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A Former Crown's Vision for Empowering Survivors of Sexual Violence

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Résumé de l'article

Notre façon de lutter contre la violence sexuelle au Canada ne fonctionne pas. Les victimes de la violence sexuelle ont perdu confiance dans le système de justice pénale, comme en témoigne le taux extrêmement faible de signalements à la police. Bien que les victimes souhaitent généralement que les auteurs de violence sexuelle soient tenus responsables de leurs actes, leur réticence à recourir au système de justice pénale indique clairement que les coûts (psychologiques et émotionnels) sont trop élevés. Les victimes ont besoin d'une protection accrue contre les nouveaux traumatismes, et quelque chose doit changer afin que les auteurs de violence sexuelle soient tenus responsables, ainsi que pour décourager la violence sexuelle. Dans le présent article, je propose un modèle de représentation des victimes tenant compte des traumatismes, confidentiel et entièrement financé pour les victimes de la violence sexuelle, afin de mieux protéger leurs droits et faciliter un accès égal à la justice. Le modèle que je propose s'appuie sur les systèmes de représentation des victimes à l'étranger, dans l'armée américaine et à la Cour pénale internationale. Les études de ces modèles démontrent que ceux-ci font participer les victimes de manière plus significative au système de justice et atténuent les préjudices de diverses façons. Je démontre également pourquoi les critiques dirigées contre ces modèles sont injustifiées. Enfin, je présente une analyse concernant les droits à l'égalité en vertu de la Charte canadienne et j'explique pourquoi notre processus actuel est discriminatoire et porte atteinte à l'égalité des femmes. Je conclus que la représentation juridique offre une excellente valeur et d'énormes possibilités d'autonomisation aux victimes de la violence sexuelle en renforçant leur protection contre les préjudices et en améliorant leur accès à la justice. Je fais également valoir qu'un tel soutien aux victimes pourrait mener à une hausse du taux de signalement de la violence sexuelle et ainsi contribuer à réduire le taux d'infractions sexuelles commises en toute impunité.

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A Former Crown's Vision for Empowering Survivors of Sexual Violence

Karen Bellehumeur*

Our method for combatting sexual violence in Canada is failing. Survivors of sexual violence have lost confidence in the criminal justice system as evidenced by the extremely low reporting rate to the police. While victims generally wish to hold perpetrators accountable, their reluctance to engage the criminal justice system is a clear indication that the cost (psychologically and emotionally) is too high. Survivors need more protection from re-traumatization and something must change in order to hold perpetrators accountable and deter sexual violence. In this article I propose a fully funded confidential trauma-informed model of victim representation for survivors of sexual violence to better protect their rights and facilitate equal access to justice. I find support for my proposed model by looking to systems of victim representation internationally, in the U.S. Military and in the International Criminal Court. Studies of these models demonstrate that they more meaningfully engage victims with the justice system and mitigate harm in various ways. I also demonstrate why the criticisms of these models are unwarranted. Finally I provide an analysis regarding equality rights under the Canadian Charter and outline why our current process is discriminatory and undermines the equality of women. I conclude that allowing legal representation offers overwhelming value and empowerment to survivors of sexual violence by improving their protection from harm and increasing their access to justice. I further postulate that providing this support to survivors could increase the reporting rate for sexual violence and thereby contribute to reducing the rate of sexually offending with impunity.

Notre façon de lutter contre la violence sexuelle au Canada ne fonctionne pas. Les victimes de la violence sexuelle ont perdu confiance dans le système de justice pénale, comme en témoigne le taux extrêmement faible de signalements à la police. Bien que les victimes souhaitent généralement que les auteurs de violence sexuelle soient tenus responsables de leurs actes, leur réticence à recourir au système de justice pénale indique clairement que les coûts (psychologiques et émotionnels) sont trop élevés. Les victimes ont besoin d'une protection accrue contre les nouveaux traumatismes, et quelque chose doit changer afin que les auteurs de violence sexuelle soient tenus responsables, ainsi que pour décourager la violence sexuelle. Dans le présent article, je propose un modèle de représentation des victimes tenant compte des traumatismes, confidentiel et entièrement financé pour les victimes de la violence sexuelle, afin de mieux protéger leurs droits et faciliter un accès égal à la justice. Le modèle que je propose s'appuie sur les systèmes de représentation des victimes à l'étranger, dans l'armée américaine et à la Cour pénale internationale. Les études de ces modèles démontrent que ceux-ci font participer les victimes de manière plus

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significative au système de justice et atténuent les préjudices de diverses façons. Je démontre également pourquoi les critiques dirigées contre ces modèles sont injustifiées. Enfin, je présente une analyse concernant les droits à l'égalité en vertu de la Charte canadienne et j'explique pourquoi notre processus actuel est discriminatoire et porte atteinte à l'égalité des femmes. Je conclus que la représentation juridique offre une excellente valeur et d'énormes possibilités d'autonomisation aux victimes de la violence sexuelle en renforçant leur protection contre les préjudices et en améliorant leur accès à la justice. Je fais également valoir qu'un tel soutien aux victimes pourrait mener à une hausse du taux de signalement de la violence sexuelle et ainsi contribuer à réduire le taux d'infractions sexuelles commises en toute impunité.

The time has come to make bold changes to the way we treat victims¹ of sexual violence in the criminal justice system. We must come to terms with the fact that our current method for combatting sexual violence in Canada is failing. Rates of sexual violence have not improved and only one in twenty victims of sexual abuse report it to the police.² Consequently, the majority of perpetrators act with impunity because the justice system is completely user-unfriendly and thereby cannot hold offenders accountable. The unwillingness of victims to utilize the justice system is highly problematic. Since victims generally want perpetrators to be held accountable, one must surmise that the cost (psychologically and emotionally) is so high that it is prohibitive. The cost of engaging the criminal justice system must be reduced so that it can be genuinely accessible. We cannot expect to see positive change if we continue to do the same thing over and over. The innovation I proposed is to provide all survivors of sexual violence with a right to legal counsel to protect their rights and to facilitate better and equal access to justice.³

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

¹ In this article the word 'victim' is used interchangeably with the words 'complainant' and 'survivor.'

² Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter (July 11, 2017), online: Juristat <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>> [Statistics Canada, *Self-reported*].

³ While Ontario has implemented a limited independent legal advice (ILA) pilot program, it is insufficient. It provides sexual assault victims with four hours of free legal advice. The criteria require that victims over 16 years old were sexually assaulted in Ontario and live in Toronto, Ottawa or Thunder Bay. As one of the lawyers on the panel of lawyers providing advice, I have found that clients highly value the advice provided but often have needs well beyond its scope. Ontario, Ministry of the Attorney General, "Ontario Victim Services" (last modified 2 April 2020), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php>>. Nova Scotia, Alberta, British Columbia also have ILA programs that provide only legal advice rather than legal representation.

to empower survivors of sexual violence is to allow them fully funded legal counsel, who have been trained in trauma, to represent their interests as they engage with the criminal justice system. Rather than a non-lawyer, legal counsel is best positioned to effectively assert victims' rights and best situated to interact with other stakeholders in the criminal justice system.

This is not a revolutionary idea. Many other countries around the world allow legal representation for victims, including the International Criminal Court.⁴ In this paper I demonstrate that other countries' experiences point to clear benefits in allowing such legal representation. I argue that legal representation provides survivors more control and agency in the aftermath of sexual violation, it enhances the level of respect and compassion shown to survivors, it improves attention to their needs, and more meaningfully engages them within the justice system. Most importantly, legal representation helps mitigate harm and re-traumatization experienced by survivors by providing them a legal voice, a representative who understands trauma and will stand up for their rights and advocate for their best interests.

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

Finally, I show why the standard criticisms of this proposal from defence counsel are not warranted. I conclude with an analysis regarding equality rights under the *Charter*⁵ that outline why our current process is discriminatory and undermines the equality of women and their access to justice. For these reasons I conclude that providing legal representation offers overwhelming value to survivors of sexual violence and improves their safety, security, equality and healing.

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

The Supreme Court of Canada has recognized the unique violation sustained by victims of sexual assault. In *R v Ewanchuk*⁶ the court declared that:

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.⁷

⁴ Office of Public Counsel for Victims, International Criminal Court, "Representing Victims Before the International Criminal Court: A manual for legal representatives," (2010), online: <<https://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF>>.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 [*Charter*].

⁶ [1999] 1 SCR 330.

⁷ *Ibid* at para 28.

Moreover, in *R v Osolin*⁸ Justice Cory observed that:

[S]exual assault is very different from other assaults. It is true that it, like all other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.⁹

Canadian statistics show the rate of charging, prosecuting and convicting for sexual assault is lower than for any other type of violent crime.¹⁰ Statistics from 2014 also show that of sexual assaults experienced by persons 15 years and older, only 5% were reported to the police.¹¹ Additionally, 43% of the cases reported resulted in charges laid, and only 43% of the charges laid ended with convictions.¹² The result is that less than 1% of those who experienced sexual assault saw the perpetrator convicted. These figures convey a discouraging reality - that victims of sexual assaults have very little chance of receiving justice through the court system. Indeed it seems that victims' lack of faith in the criminal justice system is borne out by their low reporting rates. One might even surmise that the #MeToo movement was a response to the lack of genuine access to justice through the criminal justice system - a societal bubbling-over resulting from the inadequacy of any other outlet.

While survivors' lack of confidence in the system is evident, the reasons warrant examination. A survey by Statistics Canada found that reasons for not reporting included fear of not being believed, shame and self-blame, uncertainty about the ability of the police to help, fear of the perpetrator, and fear of the criminal justice system.¹³ Many of these fears stem from a criminal justice system that is insensitive to the needs of victims and lacks respect and compassion. Furthermore, the shame experienced by many survivors is aggravated and reinforced by their interactions with lawyers and judges whose treatment of survivors is shaped by gender stereotypes and employing rape myths.¹⁴ The end result is that many complainants of sexual assault who engage the criminal justice system feel re-victimized by the process.

A. Re-Traumatization In The Criminal Justice System

Re-victimization is often a result of a negative experience in the justice system that causes new trauma in addition to pre-existing trauma. Examples of such negative experiences include making a report to police and feeling disbelieved, or undergoing aggressive and humiliating cross-examination in court. The notion of re-traumatization is validated by numerous studies that conclude that the impact of testifying in a sexual assault trial is harmful and traumatizing.¹⁵ More specifically, Garvin and Belooof assert that failure to respect victims' autonomy and agency in sexual assault cases causes secondary victimization. This re-

⁸ [1993] 4 SCR 595.

⁹ *Ibid* at para 165.

¹⁰ Statistics Canada, *Self-reported*, *supra* note 1 at 3 (statistics from 2014).

¹¹ *Ibid*.

¹² *Ibid*.

¹³ Statistics Canada, "Measuring Violence Against Women, Statistical Trends 2006," (last modified 17 October 2006), online: <<http://www.statcan.gc.ca/pub/85-570-x/2006001/findings-resultats/4144393-eng.htm>>.

¹⁴ Elaine Craig, *Putting Trials on Trial, Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston, McGill-Queens University Press, 2018) at 9.

¹⁵ *Ibid* at 4.

traumatization has been associated with many forms of distress for victims including post-traumatic stress disorder [PTSD].¹⁶ A well-quoted passage by clinical psychiatrist Judith Herman explains, “if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.”¹⁷

Melanie Randall and Lori Haskell posit that potential re-traumatization caused by engaging the criminal justice system necessitates a trauma-informed approach to processing criminal matters.¹⁸ Such an approach requires justice officials to recognize and understand the complexities of trauma's impact and responses to it.¹⁹ They stress the importance of delivering services in a way that avoids inadvertent re-traumatization and harm to individuals accessing justice.²⁰

Understanding that “trauma is subjective”²¹ is crucial to recognizing the different ways in which an individual may respond to an event that is frightening and out of one's control. An individual's previous life experiences provide a critical lens through which a traumatic event is processed.²² Consequently, those administering the criminal justice system that have never experienced sexual violence may unknowingly submit survivors to an environment that is highly traumatizing. While there is a clear need for education regarding trauma for all judges, lawyers, police officers, and other service providers in the justice system, a trauma-informed legal counsel would be well placed to advocate for survivors' protection from trauma throughout their legal experience.

It is important to understand the role of trauma in the justice system for a number of reasons. There are features of traumatic experiences that are beyond common knowledge, particularly regarding trauma's impact on the neurobiology of the brain. For example, in the face of a serious threat, the brain releases stress hormones that dramatically impair the functioning of the prefrontal cortex and reduce one's ability to reason, plan, think and even code the experience sequentially.²³ After experiencing a traumatic event, survivors may not be able to explain why they acted in the manner they did, thereby exacerbating their feelings of shame and self-blame.²⁴ Furthermore the stress hormones released may also cause survivors to experience a “freeze” response during a traumatic event, a reaction that can also lead to feelings of confusion and guilt.²⁵

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

¹⁶ Margaret Garvin & Douglas Beloof, “Crime Victim Agency: Independent Lawyers of Sexual Assault Victims” (2015) 13:1 Ohio St J Crim L 67 at 70.

¹⁷ Judith Herman, “The Mental Health of Crime Victims: Impact of Legal Intervention” (2003) 16 J Traumatic Stress 159 at 160-61.

¹⁸ Melanie Randall, “Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping” (2013) Fall 2013 Dal LJ 501 at 518.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Lori Haskell & Melanie Randall, “The Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know” (last modified 26 March 2019), online: Justice Canada <<https://www.justice.gc.ca/eng/rp-pr/jr/trauma/index.html>> at 11.

²² *Ibid.*

²³ *Ibid* at 13.

²⁴ *Ibid.*

²⁵ *Ibid* at 15.

They must understand that sufficient time needs to have elapsed for memories to be properly consolidated after a traumatic event and even then, some memories may be fragmented or enhanced, such as “flashbulb memories.”²⁶ Interview techniques must be non-confrontational and focus on inquiries about sensory and emotional memories in order to elicit the most fulsome evidence possible.²⁷

Most importantly, interviewers must understand that the attitude and treatment of survivors, such that they are respected and believed, is paramount to the success of the investigation and the recovery of the survivor. This is particularly important when the abuse experienced by the survivor involved a power imbalance similar to the dynamic with the interviewer.²⁸ As Haskell and Randall point out, interviewers must comprehend that “[i]t is possible to be both neutral and impartial, and to be compassionate and empathetic.”²⁹

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

There are numerous systemic barriers to participation for victims of sexual assault that could be lessened by the intervention of trauma-informed legal counsel. Marianna Carrera points to the intrusive and repetitive police investigations and rigorous cross-examinations, often concerning very personal issues such as mental health, substance abuse and relationship problems, as examples of a harmful process that can repel participants.³⁰ This is echoed in the Holly Johnson’s research findings that many survivors of sexual violence who report to police feel disbelieved and are thereby discouraged to proceed.³¹ Furthermore, fewer than half of those in her study who reported to police felt they received an explanation of the process or had their questions fully answered.³² Johnson questions the ability of police agencies on their own to change the current power structures that enable rape myths and poor treatment of sexual assault complainants to persist.³³

The problem of victims experiencing injury by engaging in the criminal justice system may be compounded by the potential harm their silence causes to the criminal justice system as a whole.³⁴ According to Garvin and Beloof, when disempowered victims lose confidence in the system and stop reporting their victimization, they become an excluded part of the community’s identity and that weakens the fight against sexual violence.³⁵

²⁶ *Ibid* at 19.

²⁷ *Ibid* at 22.

²⁸ *Ibid* at 24 and 25.

²⁹ *Ibid* at 27.

³⁰ Marianna Carrera, “Moving Past Barriers in Reporting Crime, Considering the need for a national comprehensive policy framework for victims of sexual assault in Canada” (2015) 6:2 Public Pol’y & Governance Rev 5 at 6.

³¹ Holly Johnson, “Why Doesn’t She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police,” (2017) 29 CJWL 36 at 49.

³² *Ibid* at 55.

³³ *Ibid* at 59.

³⁴ Garvin & Beloof, *supra* note 16 at 71.

³⁵ *Ibid*.

II. THE BENEFITS OF INDEPENDENT LEGAL REPRESENTATION

International research has demonstrated the efficacy of providing independent counsel to sexual assault survivors as they make their way through the trial process. For example, the benefits of legal representation to victims of rape were considered in an Irish study comparing the legal processes of 15 European states (the Irish Study).³⁶ It found that the trauma experienced by engaging the legal process and the consequent secondary victimization could be reduced by fully informing survivors about their cases and their role in the process, and by allowing them to participate in the proceedings as much as possible.³⁷ The report reviewed previous studies that found that it was necessary for victims to have an opportunity to be involved in the process and to voice their concerns, in order to experience satisfaction with the justice system and to experience psychological healing.³⁸

Another study reviewed by the report found that victims' participation in the criminal justice system enhanced their perception of how fairly they were treated by the authorities, which in turn increased their satisfaction with their experience of the justice system.³⁹ Ultimately, this research indicated that the factor having the most impact on victims' satisfaction with the justice process was the level of dignity and respect they were accorded.⁴⁰ The authors of the Irish study conclude that the factors required to improve rape victims' experiences in the justice system were the perception of being listened to, believed, guided, protected and offered services that met the women's needs.⁴¹

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

As Bacik et al note:

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

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

³⁶ I Bacik, C Maunsell and S Gogan, *The Legal Process and Victims of Rape* (1998), online: Dublin Rape Crisis Centre <<http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>>

³⁷ *Ibid* at 50

³⁸ *Ibid* at 51, referring to E Erez, 'Victim participation in sentencing: rhetoric and reality' (1990) 18:1 J Crim Justice 19.

³⁹ *Ibid* at 53, referring to J Wemmers, 'Victims in the Dutch Criminal Justice System: the effects of treatment on victims' attitudes and compliance' (1995) 3 Int'l Rev Victimology 323.

⁴⁰ *Ibid*, referring to M Joutsen, 'Victim participation in proceedings and sentencing in Europe' (1994) 3 Int'l Rev Victimology 57.

⁴¹ *Ibid* at 59.

Where participants had a victim's lawyer, their lawyer was the main source of information concerning bail, trial process etc. Some problems were experienced in relation to state-funding of lawyers, since in some countries the qualification threshold for the means test is very high. Finally, the victim's lawyer was the legal officer with the highest satisfaction rating among the sample...⁴²

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

III. MODELS OF INDEPENDENT LEGAL REPRESENTATION

A. Internationally

The findings of the Irish study have been met with enthusiasm. Scholar Fiona Raitt conducted a study in 2010 to explore the feasibility of introducing independent legal representation for complainants of sexual offences in Scotland.⁴³ She cites data from previous Scottish research indicating that those who report sexual offences have been critical of police conduct, investigative medical procedures, poor collection and preservation of evidence, and the humiliating cross-examination techniques used by defence counsel.⁴⁴ These complainants were particularly offended by the culture of disbelief exhibited during the investigation and prosecutions of their cases.⁴⁵ Raitt observes that there appears to be a 'disconnect' between the ambitions of politicians and the reality of victims' experiences in court.⁴⁶ She relies on the Irish Study to support her proposed model of legal representation, and argues that criticism that the study is not applicable to the adversarial style justice system is unwarranted, as many of the European countries in the study have legal systems containing elements of the adversarial style.

In Australia, a similar proposal for independent legal counsel has been made by Kersten Braun.⁴⁷ That country also seeks to improve the experience of testifying for victims of sexual assault, as one means to improve reporting and conviction rates.⁴⁸ Braun cites studies showing that law reforms to date have been unsuccessful in achieving those goals,⁴⁹ and relies on the Irish Study to support the benefits to victims of allowing independent legal counsel.⁵⁰ She suggests that legal representation could fill an existing gap in the protection of sexual assault victims.⁵¹ Further, it would enhance the courts' sensitivity and make the needs of victims more visible.⁵²

⁴² *Ibid* at 17-18.

⁴³ Fiona Raitt, "Independent Legal Representation for Complainers in Sexual Offence Trials," (2010), online: Research Report for Rape Crisis Scotland <<https://www.rapecrisisscotland.org.uk/publications/IndLegalRepReport-2010.pdf>>.

⁴⁴ *Ibid* at para 1.06.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at para 1.07.

⁴⁷ Kerstin Braun, "Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?" (2014) 25:3 Current Issues in Criminal Justice 819.

⁴⁸ *Ibid* at 819.

⁴⁹ *Ibid* at 820.

⁵⁰ *Ibid* at 822.

⁵¹ *Ibid* at 825.

⁵² *Ibid* at 824.

In the quest for the best model of independent legal representation for victims of sexual offences, some commentators have touted the merits of the Danish system. Senior researcher Dee Smythe sees it as a system offering meaningful reform options for South Africa.⁵³ She outlines the key factors of this state-funded legal representation that begins when a complaint is lodged with the police. Of note, is that in Denmark police are duty-bound to inform victims of their right to legal representation before they make even a statement.⁵⁴ The police also have the obligation to keep victims informed of the progress of the sexual assault investigation.⁵⁵ Additionally, the role of the victim's lawyer is very specific. Victim's counsel can be heard at trial, but only regarding matters that directly affect the victim, so they are only present while the victim testifies.⁵⁶ The lawyer does not have the right to cross-examine the accused or to call witnesses, but does have the right to object to questions put to the victim by either the defence or the prosecutor, and can apply for an *in camera* hearing.⁵⁷ Victims' counsel has more leeway at the sentencing hearing and can call witnesses, lead victim impact evidence and request compensation, but cannot make submissions on the sentence that should be imposed. Smythe concludes that the Danish system would be an ideal way to protect a victim's dignity and privacy rights in the South African criminal justice system.

Regarding the question of best models of legal representation for victims, there is limited data available on victim's experiences while being represented by counsel. However, a large 2014 to 2016 research study into victim's rights and services in European countries measured the satisfaction rate regarding each country's criminal justice system and showed that Denmark had the highest rating with 75% satisfaction.⁵⁸ The same study found that victims who report sexual crimes "have three procedural needs: respectful treatment, sufficient and understandable information, and a level and form of participation that is suited to their personal situation"⁵⁹ Based on that study, one may surmise that Denmark's system of providing legal representation to victims of sexual assault provides a satisfactory level of respect, information and participation.

B. The International Criminal Court and Independent Legal Representation

An excellent example of a system that recognizes the importance of victims' access to justice is the International Criminal Court [ICC]. This court was set up to try the most serious crimes in the international community and implements a unique approach to ensuring access to justice for some of the world's most vulnerable victims. The Court's architects intended that victim recognition would enhance the Court's ability to pursue truth, peace and justice. Hence, the Court allows victims to present their views and concerns where their personal interests are affected at any stage of the proceeding that the Court deems appropriate, as long as such presentation does not prejudice the rights of the accused and is consistent with a fair trial. Importantly, it also allows for legal representation of victims in order to present their views, where determined to be appropriate by the Court.

⁵³ Dee Smythe, "Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences," (2005) 2 S African J Crim Justice 167.

⁵⁴ *Ibid* at 177.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ Emanuela Biffi *et al*, *Project Ivor - Implementing victim-oriented reform of the criminal justice system in the European Union* (2016), online: <<https://www.apav.pt/ivor/images/ivor/PDFs/IVOR-Repot-WebVersion.pdf>> at 48.

⁵⁹ *Ibid* at 49.

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

Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant's right to counsel. There is no zero-sum game between those two rights. The victim's right to be treated with respect seems to have little if any negative implications for the offender.⁶⁰

One of the positive outcomes resulting from victim participation in the ICC, then, is the broadening of the objectives achieved by the Court, from strictly retributive, in ending impunity for offenders, to including a restorative aspect, in providing heightened satisfaction to victims.⁶¹

C. The United States Military and Independent Legal Representation

Closer to home, the U. S. Military's new Special Victims Counsel model is a particularly compelling model worth emulating in Canada. The necessity for reform in the U.S. military came from a 2012 report showing unacceptable numbers of unreported sexual assault. It estimated that the actual number of sexual assaults to be 26,000, compared to the 3,374 cases that had been reported that year.⁶² In response to that disparity congress passed legal reforms to enhance the military justice process relating to victims' rights. The goal, according to the Senator Claire McCaskill, was to "make [the] military the most victim-friendly justice system in the world."⁶³ Her view was that providing legal counsel to victims of sexual assault in the military was the most important feature of their legal reform. In a Senate hearing regarding the bill proposing the reform she opined:

They are giving victims their own lawyers. They are ramping up the protection, information, and deference they give victims. That is the single most important factor, based on all of my experience, that will dictate whether a victim has the courage to come out of the shadows...⁶⁴

As of 2014, the *Victim Protection Act* now provides attorney-client privileged representation by Special Victims Counsel [SVC] for members of the military who have been sexually assaulted.⁶⁵ The military's

⁶⁰ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing, 2008) at 143.

⁶¹ Giuseppe Zago, "The Role of Victims at the International Criminal Court: Legal Challenges from the Tension Between Restorative and Retributive Justice," (November 2014), online: *Diritto Penale Contemporaneo* <https://www.penalecontemporaneo.it/upload/1415744172ZAGO_2014.pdf> at 2

⁶² Erin Heuring, "'Til it Happens to You: Providing Victims of Sexual Assault their Own Legal Representative" (2017) 53 *Idaho L Rev* 689 at 712, referring to the Department of Defence's Sexual Assault Prevention and Response Office's report for fiscal year 2012.

⁶³ *Ibid* at 713.

⁶⁴ *Ibid*, referring to 159 Cong Rec S8303 (daily ed 20 November 2013).

⁶⁵ *Ibid* at 712 and Garvin & Beloof, *supra* note 16 at 73.

legal division provides lawyers to victims, independent of the prosecutor and without cost, for the purpose of advising them about the legal process and protecting their privacy interests.⁶⁶ The SVC's primary duty is to represent their client's interests during the entire process leading up to and during the court-martial proceedings.⁶⁷ Additionally, these lawyers provide education about the military justice system and the resources available to their clients.⁶⁸

The Air Force was the first branch of the military to put the program of legal representation for sexual assault survivors in place (initially as a pilot program) as well as to conduct a survey about its effectiveness. Their 2014 survey found that 92% of victims represented were "extremely satisfied" with the SVC's advice and support during the court process.⁶⁹ The survey showed even higher ratings for SVC's aid in understanding the process and for recommending the program to other victims.⁷⁰

In another compelling report to the United States' President, reporting rates for sex crimes were shown to have dramatically increased after implementing the SVC program.⁷¹ The jump in the number of sexual assault reports from the year before the SVC implementation to the year after was 50%, and after a second year was 76%.⁷² These numbers have sparked hope that the availability of legal counsel for victims will not only cause the percentage of sexual assault reported to increase, but will also have a deterrent effect on sexual violence.⁷³ This notion is supported by studies showing that an increased perceived probability of punishment corresponds to a decreased probability that an individual will behave in the punishable manner.⁷⁴ Thus, the increased prospect of getting caught may be a deterrent.

This innovative approach to the problem of unreported sexual assault in the military has scholars and commentators advocating for its application to the civilian legal process.⁷⁵ The U.S. military model has demonstrated that making legal counsel available to provide needed information and advice and to protect victims' rights is a very effective way to ensure that victims of sexual assault are treated with dignity and respect. Rather than engaging a legal process that strips the complainant of any sense of control or agency, allowing victims the right to legal representation in a limited application such as that of the SVC, provides them better access to justice and improved protection. This model is worth strong consideration as a template for legal reform to the Canadian criminal justice system.

⁶⁶ Erin Gardner Schenk & David L Shakes, "Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military" (2016) 6 U Denver Crim L Rev 1 at 5.

⁶⁷ Garvin & Beloof, *supra* note 16 at 73.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 74, referring to U.S. Dept of Defence, *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, Annex 98, online: < https://responsesystemspanel.whs.milpublic/docs/Reports/00_Final/RSP>.

⁷⁰ *Ibid*

⁷¹ Schenk & Shakes, *supra* note 66 at 7

⁷² *Ibid*, referring to Provisional Metrics on Sexual Assault Fiscal Year 2014, Dept of Defence, *Report To The President Of The United States On Sexual Assault Prevention And Response*, 23, (2014), online: <http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoDReport toPOTUSAppendix B.pdf>.

⁷³ *Ibid* at 7-8.

⁷⁴ *Ibid* at 6.

⁷⁵ Garvin and Beloof, *supra* note 16 at 77-85; Schenk & Shakes, *supra* note 66; and Heuring, *supra* note 62 at 728-737.

D. Canada's Experience with Legal Representation for Sexual Assault Victims

The need to enhance the effectiveness of the criminal justice system was recognized by Prime Minister Justin Trudeau in 2015 when he called for its examination and review in a mandate letter to the Minister of Justice and Attorney General.⁷⁶ A report prepared by the Office of the Federal Ombudsman for Victims of Crime agreed that the review was necessary to address the public's shaken confidence in the criminal justice system.⁷⁷ Consequently, after extensive public consultations, a 2017 report by the federal government set out principles to guide the reform of the criminal justice system, which includes "developing a system that shows compassion and respect for victims, meaningfully engages them, and responds to their needs."⁷⁸ Moreover, the report contains recommendations that the government create a position for 'victim navigators' to help victims navigate the criminal justice system and to prioritize the evaluation and monitoring of supports for victims.⁷⁹ In my view, these guidelines would best be implemented by providing trauma-informed legal counsel to victims of sexual violence.

While these recommendations are a recent development, even earlier, in 2005 Canadian scholar Larry Wilson had already recognized the need for a legal response to the low reporting rates and the excruciating trial process for victims of sexual assault and proposed legal representation for victims as a solution.⁸⁰ He considered prior developments in Canadian law, showing a trend toward the increased recognition of victims' rights, as an encouraging sign. He postulated that a model of legal representation for victims must respect the accused legal rights, the adversarial process and current service providers, but need not provide them with party status.⁸¹ In this way he viewed victims' legal representation as augmenting the current process and contributing to improvements not only to individual victims, but also to the proper administration of justice.⁸²

I agree with Wilson's perception of the legal shift in the last few decades toward valuing the rights of victims, and indeed the trend has continued to the present. The case of *R v O'Connor*⁸³ is an example of the Supreme Court of Canada providing victims with formerly unacknowledged privacy rights in the third party records belonging to them. In that case the Court held that the *Charter of Rights and Freedoms*⁸⁴ protected victim's privacy rights and required that they be balanced against accused's right to full answer and defence.⁸⁵ A few years later in *R v Mills*,⁸⁶ the Court found that sexual assault complainants' equality rights under section 15 of the *Charter* ought to be recognized.⁸⁷

⁷⁶ Canada, Office of the Prime Minister, "Minister of Justice and Attorney General of Canada Mandate Letter" (13 December 2019), online: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

⁷⁷ Canada, Office of the Federal Ombudsman for Victims of Crime, "Getting Fair Outcomes for the Victims of Canada's Criminal Justice System" (November 2017), online: <<https://www.victimfirst.gc.ca/res/pub/GFO-ORE/CCJS.html>>.

⁷⁸ *Ibid*

⁷⁹ *Ibid*

⁸⁰ Larry C Wilson, "Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services" (2005) 23 Windsor YB Access Just 249 at 250 and 312.

⁸¹ *Ibid* at 285-6.

⁸² *Ibid*.

⁸³ [1995] 4 SCR 411.

⁸⁴ *Charter*, *supra* note 5 at s 7-8.

⁸⁵ *R v O'Connor* [1995] 4 SCR 411 at paras 128 - 130.

⁸⁶ [1999] 3 SCR 668.

⁸⁷ *Ibid* at para 94.

Enhanced victims' rights can also be seen in legislative amendments to the *Criminal Code*⁸⁸ which have been ongoing since the 1980s,⁸⁹ as well as in Victims Bill of Rights legislation enacted in every province.⁹⁰ Indeed, victims' rights have been deemed important enough to result in the enactment of the *Canadian Victims Bill of Rights*,⁹¹ passed in 2015. The act sets out victims' rights under the headings: Information, Protection, Participation, and Restitution. It also provides new rights including the right to request testimonial aids when testifying, and to have their views considered by authorities regarding decisions that impact them.⁹² However, despite their aspirational value, these pieces of human rights legislation lack enforcement provisions and have been criticized as toothless.⁹³

Perhaps the most significant recent legal development regarding the recognition of victims' rights was the enactment of Bill C-51.⁹⁴ This act amends provisions of the *Criminal Code*⁹⁵ to allow legal representation for complainants of sexual offences in admissibility applications regarding their sexual activities other than the alleged offence.⁹⁶ As a result, survivors of sexual offences are now entitled to representation by independent legal counsel for two types of motions within a criminal trial - applications to admit other sexual activities, and applications to admit third party personal records.⁹⁷ This legal representative is fully funded by several provincial governments,⁹⁸ but in my view should be state-funded countrywide. The court in *R v T.P.S*⁹⁹ understood the importance of state funding when ruling that the province of Nova Scotia is obliged to fund the complainant's legal counsel. Justice Lynch explained as follows:

It would be an injustice to this complainant and to all complainants if they are unable to exercise their right to be represented by counsel to protect their privacy and personal dignity. It is fair and just that the complainant be represented by counsel to protect her privacy and equality interests and rights.¹⁰⁰

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

⁸⁸ *Criminal Code*, RSC 1985, c C-46.

⁸⁹ Smythe, *supra* note 53 at 167-8. Smythe created a list of 23 legislative changes made in favour of victims' rights up to the date of the paper. Such changes have continued up to present day.

⁹⁰ Wilson, *supra* note 80 at 271.

⁹¹ SC 2015, c 13, s 2.

⁹² *Ibid* at s 13.

⁹³ Wilson, *supra* note 80 at 278.

⁹⁴ Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, (as passed by the House of Commons 13 December 2018).

⁹⁵ *Criminal Code*, *supra* note 88.

⁹⁶ Bill C-51 enacted section 278.93 - 278.97 and repealed sections 276.1 - 276.5.

⁹⁷ Victims of sexual offences have been entitled to independent legal counsel for third party record applications pursuant to section 278 of the *Criminal Code* since 1997.

⁹⁸ Ontario, Nova Scotia and British Columbia fund victim's counsel.

⁹⁹ *R v TPS*, 2019 NSSC 48.

¹⁰⁰ *Ibid* at para 25.

The courts have interpreted this new legislation to permit complainant's counsel the right to receive disclosure of the applications and the right to cross-examine the accused on their affidavit.¹⁰¹ These rights have been deemed necessary to give meaning to words of the legislation that allow counsel for the complainant to "appear and make submissions."¹⁰²

That said, unfortunately the legislative changes enacted by Bill C-51 are in the process of being Constitutionally challenged around the country, based on violations of accused's *Charter* rights. One of the grounds argued is that the role of legal counsel, with standing for complainants in these applications, violates the accused's right to a fair trial under section 7 of the *Charter*. More specifically, objection has been raised regarding the requirement that defense counsel reveal their defence not only to the Crown but to the complainant as well, in order to establish an evidentiary foundation for the relevance of the other sexual activity or a record's sexual content.¹⁰³ The constitutionality of this requirement for defence disclosure is still unsettled in Canada. It has been found to be justified and causing no substantial prejudice to the accused in several cases,¹⁰⁴ but also has been found to breach the accused's *Charter* rights in other cases.¹⁰⁵

However, the defence argument that the complainant's standing in these admissibility hearings gives rise to the appearance of unfairness has generally not met with success.¹⁰⁶ For example in *R v R.S.*¹⁰⁷ Justice Breen reasoned:

A sexual assault complainant's privacy is acutely impacted by testifying at a criminal trial. Historically the law has discriminated against such witnesses, who are most frequently women or children. This mistreatment has resulted in a loss of confidence in the legal system and a widespread reluctance on the part of victims to seek the protection of the law. Affording complainants standing and a right to counsel will improve the quality of justice by ensuring that courts fully appreciate the impact of evidentiary rulings on the privacy interests of witnesses. Extending natural justice to complainants enhances the confidence of complainants and the public in the administration of justice.¹⁰⁸

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

¹⁰¹ *R v FA*, 2019 ONCJ 391 at para 65; *R v Boyle* 2019 ONCJ 253 at 5; *R v Boyle* [2019] OJ No 155 at para 42.

¹⁰² *R v Boyle* 2019 ONCJ 253 at para 6.

¹⁰³ See e.g. *R v FA*, 2019 ONCJ 391 at para 65.

¹⁰⁴ *Ibid* at para 67-68; *R v AC*, 2019 ONSC 4270 at para 43; *R v CC*, 2019 ONSC 6449; *R v Whitehouse* 2020 NSSC 87.

¹⁰⁵ *R v AM* 2019 SKPC 46; *R v DLB*, 2020 YKTC 8 at para 78; *R v Anderson* 2019 SKQB 304; In *R v RS*, 2019 ONCJ 645, Justice Breen found that requiring the Accused to provide disclosure prior to the complainant's cross-examination would cause the Accused's rights to be violated. However, he qualified his ruling that as long as the application is made during the complainant's cross-examination, rather than prior, the process does not prejudice the Accused and is therefore valid.

¹⁰⁶ *R v DLB*, *ibid* at para 83; *R v RS* *ibid* at para 81; *R v FA* *supra* note 103 at para 69.

¹⁰⁷ *Supra* note 105.

¹⁰⁸ *Ibid* at para 81.

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

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

The inability of Crown counsel to provide confidentiality to survivors is also a substantial impediment to victims' fulsome preparation for court. If a Crown receives new information during a witness's preparation, or during any conversation, that information will have to be disclosed to defense counsel. In such a situation the Crown becomes a potential witness and could be disqualified from conducting the prosecution. This risk causes Crowns to minimize the time they spend speaking with witnesses about their evidence and handcuff their ability to dive into details in a way that would best prepare victims to testify in court. While Crown counsel still maintain a duty to prepare their witnesses¹⁰⁹ and should continue in that role, in my experience the ability to have a confidential conversation with a survivor is essential to building trust and providing support. In this way, the solicitor-client relationship is essential to mitigate re-traumatization of survivors throughout the criminal process.

There are five stages in the criminal justice process where legal representation would assist victims in accessing justice: when reporting to the police, during the police investigation, after charges are laid prior to trial, during the trial, and post-trial.¹¹⁰ At some of these stages the primary role of the lawyer would be to provide information and advice to the victim, for instance at the reporting and investigation stages. Additionally, during the police investigation the victim's representative would be a valuable liaison between the victim and the police regarding important information that could assist the investigation. Counsel could also advocate for the use of trauma-informed interview strategies and best practices (such as delaying the detailed interview to allow for consolidation of memories). The victim's counsel could also convey helpful information for a bail hearing to the prosecutor, such as information about the inappropriateness of a proposed residence or surety. In the case of a plea negotiation, the victim's counsel could allow for the victims' participation by representing their interests and advocating for a resolution that accords with their wishes.

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

¹⁰⁹ Alice Woolley, "What Ought Crown Counsel do in Prosecuting Sexual Assault Charges? Some Post-Ghameshi Reflections" (29 March 2016), online (blog): *ABlawg.ca* <<https://ablawg.ca/2016/03/29/what-ought-crown-counsel-to-do-in-prosecuting-sexual-assault-charges-some-post-ghomeshi-reflections/>>

¹¹⁰ Raitt, *supra* note 43.

applications. In the case of a not guilty verdict, counsel could assist the victim with options available to them such as a civil claim, or if appropriate advocate for an appeal to the prosecutor.

As shown by some of the studies referred to above, the benefits of legal counsel for survivors of sexual violence are extensive. Legal representation would provide a single contact point for complainants and could result in reducing time restraints experienced by prosecutors and the police. By providing victims with information and preparing them to testify, counsel could lessen the workload for prosecutors and police and ensure that the complainants are properly supported and prepared. Importantly, it could help reduce the trauma experience by victims throughout their time participating in the criminal process. It could reduce their stress and improve their confidence, thus giving rise to better memory capacity and better quality of testimony.¹¹¹ Better testimony could lead to more convictions, and that together with a more positive experience in the justice system could lead to more reporting of sexual violence.

Providing satisfaction to victims and ensuring that their voice is heard should be an objective of the criminal justice system. This is supported by a resolution adopted by the UN General Assembly regarding the “Intensification of efforts to eliminate all forms of violence against women and girls.”¹¹² It urges states to develop sustained approaches and national strategies to eliminate violence against women including empowering women and girls, and gives *inter alia* the following example:

Encouraging the removal of all barriers to women’s access to justice and ensuring that they all have access to effective legal assistance so that they can make informed decisions regarding, *inter alia*, legal proceedings and issues relating to family law, and also ensuring that they have access to just and effective remedies for the harm they have suffered, including through the adoption of national legislation where necessary.¹¹³ (emphasis added)

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

IV. ANTICIPATING AND RESPONDING TO CRITICISMS OF INDEPENDENT LEGAL REPRESENTATION

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

¹¹¹ Braun, *supra* note 47 at 825.

¹¹² Resolution adopted by the General Assembly 18 December 2014 69/147 Intensification of efforts to eliminate all forms of violence against women and girls, A/69/481 (5 February 2015).

¹¹³ *Ibid* at para 20(w).

Additional criticisms have been raised by Sarah Moynihan, who argues that injecting the victim's voice into the adversarial system will result in a loss of objectivity in the criminal process.¹¹⁴ Moynihan disagrees with the validity of balancing the rights of the accused with the rights of the victim because the outcome of injustice is different, referring to the risk of incarceration falling only on the accused.¹¹⁵ She also takes the position that a victim's lawyer representing the victim's interests would introduce a third party into the process and undermine the equality of arms principle, that is, the accused would be required to face a 'double onslaught' by both the Crown and victim's counsel.¹¹⁶

A response to these objections can be found in the writings of Jonathan Doak.¹¹⁷ He describes the bipartisan adversarial system as a confrontational and competitive environment where witnesses are turned into weapons.¹¹⁸ He points out that the manipulation and control exercised on witnesses is not conducive to genuine listening, understanding or healing of the conflict in issue.¹¹⁹ This justice goal is a valid one. He explains that historically victims were responsible for prosecuting offenders privately, but in more recent times that responsibility shifted to the state as a form of public law. These two areas of law, private law for disputes between individuals, and public criminal law to protect public interests and impose punishment, are now seen as a strict dichotomy, yet their separation is not necessarily justified.¹²⁰ The purist view of criminal law only values the collective interest of society in preventing harm and punishing, and requires all subjectivity to be eliminated, viewing objectivity as essential for the consistency and legitimacy of the justice system.¹²¹ Doak argues that distinguishing criminal public objectives from private interests is artificial.¹²² He points out that civil and criminal liability share overlapping concepts of fault, and "public and private wrongs may be conceived as variations along the same continuum of fault."¹²³ Thus, he sees the criminal justice system moving toward a more interactive relationship between individual rights of victims and collective interests.¹²⁴ In fact, victim restitution orders and restorative justice initiatives are examples of that interaction.

Further, he argues that the principle of equality of arms should apply to a complainant being allowed the protection of legal counsel in the same way as an accused person.¹²⁵ He points to the harm sustained to a victim undergoing cross-examination and character attacks in a sexual assault trial and calls it "one of the most significant factors in secondary victimization."¹²⁶ It is at that point where a prosecutor's duties do not extend to protection of the victim's well-being, and objections will only be made if strategy dictates. This lack of protection and response to character attacks, harms not only the victim's sense of dignity and

¹¹⁴ Sarah Moynihan, "The Voiceless Victim: A critical analysis of the impact of enhanced victim participation in the criminal justice process," (2015) 3 IALS Student Law Rev 25 at 27.

¹¹⁵ *Ibid* at 27-28.

¹¹⁶ *Ibid* at 29.

¹¹⁷ Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 JL & Soc'y 294.

¹¹⁸ *Ibid* at 297.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 299.

¹²¹ *Ibid* at 300.

¹²² *Ibid*.

¹²³ *Ibid* at 301.

¹²⁴ *Ibid*.

¹²⁵ *Ibid* at 302.

¹²⁶ *Ibid* at 306.

emotional well-being, but also the truth seeking ability of the process, if relevant responses are never heard.¹²⁷ Hence, equality of arms should extend to victims through provision of their own legal counsel, to allow them the protection they currently lack.

Finally, in response to concerns about ‘due process,’ Doak agrees that the central focus of criminal trials should always be the determination of guilt regarding the accused, but submits that it does not have to be to the exclusion of other objectives and interests.¹²⁸ He concludes that providing victims of crime an atmosphere of fairness and respect will not detract from trial fairness or the central focus of a criminal trial, and can serve to both protect victims’ interests and bolster the integrity of the justice system.¹²⁹

In my view, the needs of victims can be accommodated without compromising the rights of accused individuals. Defendants lose nothing when victims are spared re-traumatization. Victim representation would not hamper defense counsels’ ability to cross-examine complainants regarding relevant trial issues, nor impair their ability to mount a defence. Requiring fairness to one participant in the proceeding does not require that fairness be detracted from another participant. To the contrary, the entire trial process becomes more fair. Moreover, when the criminal justice system fails to address sexual assaults that have gone unreported, key justice goals, such as protection of the public, holding perpetrators accountable and crime reduction, are not being met.¹³⁰ Consequently, allowing legal representation to survivors of sexual violence is an effective means of upholding victims’ rights in an inherently harmful adversarial process.¹³¹

V. EQUALITY RIGHTS ARE ENHANCED BY THE PROVISION OF LEGAL REPRESENTATION

The importance of victims’ rights is particularly significant in the context of sexual assault because of the gendered nature of the crime and its disproportionate impact on women. Internationally violence against women has been clearly linked to gender inequality and patriarchal societal norms. In fact the preamble to the United Nations (UN) Declaration of Elimination of Violence against Women states:

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women...¹³²

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

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

¹²⁷ *Ibid* at 307.

¹²⁸ *Ibid* at 316.

¹²⁹ *Ibid*.

¹³⁰ Carrera, *supra* note 30 at 8.

¹³¹ *Ibid* at 13.

¹³² United Nations General Assembly Resolution 48/104, (20 December 1993).

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man...Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society.¹³³

While that case dates back to 1991, little has changed according to Canadian statistics, including that 92% of victims of police-reported sexual assault are women.¹³⁴ The effect of this is that women do not experience Canadian life on an equal footing to men because they must make adaptations to protect themselves from various forms of sexual violence. And if such violence does occur, they are obstructed from genuine access to justice because of the significant risk of further harm.

What is more, sexual violence is a form of gender inequality that is often compounded by intersectional forms of discrimination such as by race, indigeneity religion, class, sexual orientation and gender expression.¹³⁵ These inequalities persist despite the protections of our *Canadian Charter of Rights and Freedoms (Charter)*, which addresses equality and prohibits discrimination. Under section 15(1):

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

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

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

¹³³ *R v Seaboyer*, [1991] 2 SCR 577.

¹³⁴ Statistics Canada, "Measuring violence against women: Statistical trends" by Marie Sinha (last modified 11 November 2015), online: *Juristat* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11766/11766-1-eng.htm#a15>>.

¹³⁵ Women's Legal Education and Action Fund, "IAAW and LEAF Continue to Seek Justice for Cindy Gladue" (2019), online: *LEAF* <<https://www.leaf.ca/iaaw-and-leaf-continue-to-seek-justice-for-cindy-gladue/?fbclid=IwAR0ofMd6MzfoqxyzQmMWqUxC5uGklQaBaHCPR1SL-buwNSCbnZs0YrqVIA8>>.

VI. CONCLUSION

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

As a society we must do better for survivors of sexual violence and for Canadians at risk of becoming future victims. By refusing to make legal reforms that address sexual violence, we perpetuate a system that undoubtedly will put more women and men in harms way. The evidence of our system's failure to protect women from sexual violence and from re-traumatization by the criminal justice process is unequivocal. Providing a legal voice to survivors signals systemic reform that values all victims. Once survivors determine that they can access justice without further harm, reporting rates may rise and offending with impunity may decline. These are important justice goals. The ensuing deterrence of sexual violence made possible by such reform would positively change the lives of untold numbers of Canadians. This hope must motivate us. We owe it to those not yet touched by sexual violence to do all we can to protect them.