Preamble

WHEREAS the 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;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;

WHEREAS the rights guaranteed by the *Canadian Charter of Rights and Freedoms* are guaranteed equally to all and, in the event of a conflict, those rights are to be accommodated and reconciled to the greatest extent possible;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence and abuse and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Parliament of Canada recognizes that the compelled production of personal information may deter complainants of sexual offences from reporting the offence to the police and may deter complainants from seeking necessary treatment, counselling or advice;

WHEREAS the Parliament of Canada recognizes that the work of those who provide services and assistance to complainants of sexual offences is detrimentally affected by the compelled production of records and by the process to compel that production;

AND WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of and House of Commons of Canada, enacts as follows:

R.S., c. -46; R.S., cc. 2, 11, 27, 31, 47, 51, 52 (1st Supp.), cc. 1, 24, 27, 35 (2nd Supp.), cc. 10, 19, 30, 34 (3rd Supp.), cc. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4th Supp.); 1989, c. 2; 1990, cc. 15, 16, 17, 44; 1991, cc. 1, 4, 28, 40, 43; 1992, cc. 1, 11, 20, 21, 22, 27, 38, 41, 47, 51; 1993, cc. 7, 25, 28, 34, 37, 40, 45, 46; 1994, cc. 12, 13, 38, 44; 1995, cc. 5, 19, 22, 27, 29, 32, 39, 42

Source: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2329535&Mode=1&File=16&Language=E

APPENDIX 3: Section 276, Canadian Criminal Code and Reputation

Consolidated Statutes and Regulations
Main page on: Criminal Code
Disclaimer: These documents are not the official versions
Source: http://laws.justice.gc.ca/en/C-46/181135.html
Act current to October 31, 2005

Criminal Code

CHAPTER C-46

An Act respecting the Criminal Law

SHORT TITLE

Short title

1. This Act may be cited as the *Criminal Code*.

R.S., c. C-34, s. 1.

Excerpt from the Criminal Code of Canada, PART VIII OFFENCES AGAINST THE PERSON AND REPUTATION – Assaults - s. 276:

Evidence of complainant's sexual activity

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(*b*) is less worthy of belief.

Idem

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(*a*) is of specific instances of sexual activity;

(*b*) is relevant to an issue at trial; and

(*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

R.S., 1985, c. C-46, s. 276; R.S., 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2; 2002, c. 13, s. 13.

Application for hearing

276.1 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing and set out

(*a*) detailed particulars of the evidence that the accused seeks to adduce, and

(*b*) the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing

(4) Where the judge, provincial court judge or justice is satisfied

(*a*) that the application was made in accordance with subsection (2),

(*b*) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and

(*c*) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold

a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

1992, c. 38, s. 2.

Jury and public excluded

276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

Complainant not compellable

(2) The complainant is not a compellable witness at the hearing.

Judge's determination and reasons

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

(*a*) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(*b*) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and

(*c*) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

1992, c. 38, s. 2.

APPENDIX 4: Guidelines for Record-Holders

Nonetheless, accused are free to bring applications, and record-holders are well advised to be prepared in case they are ever subjected to such an application. The following suggestions are just that and, although not definitive, offer some possible guidelines for how best to protect the confidentiality of clients and their records. They are made with organizations providing services to survivors of sexual assault particularly in mind, although they could be adapted to be of assistance to independent counsellors and therapists.

Policies and Procedures: Clear and simple policies and procedures should be developed. This has at least a four-fold purpose.

a) The organization as a whole is protected if it can establish that its behaviour or the actions of any of its staff or volunteers follow an organizational policy.

b) Staff and volunteers have a clear understanding of what they are expected to do and not to do as well as of when their actions are and are not sanctioned and protected by the organization.

c) Clients can be shown an organization-wide approach to this issue.

d) In the event of an application being served on the organization, everyone will know exactly what to do.

These policies should address a number of topics; for example: what kinds of records are to be kept, how are notes to be taken, what is the approach to the destruction of records, what is done when a client requests her own records, how will the organization respond to an application for disclosure, how far will the organization go to protect the confidentiality of its records, what supports and services will the organization offer or make available to staff whose records are sought.

Making it Clear to Clients: Among these procedures should be one describing in some detail how the issue of confidentiality and production of records is to be discussed with clients at the beginning of the client's relationship with the organization. This procedure should include some written confirmation from the client that she understands and accepts the organization's approach.

Training: Staff and volunteers should be thoroughly trained on a regular and frequent basis about the law, the organization's policies and procedures and possible scenarios. This training should include all staff, not just counsellors.

In the event that an application is made, consider the following guidelines for response:

i) **Avoid Panic:** There will likely be some urgency to respond quickly. Defence lawyers often serve these applications quite intentionally with as little notice as possible in an attempt to instil a panicked response. This is one reason why training for all staff is so important: an application could arrive in the office when there are no counsellors there. If the deadline for a response is only hours or a day away, then whoever receives the application needs to know how to deal with it. The first step should be to take a few moments to review the organization's protocol, which should be readily available. The second step should be to use the protocol.

ii) **Review Protocol:** No information should be given at any time to anyone outside the organization, in particular the defence lawyer, until the protocol has been reviewed and, if appropriate, the organization's lawyer has been contacted.

iii) **a) Contact Lawyer:** Where the organization uses a lawyer to deal with these applications, the lawyer should be contacted immediately and all documents provided to her/him. The lawyer should then be the only person to deal with the Crown Attorney, the defence lawyer and the court.

OR

b) Follow Protocol: Where the organization does not use a lawyer, it is the organization's protocol that should determine every step that is to be taken.

iv) **Assume Nothing:** If an organization is served with an application before putting policies and procedures in place, it is important to remember, first, that there is a high level of protection for confidential records. DO NOT assume you will have to turn notes or records over and do nothing to begin to do so.

If at all possible, seek legal advice and representation and then make decisions in consultation with your lawyer. It is not a bad idea to establish a relationship with a lawyer before an application lands in your lap so that you are not hunting for someone with a deadline hanging over your head. This also provides you with the opportunity to find a lawyer who understands the particular issues related to sexual assault and who shares at least some of the values of your organization. There are lawyers who are prepared to do this kind of work on a pro bono or reduced fee basis, but it can take a bit of time to find one.

If you will be handling the application without legal assistance, ensure that you know the place, date and time that the hearing will be heard. This information should appear on the front page of the documents served on you. Gather whatever information you need from within your organization so that you know the details of the file. Consider speaking with the Crown Attorney, who will also be opposing the application, so you can ensure that between you all the necessary arguments are made to the judge. Prepare what you want to say to the judge. You do not need to submit any written materials; if you choose to do so, you must make copies available to the defence and the Crown as well as the judge. You should also provide a copy to your client.

v) **A New Relationship with the Client:** The relationship between the client and the organization is tricky. Although you are, basically, on the same "side", your interests are not exactly the same. For instance, the client's position may be that she does not want the records turned over no matter what and she may want you to risk a contempt of court charge to protect her privacy. Your position may be that you will fight as hard as possible to protect the records, but if the judge orders that they be produced you will not violate that order. As a result, while you may decide to speak with the client to determine her position and whether she will be making her own submissions, it is generally advisable that each of you prepares your arguments separately and that you not share legal representation.

Conclusion

The decision of the Supreme Court of Canada in *R. v. Mills* could signal the beginning of a new era for survivors of sexual assault who wish to pursue therapeutic assistance as well as a criminal prosecution of their assailant. There are limitations to the *Criminal Code* provisions and organizations and individuals offering services to survivors of sexual assault must still remain prepared to respond to an application for disclosure. Nonetheless, the test set out in Sections 278.1 to 278.9 is a stringent one and will make it very difficult for an accused to be successful in these applications.

This is a time to encourage survivors of sexual assault to seek the therapy and counselling they need and deserve without undue fear that their private records will fall into the hands of their assailants. It is also a time for counsellors and therapists to do their work relatively free from the fear that they will have to choose between respecting and protecting the confidentiality of their clients and subjecting themselves to a contempt of court charge.

APPENDIX 5: Recommendations from "A Review of the Investigation of Sexual Assaults", Toronto Police Service

The following is a complete list of recommendations matching those contained in the body of the report. After each recommendation, the number of the page on which the recommendation can be found, as well as the background information supporting the recommendation, is provided.

Recommendation:

1. City Council forward this report to the Toronto Police Services Board. The Chief of Police be requested to provide a written response within six months to the Police Services Board with regard to the recommendations contained in this report. The report prepared by the Chief of Police include a specific workplan and timetable for the implementation of the recommendations.

   Page 31

2. The Chief of Police appoint a senior office to assume responsibility and be accountable for the implementation of the recommendations. This officer should be familiar with the conduct of sexual assault investigations and preferably have served in an investigative or policy role in this area.

   Page 32

3. A regular, structures, reporting process to the Police Services Board be initiated in regard to the implementation of recommendations. Reports should be prepared for the submission to the board on a quarterly basis.

   Page 32

4. The City Auditor be requested to conduct a follow-up audit in regard to the status of recommendations contained in this report, the timing of such audit to be consistent with the time frame outlined in the report of the Chief of Police. The City Auditor be required to report directly to the Toronto Police Services Board in regard to the results of the follow-up audit.

   Page 32

5. The Chief of Police undertake a review of the mandate of the Sexual Assault Squad. Consideration be given to expanding the mandate of the squad to include those cases where the offender is known and where penetration has taken place or has been attempted.

   Page 41

6. The Chief of Police conduct an evaluation of the additional staffing requirements of the Sexual Assault Squad. Staff resources, in relation to the increase in responsibilities of the squad, be redeployed from other areas within the service.

   Page 41

7. The Chief of Police ensure that any revision to the mandate of the Sexual Assault Squad be clearly communicated to all police officers.

   Page 41

8. The recruitment of staff to the Sexual Assault Squad be restricted to staff who are trained and experienced in the investigation of sexual assaults and have demonstrated an interest and an aptitude in the investigation of such cases. Potential candidates to the squad be evaluated against the core competencies required for positions in the squad.

   Page 42

9. The Chief of Police give consideration to a revision of the duty scheduling for members of the Sexual Assault Squad. The current hours of operation of the squad do not appear to best serve the needs of either the public or other police officers who rely on the advice and direction of the Sexual Assault Squad. Duty time should be more in line with the document timing of sexual assault occurrences.

Page 42

10. The Sexual Assault Squad Internet web site be expanded to include information directed to the rights of women who have been sexually assaulted. In particular, the site include the following information for the benefit of women who have been sexually assaulted:

    - information relating to the roles and responsibilities of the investigating officers;
    - information relating to the roles of the sexual assault care centres and the Victim Services Program; and
    - information relating to various support services in the community and in particular, the Toronto Rape Crisis Centre.

Page 43

11. The Sexual Assault Squad give consideration to the establishment of a Sexual Assault Hot Line. The establishment of such a hot line be set up after consultations with key stakeholders who work in the area of sexual assault. The availability of such a hot line be widely communicated to women in the community.

Page 44

12. The Chief of Police direct all first-response officers immediately that policies and procedures be complied with. First officers responding to sexual assault incidents be specifically directed that they collect only basic information concerning the assault from the woman who has been sexually assaulted. The extent of what constitutes “basic information” should be clearly articulated in the form of a detailed interview check list. The Sexual Assault Squad be required to develop a detailed interview checklist in order to assist officers during the initial interview. Only officers with specific training in sexual assault investigations be allowed to conduct detailed interviews with women who have been sexually assaulted. The Sexual Assault Squad be charged with the responsibility of ensuring that directives are complied with.

Page 49

13. The Chief of Police immediately direct all officers in charge that policies and procedures be complied with. Existing policies require that officers in charge are required to attend the scene of a sexual assault in order to ensure that the preliminary investigation is conducted appropriately. The Sexual Assault Squad be charged with the responsibility of ensuring that directives are complied with.

Page 50

14. The Chief of Police amend existing directives to include specific policies and procedures in relation to the interview of women with special needs. The amended directive requires that officers obtain specific assistance from appropriate professionals such as those available in the Victim Services Program.

Page 50

15. The practice of talking lengthy and detailed statements immediately after the initial interview from a woman who has been sexually assaulted be reconsidered. Consideration be given to deferring the taking of detailed statements for at least 24 hours.

Page 51

16. All occurrence reports relating to sexual assault be reviewed by supervisory staff at the divisional level prior to submission to the Sexual Assault Squad. Evidence of the review be appropriately documented. Incomplete or inappropriate occurrence reports be discussed with the officer concerned and changes made where necessary. Continued problems relating to the preparation of occurrence reports be dealt with through training and finally, if necessary, discipline. Occurrence reports prepared by members of the Sexual Assault Squad be reviewed and approved by supervisory staff.

Page 53

17. Any concerns identified during the review of occurrence reports by the Sexual Assault Squad be communicated to the officer who approved the report. Inappropriate or incomplete reports be returned to the originator for resubmission. Continued problems relating to the preparation of occurrence reports be dealt with through training and finally, if necessary, discipline.

Page 54

18. Under no circumstances should a first-response officer make a determination as to whether a sexual assault incident is classified as unfounded. The determination of this matter be reviewed and approved by a qualified trained sexual assault investigator. All occurrence reports contain information sufficient to substantiate conclusions.

Page 54

19. The definition of what constitutes an unfounded sexual assault occurrence be reviewed. Incidents in which a woman decides not to proceed with the laying of charges should not be automatically classified as unfounded.

Page 55

20. Wherever operationally possible, sexual assault investigative teams be comprised of officers of both sexes, and the woman who has been sexually assaulted be offered a choice with respect to the gender of the qualified investigator to conduct the interview.

Page 56

21. Whenever possible, the officer responsible for the initial interview be required to remain with the woman who been sexually assaulted until the completion of the medical examination at the sexual assault care centres. Procedures be in place to minimize the unnecessary repetition of the facts of the sexual assault to different police officers.

Page 58

22. The continuity of police officers assigned to sexual assault investigations be given priority. If during an investigation an officer is transferred or assigned different responsibilities within the service, the officer be required to continue the investigation of the assault to its conclusion.

Page 58

23. Policies and procedures relating to the investigation of sexual assaults be amended to require that the officer in charge of an investigation maintain consistent regular contact with the woman who has been sexually assaulted throughout the investigative and legal process. Wherever possible, the investigative officer should provide regular updates on the progress of the investigation.

Page 59

24. The Sexual Assault Squad initiate a consultation process with those agencies who deal with sex trade workers, homeless women, women of colour and women with disabilities in order to identify and address areas of concern. The Sexual Assault Squad develop, in consultation with these agencies, an effective complaints process independent of divisional officers. Community agencies be compensated for their work.

Page 62

25. The Sexual Assault Squad evaluate its management information needs in consultation with the Information and Technology Divisions of both the Toronto Police Service and the City of Toronto. These needs be addressed through the budget process on a priority basis.

Page 64

26. The Chief of Police ensure that the comprehensive internal review of training currently underway take into consideration the recommendations contained in this report.

Page 66

27. The present accounting structure be revised in order to accurately account for all costs relating to training activities throughout the service. These costs to include expenditures incurred at the C. O. Bick College, expenditures incurred at the Sexual Assault Squad, including all costs relating to attendance at outside training courses, including conferences and any expenditures incurred relating to decentralized training at the divisional level.

Page 67

28. The Sexual Assault Squad be required to maintain an accurate up-to-date listing of police officers who have received sexual assault training. This listing also contain information concerning the date of attendance. This information be used as a basis to:

    - forecast training needs throughout the service; and
    - appropriately deploy police officers to those areas where the need is the greatest.

Page 68

29. The Sexual Assault Squad be required to conduct a long-term analysis in regard to the projected requirements for police officers trained in the investigation of sexual assaults. This analysis take into account potential retirees over the next number of years as well as the anticipated demands for such trained officers. This analysis be used to determine the adequacy or otherwise of the current training schedule and, where appropriate, the training schedule be amended.

Page 69

30. The Sexual Assault Squad assume responsibility for the development of training activities relating to the investigation of sexual assaults. In addition, the squad assume responsibility for the coordination of all such training throughout the service.

Page 69

31. A re-evaluation of the content of the Sexual Assault and Child Abuse (SACA) course be undertaken. Particular emphasis be placed on course content and its relevance to practical day-to-day experiences. Course content not directly relevant to the work of divisional sexual assault investigations be eliminated. The course be designed in a structured, methodical manner. Community input be sought in the restructuring of the course content.

Page 72

32. The process by which officers are selected to attend sexual assault and child abuse training be formalized. Supervisors be held accountable for the selection of appropriate course attendees.

Page 73

33. As a part of the evaluation of the SACA course consideration be given to incorporating certain components of the SACA course into the training programs provided to recruits and first-response officers.

Page 74

34. Training provided to recruits and front-line officers in relation to the investigation of sexual assaults be re-evaluated. In addition, an evaluation of the RCMP publication, An Investigative Guide to Sexual Assaults be conducted by senior staff at C. O. Bick College in conjunction with members of the Sexual Assault Squad and the community. A determination should be made as to whether or not this particular document would be useful in the training of police officers.

Page 75

35. An evaluation be conducted by the Sexual Assault Squad in relation to the need for an ongoing update training process in regard to police officers who have previously attended the SACA course.

Page 76

36. An evaluation of all training courses and conferences attended by members of the Sexual Assault Squad be conducted. Individual squad members be required to document their training requirements and align such requirements with the objectives of the squad. These requirements be reviewed by the staff inspector for approval. In order to minimize duplication and to reduce costs, attendance at courses and conferences be coordinated with other members of the squad. Attendance at courses and conferences which have no relevance to the professional development requirements of the squad should not be approved.

Page 77

37. An evaluation of the Sexual Assault Investigators Conference be conducted to determine its effectiveness, relevance and costs.

Page 78

38. The Sexual Assault Squad review the content of any conference presentations made by external participants prior to their being made, to ensure that the content is appropriate and consistent with the policies and practices of the Toronto Police Service.

Page 78

39. An evaluation of the benefits of sending a significant number of members of the squad to the annual Sexual Assault Investigators Conference be reviewed particularly as members are already trained in many of the topics discussed. In addition, the necessity and appropriateness of sending significant numbers of Toronto police officers to this conference be re-evaluated. A formal process be established to determine that attendees at the conference be restricted to those officers who have been SACA trained.

Page 78

40. Consideration be given to the use of external community resources in the training of sexual assault investigators. External community resources be compensated for their work.

Page 79

41. The recruitment and appointment of trainers to C. O. Bick College be formalized. The skills and qualifications necessary to become a trainer be explicitly identified and used in the appointment of all training staff.

Page 80

42. An evaluation of the effectiveness of the courses in relation to Adult Education Training offered by St. Francis Xavier University be conducted. Once this evaluation has been done, a determination be

made as to whether the service should continue to participate in the program. A comparison should be made with material delivered in other existing academic programs.

Page 81

43. The evaluation of trainers be conducted on a regular basis with the input of course attendees as well as senior instructors. The results of such evaluations be considered I in relation to future training assignments and responsibilities.

Page 81

44. Violent Crime Linkage Analysis System (ViCLAS) reports must be completed and submitted to the Toronto Police Service Sexual Assault Squad coordinator within the prescribed time limit (21 days) as demanded in the Toronto Police Service Directive 05-19, Violent Crime Linkage Analysis System.

Page 86

45. ViCLAS reports must be completed and submitted to the Ontario Provincial Police ViCLAS Centre in Orillia by the Toronto Police Service Sexual Assault Squad within the prescribed time limit (a further nine days) as required by Ontario Regulation 550/96 of the Police Services Act.

Page 86

46. All police officers be informed of the reporting requirements of ViCLAS.

Page 86

47. A regular reporting process be initiated in regard to ViCLAS submissions. All instances of non-compliance with the regulation and the Directive 05-19 should be reported immediately to the appropriate Deputy Chief of Police for action.

Page 86

48. All ViCLAS reports reviewed by the Sexual Assault Squad include evidence of such review. In addition, any deficiencies noted during this review should be communicated to the originator of the report as well as to the division. Such a process would reduce future deficiencies and accelerate the submission of reports to Orillia.

Page 87

49. The Chief of Police request that any re-engineering of ViCLAS by the RCMP be conducted in consultation with its major user, the Toronto Police Service. The reengineering of ViCLAS should include the following:

    - the elimination, if possible, of redundant information required in the ViCLAS booklet;
    - the automation of the preparation of the ViCLAS booklet;
    - the electronic submission of ViCLAS reports to the various ViCLAS reporting centres; and
    - the reduction of the significant time from the crime occurrence to the potential identification of linkages.

Page 88

50. The City of Toronto Police Service ensure, if possible, that any re-engineering of the ViCLAS system by the RCMP should take into account the potential to link with U.S. cities linkage systems, with a particular emphasis on the ViCAP system currently used by the FBI.

Page 89

51. A re-evaluation be conducted of the ViCLAS training process. Training should be conducted only by appropriate personnel. Consideration should be given to retaining staff from the OPP ViCLAS Centre in Orillia to provide such training.

Page 90

52. Police officers be specifically educated on the roles and responsibilities of the sexual assault care centres. It is important that police officers understand fully the roles of the centres in order to ensure that the officer is able to provide assistance and convey accurate information to women who have been sexually assaulted.

Page 95

53. A formal written protocol be developed between the police service and the sexual assault care centres which provides for the reporting of inappropriate police behaviour. The protocol include a provision that such behaviour be reported to the Sexual Assault Squad for action which may involve additional training and/or discipline. The protocol should include a process for the communication of the action taken by senior police staff to address the concerns identified by the centres.

Page 96

54. The Police Services Board notify the Province of the need to expedite its review of the Sexual Assault Medical Kit (Evidence Kit).

Page 97

55. The role and responsibilities of the Victim Services Program be communicated and explained to all officers. The communication program be initiated via the Toronto Police Services “Live Link” video facilities.

Page 99

56. The Sexual Assault Squad be required to form relationships with community groups, share information and concerns and work together to meet common objectives. In addition, consideration be given to the establishment of a formal succession planning process in order to ensure that the transfer of police officers to other responsibilities does not disrupt relationships with community organizations.

Page 102

57. The Chief of Police develop a written protocol detailing the circumstances in which a general warning should be given to the public that a suspected serial sexual predator is active. Community consultations should take a place in the preparation of this directive.

Page 105