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JURIDIQUE POUR LES FEMMES

DUE JUSTICE FOR ALL

PART TWO: ALTERNATIVE AVENUES TO JUSTICE FOR SEXUAL ASSAULT SURVIVORS

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LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform, and public education using the *Canadian Charter of Rights and Freedoms*.

This publication was created as part of the Due Justice for All Project, an initial collaboration between LEAF, METRAC – Action on Violence, and WomenatthecentrE. WomenatthecentrE was not involved in the research or drafting of this report, and instead created their own report: *Declarations of Truth: Documenting Insights from Survivors of Sexual Violence*. LEAF encourages readers to review this report, which is grounded in survivor-led community-based participatory research and includes a transformative justice model. LEAF is committed to developing a trust-based relationship with WomenatthecentrE moving forward.

Unless otherwise noted, content in this report is current as of 2019.

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Introduction

This report constitutes Part 2 of LEAF's research into existing and potential alternative avenues to justice for sexual assault survivors. Part 1 examined existing, traditional legal models through the lens of survivors' justice interests, including the extent to which the existing models achieve justice in the eyes of survivors. As noted in that report, sexual assault is a gendered crime, as survivors of sexual assault are disproportionately women. The report also highlighted that Canada's existing models have unique elements that may meet the needs of different survivors, depending on their individual goals. Nonetheless, all the models are in one way or other inaccessible to and ineffective for many survivors of gender-based sexual violence, for example due to financial costs or invasive cross-examination procedures.

Different Canadian and international approaches have sought to make justice more accessible, effective, and meaningful for sexual assault survivors. These include small-scale projects designed to improve existing avenues, such as specialized courts. They encompass larger efforts to develop location-specific responses to sexual violence, such as post-secondary sexual assault policies. They also include approaches that reimagine legal responses to sexual assault, such as restorative or transformative justice processes. While specialized courts and campus sexual assault mechanisms are important and can meaningfully improve legal responses, the alternative models of restorative and transformative justice also warrant consideration. Piloting these programs could supplement the existing legal models and meaningfully increase access to justice for at least some survivors in some circumstances.

This report examines three approaches that have been used in Canada and internationally to respond to sexual violence against women:

1. Specialized courts designed to respond specifically to violence against women
2. Campus sexual assault policies and mechanisms at Canadian universities

3. Alternative justice processes, including restorative justice and transformative justice

The report summarizes the key aspects of these models and discusses their potential advantages and disadvantages. The report concludes by offering ideas for potential pilots and considerations to keep in mind.

Specialized courts

A. Overview

Some countries, including Canada, have sought to address the problems women face in criminal prosecutions of gender-based violence by developing specialized courts. The introduction of these courts is consistent with *UN Handbook for Legislation on Violence Against Women*, which recommends that states should enact legislation that:

- Provides for the creation of specialized courts or special court proceedings guaranteeing timely and efficient handling of cases of violence against women; and
- Ensures that officers assigned to specialized courts receive specialized training and that measures are in place to minimize stress and fatigue of such officers.[1]

Courts specialized in gender-based violence tend to focus on forms of violence by specific actors and in specific contexts such as domestic violence and sexual violence. These courts exist in a number of countries, including South Africa, New Zealand, Brazil, Uruguay,

[1] UN Department of Economic and Social Affairs, Division for the Advancement of Women, Handbook for Legislation on Violence Against Women, UN Doc ST/ESA/329, 2010, online: http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf at 19.

Venezuela, the United Kingdom, Spain, a number of states in the United States, and provinces in Canada.[2]

Similar to other "specialty" courts, gender-based specialized courts offer a diversionary method that runs parallel to the standard system and seeks to coordinate the efforts of community players in responding to sexual violence. However, unlike most other specialty courts that prioritize rehabilitation, gender-based violence courts place a considerable focus on the efficiency of case processing, offender accountability, victim services and safety, and access to social services.[3] Under the specialized court model, judges, police, lawyers, victim support staff, court staff, and probation officers have specific training in the impact of sexual and domestic violence offences, which can increase the efficiency of the process and quality of service. The trained professionals can also tailor their practice to reduce the stress and trauma of participating in an adversarial trial.[4]

Specialized courts may also allow for the integration of a variety of legal processes including criminal, civil, and family law issues.[5] This theoretically enables survivors of violence to resolve the various legal issues arising from that violence in one forum, in front of one judge who is informed of the various issues and dynamics that would impact the proper resolution.

The following examples of specialized courts provide insight into how these courts can be established and operate. These examples are accompanied by commentary on whether

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[2] *Ibid* at 20.
[3] Julie Blais, Guy Bourgon, and Leticia Gutierrez, "Do Domestic Violence Courts Work? A Meta-Analytic Review Examining Treatment and Study Quality" (2016) 17:2 Justice Research and Policy 75 at 78.
[4] Julie Stewart, "Specialist Domestic/Family Violence Courts within the Australian Context" Australian Domestic and Family Violence Clearinghouse Issue Paper No 10, online: www.domesticpeace.ca/images/uploads/documents/ResearchonDVCourtsinAustralia.pdf at 10-18.
[5] *Ibid* at 8.

these courts can meaningfully serve women's justice interests in the context of sexual violence.

B. Domestic violence courts

This specialized court model is most commonly used in family violence cases, to integrate criminal and family proceedings.

i. Canada's Domestic Violence Courts

Over 50 Domestic Violence Courts (DVCs) exist in Canada. These courts are active in most provinces and primarily hear criminal law matters. Trained judges, prosecutors, police officers, and other legal professionals comprise the DVC's key players.[6] While DVCs across the country differ in terms of process and procedure, they all have the common objective of victim safety and support, offender accountability, and early intervention/timeliness of the court process.[7]

In the 1980s, all jurisdictions in Canada adopted pro-arrest and pro-prosecution policies with the aim of ensuring domestic violence (DV) was treated as a criminal offence. Under the pro-arrest policy, police are required to lay charges where there are reasonable and probable grounds to believe that DV has taken place.[8] In British Columbia, for example, once the police have made an arrest, they generally undertake one of two approaches under

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[6] British Columbia, Ministry of Justice, *Framework for Domestic Violence Courts in British Columbia*, (Ministry of Justice, 2014), online: www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/public/dv-courts-framework.pdf [*BC Report*] at 3.

[7] For detailed although somewhat dated summary of DVCs across Canada, see Ontario, Ontario Ministry of Attorney General, prepared by Information Info Strategy, *Evaluation of the Domestic Violence Court Program: Final Report*, (2006) [*Ontario Report*] at i, Appendix A.

[8] "Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation" (24 February 2017), online: Department of Justice www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/p2.html.

the DVC framework: an early intervention for low-risk or first time offenders, or vigorous prosecution for high-risk or repeat offenders.[9]

In Ontario, the Crown Attorney considers offenders for early intervention if an offender has no prior convictions for DV-related offences, has not caused significant injuries or harm, has not used weapons, and chooses to plead guilty. Offenders who enter the early intervention program are generally remanded on conditions to attend and complete the Partner Assault Response (PAR) program—a counselling and anger management program for abusers. If they complete the program, offenders are granted a conditional discharge, absolute discharge or peace bond. If the offender does not complete the program or re-offends during the program, the original charge is reinstated and new charges may be laid.[10]

Many jurisdictions in Canada have a "no drop" prosecution policy, which generally means that law officials have distinct protocols for prosecution and will not drop a charge due to the victim's non-participation. Offenders who do not wish to participate in or are not eligible for early intervention are prosecuted through the coordinated prosecution stream, whereby a DVC will hear the case on a separate docket from other criminal matters. The coordinated prosecution stream utilizes specialized evidence collection and enhanced investigation procedures by the police in order to maximize the amount of supporting evidence that is presented to the court (for example, 911 tapes, video-taping of victims statements, photographs of injuries, medical reports, and witness statements).[11]

In addition to DVCs, Ontario also has one Integrated Domestic Violence Court (IDVC), where one judge hears a family's criminal and family law matters if the underlying issue for

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[9] *BC Report*, *supra* note 6 at 5.
[10] "Programming Responses for Intimate Partner Violence, Ontario", online: Department of Justice www.justice.gc.ca/eng/rp-pr/jr/ipv-vpi/p10.html.
[11] *Ibid.*

the family is DV.[12] The family law issues may include custody, access and/or support, but not divorce, family property or child protection cases. The courts are designed to promote a "more integrated and holistic approach to families experiencing domestic violence, increased consistency between family and criminal court orders and quicker resolutions of the judicial proceedings."[13]

The IDVC, located in downtown Toronto (311 Jarvis Street), sits one day every two weeks, hears all relevant cases in its geographical jurisdiction, and is presided over by judges experienced in criminal and family matters. The IDVC also benefits from a dedicated Crown Attorney, criminal and family legal aid duty counsel, a community resource coordinator, a victim witness services court worker, and a family support worker. At each hearing date, all of the criminal proceedings are addressed, followed by a brief adjournment and all of the family matters.[14] This integrated system gives the hearing judge more information and allows them to monitor the family, which in turn increases the accountability of the accused and enhances the complainant's safety.[15]

ii. Advantages

a. Faster and more efficient case processing

The DVC framework is the result of an overhaul of the mainstream system, and its processes and procedures are adjusted and refined to ensure an effective and efficient specialist response to DV.[16] These changes seek to overcome the fragmented and ad hoc

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[12] "Integrated Domestic Violence Court (IDV Court)", online: Ontario Court of Justice www.ontariocourts.ca/ocj/integrated-domestic-violence-court/.
[13] *ibid.*
[14] Nicholas Bala, Rachel Birnbaum, and Peter Jaffe, "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned" (2014) 29 Can J Fam L 117 at 146-147.
[15] "Integrated Domestic Violence Court (IDV Court) Overview", online: Ontario Court of Justice https://www.ontariocourts.ca/ocj/integrated-domestic-violence-court/overview/.
[16] Stewart, *supra* note 4 at 9.

approach that the mainstream court system may have towards DV cases.[17] IDVCs seek to further improve efficiency by avoiding multiple hearings and further integrating a family's legal matters within one single justice unit. An evaluation of DVCs in Ontario found that DVCs either reduced case processing time (from first appearance to disposition) or met their pre-established goals despite increased caseload.[18]

One important way in which DVCs' efficiency improves court outcomes is with regards to complainants' perceptions of the justice system. A 2011 study of Calgary's DVC found that the justice personnel's holistic approach to DV cases provided for a more efficient response, which in turn minimized factors related to the dynamics of abuse and violence that impede or impair court processes, such as victims recanting their testimony or being reluctant witnesses.[19]

b. DV cases are taken more seriously

Some studies have highlighted an increase in the number of charges, prosecutions, and convictions under the DVC framework. For example, a 2016 study of Nova Scotia's pilot DVC program found that substantially fewer charges, hearings, and final dispositions were dismissed and more cases ended with a conviction and sentence.[20] More concretely, in Nova Scotia the dismissal rate dropped from 50% to 32% since the pilot, and the sentencing rate increased from 23% to 33%.[21]

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[17] *ibid.*
[18] Ontario Report, supra note 7 at 19.
[19] Deborah Jesso, "Evaluation Of The Calgary Specialized Domestic Violence Trial Court & Monitoring The First Appearance Court" (2011), online: The National Crime Prevention Centre of Public Safety Canada and The Alberta Law Foundation www.researchgate.net/publication/258629709_Evaluation_of_the_Calgary_Specialized_Domestic_Violence_Trial_Court_Monitoring_the_First_Appearance_Court_Final_Report at 40.
[20] Bob Crocker, Diane Crocker, & Myrna Dawson, "Domestic Violence Court Pilot Project Sydney, Nova Scotia" (2016) online (pdf): *Atlantic Evaluation Research Consultants*, prepared for *Court Services, Department of Justice, Nova Scotia*, online: www.novascotia.ca/just/documents/Final-Report%20April-2016.pdf at 27.
[21] *ibid.*

Under no-drop charging and prosecution policies present in Ontario and other provinces, DV cases are charged and prosecuted independent of the victim's wishes. While not without disadvantages (discussed below), some authors have cited the following as advantages of this policy: demonstrating a clear commitment to treating DV as a serious offence; providing for a speedier court process, a clear threat of prosecution, and greater consistency in sentencing; and protecting the woman from retaliation if the abuser perceives the decision is out of her hands.[22]

c. Specialized knowledge of the legal personnel

In the ideal DVC program, only judges who are trained about violence between intimate partners and familiar with the related issues preside over DV cases. There are significant benefits from having specialist judges. They have an understanding of complainants' experiences and concerns, a high degree of expertise with the laws governing sexual assault cases (including rules of evidence and procedure), and a willingness to ensure that complainants' interests are safeguarded.[23] The program also includes special training about intimate partner violence for police, Crown lawyers, probation officers, and other staff that are involved in the program.[24] This aspect of the DVC framework could greatly enhance the habitability of the legal process for survivors.

d. Victim advocates and other support services

The report evaluating DVCs in Ontario found increased cooperation and coordination of services (including victim services) between criminal justice and community partners.[25] One important priority for victim support services is to inform victims about the court

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[22] Holly Johnson, "Protecting Victims' Interests in Domestic Violence Court" (4 November 2010) at 3, online: *Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick* www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/2johnson.pdf [Johnson, "Protecting Victims"] at 3.
[23] Stewart, *supra* note 4 at 10.
[24] *Ibid* at 9.
[25] Ontario Report, supra note 7 at xii.

process. In the Ontario study, over half of victims reported feeling well-informed about the legal process.[26] A literature review analyzing the impact of DVCs in Canada found that, overall, victim support services under the DVC framework have improved risk assessments, referrals to community agencies, and overall victim support throughout the criminal justice process.[27]

e. Survivor input into the process

Some DVCs may provide outlets for survivors' input into the process. In Ontario, survivors can provide input into the process by working with victim services to draft memoranda for Crown prosecutors, for example on guilty pleas[28] or conditions for bail or probation.[29] Survivors can also provide input through victim impact statements.[30] Over half the interviewees in Ontario's DVC evaluation reported having had contact with the Crown, and most reported being fairly treated. As well, half of the interviewees believed that their views were considered in how the case was handled, particularly with regards to plea agreements and disposition of the case.[31]

f. Advantages specific to IDVCs

IDVCs can offer a variety of advantages over the standard criminal proceeding and the DVC. First, since one judge delivers all relevant judgments, these decisions do not contradict each other and will be well-informed by the dynamics of the particular family.[32] Second, the IDVC framework can better connect survivors with a variety of social services that address all

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[26] *Ibid* at iii.
[27] Johnson, "Protecting Victims", *supra* note 22 at 4.
[28] *Ibid* at 56.
[29] Ontario Report, supra note 7 at 54.
[30] *Ibid* at 58. As of 2016, all victims of crime have the right to submit a victim impact statement. See: *Canadian Victims Bill of Rights*, SC 2015, c 13, s 15.
[31] *Ibid* at 59.
[32] Nicholas Bala, Rachel Birnbaum, and Peter Jaffe, *supra* note 14 at 143.

their needs and conditions.[33] Third, having fewer court trips and appearances reduces the costs for the parties and the justice system.[34]

In an evaluation of Toronto's IDVC, the majority of participants had a generally positive experience with the court. Nonetheless, stakeholders raised concerns about lack of information about the operation of the IDVC, the high cost of retaining separate counsel for criminal and family law matters, and potentially lengthy hearings.[35] Despite this, the report noted, "IDVC seems to be having a positive impact from a systemic perspective. That is, information sharing between the criminal and family courts appears to be a positive outcome."[36]

iii. Disadvantages

The DVC model also has significant disadvantages, some of which reflect poor implementation of the program, and some of which are inherent in the DVC model.

a. Inadequate expertise

Even though the specialized training of judges, Crown Attorneys, and the legal personnel is a premise of the DVC framework, several authors report that in practice DVC professionals are not well-trained or sensitive to the needs of DV survivors. The 2016 evaluation of Nova Scotia's DVC framework highlighted that the professionals had not "received training related specifically to risk assessment in domestic violence cases, specialized courts or collaborative case management work," and encouraged "professional development in these areas for all staff working in a specialized domestic violence court."[37] A 2011 study of Calgary's DVC also recommended ongoing and more effective education for

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[33] *ibid* at 144.
[34] *ibid*.
[35] *ibid* at 168.
[36] *ibid* at 170.
[37] Crocker, Crocker & Dawson, *supra* note 20 at 41.

justice personnel in order to increase sensitivity towards DV issues, particularly for the junior staff.[38] The Ontario report echoed these findings, recommending additional training specifically for frontline police officers who first respond to the scene. This additional training is to remedy the stakeholders' and victims' concern that the justice response is too dependent on the officer involved.[39] Without specialized training, the justice interest of habitability may not be as well-served.

b. Inaccessibility and cultural sensitivity

The DVC framework may be inaccessible and alienating to marginalized populations. As Johnson noted in her literature review on DVCs, DVC frameworks have been adopted "without an appreciation of the multiple ways in which social positions conditioned by race, ethnicity, colonization, immigrant and refugee status, class, sexual orientation, and level of physical and mental ability affect the experience of intimate partner violence, the decisions women make when seeking outside help, and the response of helping agencies."[40]

According to the Ontario report, Indigenous and immigrant communities feel alienated by the DVC program as they find it to have a "a middle-class, Anglo-Canadian perspective."[41] Similarly, the report identified Indigenous women as being less likely to get the police involved due to fear of racism, losing their children, insensitive and discriminatory police officers, and community shaming.[42] Immigrant and refugee women who are not yet permanent residents may fear that involving the police may lead to their husbands' deportation or to problems with their own immigration status.[43] To remedy these challenges, the Ontario report recommended more diversity within the DVC staff, more outreach to

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[38] Jesso, *supra* note19 at 105.
[39] Ontario Report, supra note 7 at 157.
[40] Johnson, "Protecting Victims", *supra* note 22 at 54.
[41] Ontario Report, *supra* note 7 at iv.
[42] Leslie Tutty et al, "The Justice Response to Domestic Violence: A Literature Review" (November 2008), online: *Resolve Network, University of Calgary* www.ucalgary.ca/resolve-static/reports/2008/2008-01.pdf at 40-41.
[43] *Ibid* at 44.

communities, diversity and equity training for staff, as well as the incorporation of Indigenous practices into the DVC framework.[44]

The Ontario report also identified barriers for persons with mental health issues. More specifically, stakeholders noted that DVC services, in particular the PAR program, do not work well for persons with mental disabilities or mental illness.[45] Overall, then, the DVC framework may not be accessible to or appropriate for survivors of intimate partner violence who most need a sensitive and effective DV response.

c. Survivors' input may not be incorporated

A survivor's input may either not be incorporated into the justice process, or it may not be incorporated meaningfully. Holly Johnson reported that, for many women, procedural justice—defined as "the perceived fairness of decision-making"—is as important as the case outcome.[46] Women in Johnson's focus group were frustrated with the court process as they found the justice process insensitive to their input. Many more of the women would have been satisfied with the court process if they had more input in the process, regardless of the eventual outcome. Participants noted that the court experience could be positive when they felt supported and prepared by the Crown Attorney, when the Crown Attorney invested in developing a relationship with the victim, and when victims felt able to express themselves and feel heard.[47]

As noted, many jurisdictions have adopted a mandatory DV charging policy. However, it may not be appropriate to force women to participate in policies and procedures that so fundamentally affect all aspects of their lives, and mandatory charging and vigorous

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[44] Ontario Report, supra note 7 at iv.
[45] *Ibid* at v.
[46] Holly Johnson and Jennifer Fraser, "Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I" (October 2011), online: Department of Criminology, University of Ottawa www.endvaw.ca/wp-content/uploads/2015/12/dvc-do-theymake-women-safer.pdf at 9.
[47] *Ibid.*

prosecution policies do not always constitute an appropriate response. According to Johnson, the "no drop" prosecution policy is too rigid and diminishes women's autonomy to determine what outcome is best for them and their children. Most survivors only seek short-term protection and immediate resolution to a particular incident as opposed to a long-term prosecution and harsh punishment.[48]

Moreover, while pro-arrest and prosecution policies can increase reporting and conviction rates, they can also decrease women's safety. When men are charged or prosecuted against women's will, women can face retaliation, intimidation, and harassment when men are released on bail or charges are dropped due to insufficient evidence.[49] This is especially problematic as many women are unaware of the no-drop policy, and many only wish to warn their partner by an arrest threat, as opposed to initiate an actual arrest or prosecution.[50] In order to assert their wish not to prosecute, women may also recant their statement, which is seen as "obstructing the goals of a justice system set up to assist *them.*"[51]

Furthermore, dual charging—where criminal charges are laid against both the victim and the violent partner—also significantly hampers women's safety and introduces a host of new consequences and issues. For example, women may risk losing their children to child protection services or risk losing their immigration status if their status is dependent on their partner. They may also face other consequences related to their employment or housing, further exacerbating an already difficult situation.[52]

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[48] Johnson, "Protecting Victims", *supra* note 22 at 7.
[49] *Ibid* at 16.
[50] *Ibid* at 15.
[51] Holly Johnson, ""No-Drop Policies" Are Harming Some Women", Brief for Social Sciences Research at the University of Ottawa, (2012), online: www.sciencessociales.uottawa.ca/sites/socialsciences.uottawa.ca/files/hjohnson_worldideas.pdf at 2.
[52] Shoshana Pollack, Melanie Battaglia & Anke AllspachWomen, "Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies" (March 2005), online: The Women Abuse Council of Toronto www.oaith.ca/assets/files/Publications/womenchargedfinal.pdf.

d. Punishments and recidivism

The DVC framework may not be effective at providing accountability and preventing repeat offences. As noted, Crown Attorneys can refer an offender to alternative justice mechanisms, for example to the PAR program in Ontario. However, several Canadian and American studies have highlighted that women may be unsatisfied with alternative measures and the overall leniency of the court outcome.[53] In a UK study, women particularly expressed their dissatisfaction when offenders only received a monetary fine.[54] This leniency may be caused by some judges' view of DV as an isolated incident unlikely to reoccur.[55] In the report on Nova Scotia's pilot DVC, the authors expressed concerns with court outcomes, stating, "[w]e would not equate pleading guilty or having successfully completed treatment with being held fully accountable."[56]

In terms of recidivism, a study by the Department of Justice found that DVCs had little impact on reducing the overall likelihood of recidivism, but offenders who appeared in a DVC were less likely than offenders who appeared in other Ontario courts to be reconvicted of DV; rather, they were more likely to be convicted of an administrative offence.[57] On the other hand, a meta-analysis of 20 studies found that participation in DVCs was more likely to be correlated with reduced *general* recidivism, as opposed to with reduced DV recidivism.[58] Even though the meta-analysis found great variability between rates of recidivism reported by

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[53] Tutty et al, *supra* note 42 at 68.
[54] Amanda Robinson, *Measuring What Matters in Specialist Domestic Violence Courts in Austria, Federal Chancellery, Federal Minister for Women and Civil Service, Ten Years of Austrian anti-Violence legislation* (Report delivered at the Council of Europe Campaign to Combat Violence Against Women, Including Domestic Violence, Vienna and St. Pölten, Austria, 5-7 November 2007), online: www.bunmegelozes.easyhosting.hu/dok/10_jahre_gewaltschutzgesetz_2008_en.pdf#page=229.
[55] *Ibid.*
[56] Crocker, Crocker & Dawson, *supra* note 20 at 77.
[57] Canada, Department of Justice, "Offender Profile and Recidivism among Domestic Violence Offenders in Ontario", 2006, by Nathalie Quann, rr06-fv3e (Ottawa: Research and Statistics Division), online: www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr06_fv3-rr06_vf3/rr06_fv3.pdf at iv.
[58] Blais, Bourgon & Gutierrez, *supra* note 3 at 90.

different studies,[59] it concluded that "the effects of DVCs on reducing reoffending compared to standard justice processing are negligible."[60] Overall, for women who seek accountability for the offender, the DVC program may not be appropriate due to its emphasis on alternative accountability mechanisms as well as the lack of conclusive data about the program's impact on recidivism.

e. DVCs present the same issues as the traditional court system

In their literature review, Tutty et al. noted that women have different levels of satisfaction with various elements of the criminal justice process. Overall, most victims were fairly satisfied with the police response to DV but recognized that there was room for improvement, particularly with regards to their attitude towards victims and their policies around dual charging.[61]

However, the review found that women were likely to be dissatisfied with various aspects of the court process. For instance, women may feel revictimized or feel that they lack information about and control over the process. This is caused by long waiting times, no drop policies, disrespectful prosecutors and/or judges, and lawyers who provide little information to their clients.[62] Moreover, Indigenous, immigrant, and refugee women face additional difficulties due to language and cultural barriers, lack of information about resources, and financial burdens.[63] As such, in attaining justice, women may face the same challenges within the DVC framework as they do within the traditional court system.

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[59] *ibid.*
[60] *ibid* at 93.
[61] Tutty et al, *supra* note 42 at 86.
[62] *ibid.*
[63] *ibid.*

iv. Conclusion

Overall, while Canada's specialized courts have made the criminal justice system more responsive to DV, the reviewed research shows that there are still changes to be made in order for women to feel comfortable turning to them in times of need.

While it is challenging to transpose legal responses to DV to the context of sexual assault addressed in this paper, some of the elements of DVCs could inform sexual assault law reform. In particular, greater access to victim services, highly trained personnel, and increased efficiency in the process would likely improve women's experiences of criminal prosecutions of sexual offences. However, as demonstrated by the studies on DVCs, the success of such reforms depends significantly on funding, organization, and implementation. As well, improved policies do not guarantee that survivors' experiences will significantly improve in the overburdened criminal justice system. Moreover, the specialized court models LEAF has identified all rely on the criminal law, and include criminal trials, potential criminal consequences, and therefore the constitutionally mandated procedural and fundamental justice protections for the accused. As such, the DVC model may not be a meaningful alternative to the criminal justice system for some sexual assault survivors.

With that said, to the extent that key principles underlying the DVC framework can inform a non-criminal specialized court, it may be worth considering the following recommendations:

- **Improved information sharing:** it is crucial that victims are aware of legal procedures and process with respect to their case.
- **Respecting women's wishes and input:** lack of attention to women's concerns—such as through aggressive charging and prosecution policies—can discourage women from reporting and further jeopardize their safety.

- **Improved access to services and resources:** studies have noted that women value victim assistance services and community referrals, particularly in order to remain well-informed about the legal process.
- **Improved training and procedure:** specialized training for key players, reduced delays due to postponement, and enhanced investigation mechanisms can all contribute to a more effective and efficient legal process.

C. Sexual offence courts

Even though the DVC framework is well-established in Canada, specialized sexual violence courts are more relevant to the Due Justice for All Project's objectives. Canada currently does not have any specialized sexual assault courts, although one was proposed in Quebec in 2019, with a working group established in early 2021 to further investigate feasibility and design. We can look to other countries for experience and guidance.

i. South Africa's Sexual Offences Courts

South Africa is globally seen as innovative and successful in its experiment with specialized sexual assault courts, and therefore presents an appropriate case study.[64] South Africa's Sexual Offences Courts (SOCs) were established in 1993 in response to alarmingly high rates of sexual violence in the country coupled with very low rates of prosecution and conviction, particularly for sexual offences against children.[65] As stated by the South African government, the objective of the SOC model is to (a) reduce the insensitive treatment of survivors; (b) adopt a coordinated and integrated approach among key justice players; and

[64] See, e.g. UN Department of Economic and Social Affairs, *supra* note 1, at 20.
[65] Jeremy Finn, "Decision-Making and Decision Makers in Sexual Offence Trials: Options for Specialist Sexual Offence Courts, Tribunals of Fact and the Giving of Reasons" (2011) 17 Canterbury L Rev 96 at 97.

(c) improve the investigation and prosecution, as well as the reporting and conviction rates, in sexual offence cases.[66]

The first SOC, begun as a pilot project in Cape Town, was successful in many ways—for example, it maintained a conviction rate of up to 80%.[67] By contrast, prior rates of both prosecution and conviction were between 10 to 20%.[68] By the end of 2005, South Africa had over 74 SOCs,[69] most with conviction rates of over 60% which is significantly higher than rates associated with non-specialized courts in that country.[70] However, South Africa's high rates of conviction may be because, in the SOC era, sexual assault investigations and selections at the initial stage are more effective, and hence only the strongest cases proceed to trial. This hypothesis also accounts for the discrepancy between reported cases of rape and eventual convictions. In 2017-2018, 40,035 rape cases[71] were reported, but just 6,879 were prosecuted, resulting in 5,004 convictions.[72]

Although SOCs declined and were under a moratorium for several years,[73] the South African government declared them necessary to respond to the needs of sexual assault victims and reinstated them in 2013.[74] To that end, the government introduced a new "Sexual Offences Court Model" with extensive guidelines and requirements for establishing SOCs. This blueprint outlines SOC's infrastructure in terms of both personnel requirements, and

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[66] South Africa, Department of Justice and Constitutional Development, Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, *Report on the Re-Establishment of Sexual Offences Courts* (Pretoria: 2013), online: www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf [South Africa 2013 Report] at 18.
[67] *Ibid* at 9.
[68] Finn, *supra* note 65, at 100.
[69] South Africa 2013 Report, *supra* note 66 at 9.
[70] *Ibid* at 24.
[71] "Factsheet: South Africa's crime statistics for 2017/18" (11 September 2018), online: www.africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2017-18/.
[72] South Africa, National Prosecuting Authority of South Africa, Annual Report: National Director of Public Prosecutions in Terms of the NPA Act 32 Of 1998, 2017/2018 (Pretoria: 2018), online: www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf at 37.
[73] South Africa 2013 Report, *supra* note 66 at 24.
[74] *Ibid* at ii.

equipment and location requirements. Personnel requirements for prosecutors are more comprehensive than those set for other justice players such as judges and victim support services. These requirements are: a minimum of three years' experience in criminal litigation, being passionate and empathetic about sexual offences, having been trained as a specialist sexual offences prosecutor, and receiving continued training and debriefing. The Sexual Offences Court Model requires two prosecutors per court.[75]

The blueprint also specifies certain physical requirements for court buildings. The courtroom and all associated services must be situated so as to prevent contact between the accused and victims. There must be separate waiting rooms for children and adults, private consultation areas, CCTV and/or one-way mirror systems, and a special testifying room.

The Sexual Offences Court Model blueprint has resulted in the creation of two distinct forms of specialized sexual assault courts. Courts that meet a relatively high standard according to the blueprint and exclusively deal with sexual offences may be designated "pure" SOCs. SOCs may be designated as "hybrid" in circumstances where it is infeasible to establish a pure SOC due to infrastructural and resource challenges. Unlike pure SOCs, hybrid courts have a mixed court role but prioritize the prosecution and adjudication of sexual offence cases.[76] As of 2019, South Africa had 84 SOCs,[77] although a majority of those courts were hybrid.[78]

Ultimately, SOCs are criminal courts that are specialized to respond to sexual violence and provide a variety of victim support services to safeguard the rights of survivors within the context of the criminal trial. However, since so few reported cases proceed to trial, it is

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[75] *ibid* at 21.
[76] *ibid* at 11.
[77] Canny Maphanga, "Ramaphosa launches Sexual Offences Court: 'Women and children don't feel safe on SA's streets'" (28 March 2019), online: news24 www.news24.com/SouthAfrica/News/ramaphosa-launches-sexual-offences-court-women-and-children-dont-feel-safe-on-sas-streets-20190328.
[78] "List of Regional Courts upgraded into Sexual Offences Courts," online: Department of Justice and Constitutional Development www.justice.gov.za/vg/sxo-SOC-list.html.

possible that the SOC regime has not had much impact on the way sexual assault reports are investigated.

ii. Quebec's Proposed Sexual Assault Tribunal

In January 2019, the Quebec government announced that it was exploring launching a specialized sexual assault tribunal to address and standardize legal responses to criminal allegations of sexual assault within the province.[79] The tribunal would act as a special division of the Quebec Court, much akin to civil and youth court divisions.

The Quebec government noted that the primary idea behind creating a specialized court is to restore victims' trust in the system, which the government acknowledged was alarmingly and unsustainably low.[80] A committee of legal professionals and support workers was struck in March 2019 to create a plan for achieving this goal. To that end, the sexual assault tribunal would ensure that survivors are psychologically supported, that cases are tried and resolved more quickly, and that Crown prosecutors, judges, and court staff are trained to handle sexual assault cases.[81] Moreover, the tribunal would aim to allow survivors to play a larger role in the process.[82] At the time of writing, the Quebec government had not further clarified what these objectives would entail in practice. While this project has not yet been implemented and evaluated, it has the potential to minimize some of the harms of the criminal justice system and improve survivors' satisfaction with the justice process.

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[79] The Canadian Press, "Quebec parties meet to discuss ways to better support sexual assault victims" (14 Jan 2019), online: CityNews www.toronto.citynews.ca/2019/01/14/quebec-parties-meet-to-discuss-ways-to-better-support-sexual-assault-victims/.
[80] Lia Leveque, "Quebec convenes experts to support sexual and domestic violence victims" (18 March 2019), online: CTV News www.montreal.ctvnews.ca/quebec-convenes-experts-to-support-sexual-and-domestic-violence-victims-1.4340664.
[81] *Ibid.*
[82] "Quebec debates special tribunal for sexual assault cases" (14 January 2019), online: Canadian Press www.iheartradio.ca/cjad/news/quebec-debates-special-tribunal-for-sexual-assault-cases-1.8670823.

iii. Advantages

A 2017 study of the South African model found that the overwhelming majority of survivors using the SOC process had a positive experience,[83] and the study concluded by attributing this satisfaction to the court personnel's sensitivity and warmth. General satisfaction existed even in SOCs that had relatively fewer resources.[84] The study recommended that for the most part "the quality of trained and specialized staff should be given greater priority than the physical resources, and that this is a key element in the success of these courts."[85]

Further, as noted, sexual offences in South Africa have very high conviction rates and are also subject to mandatory minimum sentencing requirements.[86] These features, as well as the simple existence of specialist courts can send a signal to the community that sexual

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[83] KD Muller, "A Study to Determine the Satisfaction Level of Victims Accessing Services at Identified Sexual Offences Courts in South Africa" (15 May 2017), online: The Child Witness Institute www.docplayer.net/135168827-A-study-to-determine-the-satisfaction-level-of-victims-accessing-services-at-identified-sexual-offences-courts-in-south-africa.html at 53-54.

[84] *Ibid* at 27.

[85] *Ibid.*

[86] Criminal Law Amendment Act, No 105 of 1997, s 51, online: www.justice.gov.za/legislation/acts/1997-105.pdf. However, s 51 of the Act also stipulates that the courts are actually required to deviate from the statute and impose a lesser sentence where they find "substantial and compelling circumstances," or where the minimum sentence would be "unjust."

While there are guidelines as to what does not constitute "substantial and compelling circumstances" (such as the complainant's sexual history), little guidance is provided concerning the meaning of these terms. Hence, Jill Thompson and Felly Nkewto Simmonds argue that it is likely that courts continue to determine sentences in largely the same way that they always have—by weighing all the traditional mitigating and aggravating factors, and tailoring the sentence to the individual case. See: "Rape Sentencing Study: Statutory Sentencing Provisions for Rape, Defilement, and Sexual Assault in East, Central, and Southern Africa" (2016), online: Population Council https://www.svri.org/sites/default/files/attachments/2016-0718/Rape%20sentencing%20study%20ECSA_0.pdf at 7.

violence is a serious offence, and warrants a specialist court to ensure offenders are punished appropriately.[87] This may also encourage more victims to report sexual offences.[88]

iv. Disadvantages

A 2017 study of SOCs also found that SOCs are, at least in some cases, plagued by the same problems as mainstream criminal courts. The study particularly highlighted two problems with the SOCs' operation: the persistent failure to communicate the outcome of a case to survivors and instances of magistrates' neglect to protect survivors from intimidation by offenders or by defence counsel.[89] These challenges may be because specialized courts are still, ultimately, rooted in adversarial criminal models, with the consequent challenges relating to testimonies, cross-examination, disclosure, delays, acting as a witness rather than a participant, and the high burden of proof. Despite the increased trauma-sensitivity of SOCs, they do not alter many of the more fundamental concerns about the criminal justice system.

Some authors have also identified concerns with the public perception of specialized courts. Some think that creating separate courts for sexual offences may lead people to view sexual offending as less significant because those offences are not tried in the mainstream court system. Moreover, some may believe that, compared to the mainstream courts, specialist court are biased in favour of the survivor.[90] Such views may decrease the negative social consequences of a sexual offence conviction and possibly lessen the perceived public seriousness of sexual offending. Moreover, offenders have expressed a lack of confidence in the fairness and objectivity of the court and the court staff, including the prosecutors. A

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[87] It is important to note the significant criticisms of mandatory minimum penalties. In Canada, these have contributed to the over-incarceration of Indigenous and Black persons (see e.g. Department of Justice Canada, "JustFacts: The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" (September 2017), online: https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/oct02.pdf).
[88] *Finn*, *supra* note 65 at 102. However, as noted in Part 1 of this report, many women would like offenders to be held accountable for their actions – but not necessarily through incarceration.
[89] SP Walker and DA Louw, "The Bloemfontein Court for Sexual Offences: perceptions of its functioning from the perspectives of victims, their families and the professionals involved" (2004) 17 SACJ 289 at 305.
[90] Finn, *supra* note 65 at 102.

perception that a specialized court's processes are not fair will perpetuate the belief that offences punished by the court are not serious and the court's verdicts are invalid.[91]

There is also risk that a specialist court may appear to be treating the victims of sexual offences in a way which privileges them compared to victims of other kinds of offences. This might in turn appear to be "privileging" sexual offences over other offences, which may have negative impacts on victims of other offences, such as domestic violence and other serious assaults.[92] This possibility was realized in South Africa: SOCs were under a moratorium in the 2000s as they were seen to be privileging sexual offences and sexual assault victims over other types of crime and other victims.[93]

v. Conclusion

South Africa's experience with specialized sexual assault courts, particularly the Sexual Offences Court Model, can be a good starting point for exploring the viability of specialized sexual assault courts in Quebec and elsewhere in Canada. However, as seen in South Africa, working within the criminal justice system cannot fully address survivors' needs and concerns. This may be because, as stated earlier, a specialized sexual assault court still operates within the criminal justice system. As a modification of the adversarial system rather than an alternative to it, the specialized courts may still be prone to the challenges explored in Part 1 of this report, such as those related to cross-examination and survivors' role in the process.

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[91] *Ibid.*
[92] *Ibid.*
[93] South Africa 2013 Report, *supra* note 66 at 24.

Campus sexual assault policies and mechanisms

A. Overview

Postsecondary institutions across the country have been under pressure in recent years to develop effective and sensitive mechanisms to address sexual violence on campus. Developing standalone policies on sexual assault (as opposed to relying on policies on sexual harassment or student conduct) has been a cornerstone of students-activists' recent demands. Ontario,[94] British Columbia,[95] Manitoba,[96] and Quebec[97] have all passed legislation mandating postsecondary institutions to develop sexual assault policies that set out their response to sexual assault. While other provinces such as Alberta[98] and Nova Scotia[99] have not gone that far, they have nonetheless encouraged universities and colleges to effectively respond to sexual assault. In 2018, the federal government intervened by allocating $5.5 million to ensure a consistent response to campus sexual assault in all provinces and threatened to "consider withdrawing federal funding" from noncompliant institutions.[100]

Generally, the definitions of consent and sexual assault in campus sexual assault policies closely mirror those found in the *Criminal Code* and legal jurisprudence.[101]

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[94] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, 1st Sess, 41st Leg, Ontario, 2016 (as assented to in 8 March 2016), SO 65, c 2, sch 3.
[95] *Sexual Violence and Misconduct Policy Act*, 2016, SBC 2016, c 23.
[96] Bill 15, *The Sexual Violence Awareness and Prevention Act*, 1st Sess, 41st Leg, Manitoba, 2016, (as assented to in 10 November 2016), CCSM 2016, c A6.3.
[97] An Act to Prevent and Fight Sexual Violence in Higher Education Institutions, 2017, SQ 2017, c 32.
[98] Government of Alberta, "Commitment to end sexual violence," online: www.alberta.ca/commitment-to-end-sexual-violence.aspx.
[99] Nova Scotia, Labour and Advanced Education, Memorandum of Understanding Between the Province of Nova Scotia and the Nova Scotia Universities, Memorandum of Understanding (Halifax: Labour and Advanced Education, 2016), online: www.novascotia.ca/lae/pubs/docs/MOU-2015-2019.pdf.
[100] Canada, Department of Finance, *Equality Growth: A Strong Middle Class*, (Budget), Catalogue No F1-23/3E-PDF (Ottawa, Department of Finance: 27 February 2018), online: www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf at 201.
[101] See e.g. Ryerson University, *Sexual Violence Policy*, Toronto: Ryerson University, 2016, ch IV, online: www.ryerson.ca/policies/policy-list/sexual-violence-policy/.

Nonetheless, some policies engage a broader definition of sexual misconduct. In Ryerson University's policy, for example, "sexual violence" is defined as, "Any sexual act or act targeting a person's sexuality, gender identity or gender expression, whether the act is physical or psychological in nature that is committed, threatened or attempted against a person without the person's consent."[102] According to this policy, sexual violence can encompass a wide range of activities, from sexual assault to cyber stalking and non-consensual distribution of intimate images. Moreover, sexual assault policies distinguish a "disclosure" from a "report": while the former refers to discussing one's experience of sexual violence with another person, particularly with staff at university-funded sexual assault support centres, the latter entails engaging in such disclosure with the specific purpose of launching an investigation.[103] It is possible to receive accommodations through a disclosure and in the absence of a formal report.

Campus sexual assault policies apply to all members of the university community, including students, researchers, faculty, and staff.[104] The policies apply to incidents occurring at the university as well as at university-related activities. For instance, McGill University's policy covers events occurring off-campus (including those online) that "may be reasonably seen to adversely affect the safety of students, faculty or staff […] or [their] right […] to use and enjoy the University's learning or working environment."[105]

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[102] *ibid.*
[103] See e.g. McGill University, *Policy Against Sexual Violence*, Montreal: McGill University Board of Governors, 2016 (Reviewed 2019), ss 7(d), 7(h).
[104] See e.g. *ibid* at s 7(e).
[105] *Ibid* at s 7(n).

Reporting mechanisms differ between universities. For example, at McGill, reports can be made in writing, via email, or in person,[106] while at the University of British Columbia (UBC) complainants must submit an online form.[107]

Many universities, including McGill, UBC, University of Toronto, and Ryerson, have an independent investigation framework for sexual assault reports. Generally, the process proceeds as follows: a third-party or internal investigator will hold an initial interview with complainants to ensure the policy's jurisdiction over the incident, to offer an alternative dispute resolution process as a potential option where appropriate, and to offer interim support and accommodation.[108] If the policy provides jurisdiction over the incident and mediation is inappropriate, the investigator will begin an investigation.

At McGill, the process is as follows: the investigator will first send a copy of the complainant's report to the respondent, and the respondent must respond either in writing or orally within 14 days.[109] The complainant will receive a copy of the respondent's response.[110] The investigator is authorized to "investigate in any manner required to obtain the information required to make the necessary findings of fact," such as meeting with and requesting information from the complainant, respondent, or third parties.[111]

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[106] "Reporting Harassment, Discrimination, and Sexual Violence," online: *McGill University* www.mcgill.ca/how-to-report/sexual-violence/filing-report.
[107] "University of British Columbia Independent Investigations Office (UBC IIO) Form to Report Sexual Misconduct" (2019), online: University of British Columbia www.doi.sites.olt.ubc.ca/files/2019/06/IIO-Report-of-Sexual-Misconduct-rev-JUN-2019_fillable.pdf.
[108] McGill University, *Procedures for the Investigation of Reports of Sexual Violence*, 2019, Montreal: McGill University, online: https://mcgill.ca/secretariat/files/secretariat/procedures_investigation_of_reports_of_sexual_violence.pdf, s 20.
[109] *Ibid* at s 23.
[110] *Ibid* at s 24.
[111] *Ibid* at s 27.

The investigation must be completed within 90 days.[112] When the investigation is complete, the investigator will submit a report to the university's senior administration, and at some universities, the complainant and respondent.[113] The administration will determine the university's response to the report.[114] The disciplinary outcome is communicated to the Respondent, and, at UBC, The Director of Investigations will also inform the complainant of any disciplinary outcomes that must be disclosed for compelling health or safety reasons.[115] In the case of sexual misconduct, the Director of Investigations may also inform bodies such as the UBC Student Housing and Hospitality Services, if the Respondent is subject to a UBC residence contract or agreement.[116]

At the University of Toronto (U of T), at the conclusion of an investigation, the administration may refer the matter for a hearing under the *Code of Student Conduct*.[117] The hearing involves the accused, who may be represented by a lawyer, and the investigator or the administration. The policy permits the survivor's participation only as a witness, who can be cross-examined.[118] Hearings are open to the university community unless otherwise specified.[119] The hearing officer will determine the outcome and potential discipline for the

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[112] *Ibid* at s 26.
[113] *Ibid* at s 30.
[114] McGill University, *supra* note 103 at s 37.
[115] University of British Columbia, *Sexual Misconduct and Sexualized Violence Policy*, 2020, Vancouver: University of British Columbia, online: https://universitycounsel-2015.sites.olt.ubc.ca/files/2020/09/Sexual-Misconduct-Policy_SC17.pdf, s 7.5.
[116] *Ibid* at s 6.6.
[117] University of Toronto, *Policy on Sexual Violence and Sexual Harassment*, 2016, Toronto: University of Toronto Governing Council, online: www.governingcouncil.lamp4.utoronto.ca/wp-content/uploads/2016/12/p1215-poshsv-2016-2017pol.pdf, s 73.
[118] University of Toronto, *Code of Student Conduct*, 2012, Toronto: University of Toronto Board of Governors, ch on "Memorandum of Procedures for Hearings arising from the *Code of Student Conduct*", online: www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/ppjul012002.pdf, s 8.
[119] *Ibid* at s 9.

respondent, but the policy does not state whether or not the result of the hearing is shared with the complainant.[120]

Campus sexual assault mechanisms provide for several types of potential discipline that vary in severity. At McGill, for example, discipline for students may include admonishment, reprimand, probation, an order to cease and desist communication, suspension, or expulsion.[121] For employees, these measures can include a letter of reprimand, suspension without pay, and dismissal from the university.[122]

Proceeding with a complaint under the university policies does not bar other courses of action through the criminal or civil route, or, for employees, through collective grievance procedures.[123]

B. Advantages

Campus sexual assault policies and mechanisms offer a number of advantages. These include:

1. providing a response to a specific, acute need;
2. offering an opportunity for expression for survivors;
3. providing clear time frames;
4. allowing for forms of offender accountability and other remedies;
5. providing support to survivors;
6. providing interim accommodations, and accommodations even where no report is filed;
7. featuring a lower burden of proof than criminal proceedings; and

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[120] *Ibid* at s 13.
[121] McGill University, *supra* note 103 at s 39.
[122] *Ibid* at s 40.
[123] See e.g. The University of British Columbia, *supra* note 115 at s 4(4).

8. striving to take a trauma-informed and intersectional approach.

i. Targeted response to a significant, acute need

According to Statistics Canada, young women between the ages of 15 to 24 account for almost half of all self-reported sexual assaults in the country.[124] Referred to as the "red zone" in US research,[125] a female student's first semester and year of study has been recognized in the US and Canada as a period of elevated risk of sexual assault.[126] This may be because, as highlighted by Statistics Canada, women participating in "evening activities—such as going to work, night class, meetings or volunteering, or going to bars, clubs or pubs," are more regularly targeted by perpetrators of sexual assault, and university students are likely to engage in those activities.[127] Research also confirms that drugs and alcohol, common on campus, are often used by sexual offenders to gain sexual access to women and commit sexual assault. [128]

Since women on campus experience high rates of sexual violence, a specialized mechanism to respond to their complaints can fill an important justice need. As noted, many women do not have confidence in the police and may find a court process intimidating or too expensive. Data from the US highlights that students are less likely to report sexual assault to

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[124] Shana Conroy and Adam Cotter, *Self-Reported Sexual Assault in Canada, 2014*, Catalogue No 85-002-X (Ottawa: Statistics Canada: 11 July 2017), online: www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm.

[125] Matthew Kimble et al, "Risk Of Unwanted Sex For College Women: Evidence For A Red Zone" (2008), 57(3) *Journal of American College Health* 331, online: www.tandfonline.com/doi/abs/10.3200/JACH.57.3.331-338 at 331–332.

[126] Paula Barata et al, "Sexual Violence In The Lives Of First-Year University Women In Canada: No Improvements In The 21st Century" (2014) 14 *BMC Women's Health* 136, online: www.bmcwomenshealth.biomedcentral.com/track/pdf/10.1186/s12905-014-0135-4 at 140.

[127] Conroy and Cotter, *supra* note 124.

[128] Barata et al, *supra* note 126 at 140; Christopher Krebs et al, "College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College" (2009) 57(6) *Journal of American College Health* 639, online: www.tandfonline.com/doi/abs/10.3200/JACH.57.6.639-649.

the police.[129] Survivors may feel more comfortable with the campus complaint mechanism, which may allow for complaints to be made online or anonymously, making it more accessible than other options.[130]

ii. Form of expression for survivors

The investigation model can provide survivors with the opportunity to tell their story in their own terms to an investigator trained in trauma-informed approaches, without having to participate in a trial. Some universities are taking steps to better meet this justice interest. For example, at UBC, the policy states that, when speaking to the campus investigator, "you can expect conversation – not interrogation."[131] Evidence is assessed and findings of fact are made with knowledge of the impact that trauma has on memory and presentation.[132]

iii. Clear time frames

Most policies set clear time frames for the length of different stages of an investigation. For example, at McGill, an initial review of a report must commence within 7 days of its receipt.[133] If an investigation is to follow, it has to be concluded within 90 days,[134] unless parties agree to mediation, which can suspend the limit by up to 30 days.[135] The administration needs to inform the parties of the result of an investigation in 14 days.[136] While not all policies contain clear time limits (at Ryerson and U of T, respectively, investigations

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[129] US, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Rape and Sexual Victimization Among College-Aged Females, 1995-2013*, NCJ 248471 (Washington: Bureau of Justice Statistics, 2014), online: www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf at 1.
[130] Anonymous reports may not be fully investigated. See i.e. McGill University, *supra* note 103 at ss 16-17; University of Toronto, *supra* note 117 at ss 84-86.
[131] "UBC Investigations Office", online: The University of British Columbia https://investigationsoffice.ubc.ca/.
[132] *Ibid.*
[133] McGill University, *supra* note 108 at s 14.
[134] *Ibid* at s 26.
[135] *Ibid.*
[136] *Ibid* at ss 33, 34.

may take "several months,"[137] or are required to be completed "in a timely manner"[138]), those that do offer a significant advantage over often lengthy and unpredictable criminal or civil proceedings.

iv. Offender accountability and remedies for survivors

Campus sexual assault policies provide for disciplinary outcomes that can serve survivors' interest in offender accountability. Some of these sanctions—such as removing an offender from a class, residence, or the university—may be unavailable through the criminal or civil process, but may be precisely what survivors seek. Some survivors may seek accountability in the form of denying offenders undue status, and many seek to ensure that the offender is denied the opportunity to harm someone else. Some of the outcomes available through this process could serve those purposes, denying offenders status through, for example, removing them from a prestigious university and taking them out of an environment where they may cause harm, such as a university residence.

The campus complaint mechanism may also be an efficient means by which survivors can access safety-protecting mechanisms on campus, such as stay-away orders or orders preventing the perpetrator from attending the same classes or residences as the complainant. While the criminal system can result in incarceration or restraining orders that could accomplish these goals, the process is lengthy and the burden of proof to achieve these outcomes is much more onerous. The campus complaint process may be a good option for women to ensure their safety in cases that do not meet the criminal burden of proof, for women who require efficient remedies to protect their immediate safety, or for women who for other reasons choose not to engage with the police.

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[137] Ryerson University, *supra* note 101 at s 3(g).
[138] University of Toronto, *supra* note 117 at s 64.

Finally, it is possible that the investigation process and the disciplinary outcomes can serve survivors' interest in vindication. A finding from the university that the offender's actions constituted sexual misconduct and warrant sanction can serve this interest. However, this is significantly tempered by the issues plaguing campus investigations, as outlined below. These include survivors often being left out of the loop about the status of the investigation and the outcome, and not being informed about the disciplinary penalties imposed.

v. Support for survivors

As a related point, under campus sexual assault policies, survivors who have reported sexual assault can access accommodations on campus that may give them the time and space to recover from the assault without incurring academic or financial loses. For example, McGill provides the following options for survivors of sexual assault: "exam or assignment deferrals, late withdrawal from a course without a transcript 'W,' allowing tuition reimbursement for courses from which the survivor must withdraw, priority access to Counselling Services, or a change in University residence."[139] As noted in Part 1 of this report, sexual assault can impact women's education and, consequently, career prospects. These accommodations—which are not available through other legal proceedings—can facilitate their continued access to education and reduce the negative impacts of the assault on their personal lives. It is significant that these accommodations are available without a formal report, making it more accessible for women who choose not to engage the investigation process. This can facilitate survivors' continued access to education in the absence of an official report or a conclusive investigation.

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[139] McGill University, *supra* note 103 at s 14.

vi. Availability of interim accommodations, and accommodations in the absence of a report

Survivors do not need to await the conclusion of an investigation or even make a formal report to receive support and accommodations.[140] For example, U of T students can access interim measures or accommodations in response to their disclosure, such as "separation of the parties, exam or assignment deferral, class and/or schedule changes, emergency bursaries, and/or housing changes," and employees may be entitled to "changes that are not disciplinary but precautionary to avoid contact between parties."[141]

This is a significant advantage relative to civil and criminal proceedings. Survivors can have many valid reasons to avoid reporting a sexual offence. Moreover, accommodating students before and without an investigation is important as it facilitates survivors' education as they await the outcome of an investigation. These limitations also reflect student realities, as accommodations are often needed immediately. For example, a student may only have class with a perpetrator for a semester, or share the same residence with him for one school year. Awaiting the outcome of the investigation may be too long to avoid survivors suffering serious negative repercussions as a result of the assault, such as losing access to a safe educational environment.

vii. Lower burden of proof

Similar to other civil remedies, campus sexual assault mechanisms provide for investigative procedures or hearings that make findings on a balance of probabilities,[142] which is advantageous for the reasons outlined in Part 1 of this report. It is also significant

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[140] University of Toronto, *supra* note 117 at s 39.
[141] *Ibid* at s 55(c).
[142] See e.g. The University of British Columbia, *supra* note 115 at s 4(5)(3).

that survivors can receive accommodations on a report alone, without having to prove that an assault occurred.

viii. Habitability: Trauma-informed and intersectional approach

University sexual assault policies often call for a trauma-informed and intersectional approach. Ryerson's policy highlights that "the university is committed to ensuring that its responses, prevention efforts and supports take an anti-oppressive and trauma-informed approach so that all community members can access these supports and services with care."[143] Also committed to a trauma-informed process,[144] the McGill policy notes that the university "recognize[s] and account[s] for intersectional identities and experiences, as well as the disproportionate effect of Sexual Violence on women, gender minorities, and persons who are racialized, Indigenous, and/or disabled."[145] Policies also have special anti-retaliation clauses,[146] which are particularly crucial when alleged offenders are in positions of authority.

The universities' commitment to intersectionality and trauma sensitivity can increase the habitability of the process, as they try to ensure survivors are not re-victimized through disclosure and reporting. They make it less likely that survivors will be confronted with victim-blaming questions and attitudes throughout the process, and increase the likelihood that investigators will understand the impact of trauma on how survivors recall and tell their story.

Perhaps most importantly, the complaint mechanism in some universities is not generally an adversarial process. At UBC[147] and McGill,[148] the process ends with an investigation report, which administrators use to determine disciplinary measures. This

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[143] Ryerson University, *supra* note 101 at s 1.
[144] McGill University, *supra* note 103 at preamble.
[145] *Ibid* at s 20(c).
[146] See e.g. University of Toronto, *supra* note 117 at s 21.
[147] The University of British Columbia, *supra* note 115 at ss 4(5), 5(1).
[148] McGill University, *supra* note 108 at ss 30-35.

provides an avenue for survivors to seek justice for sexual assault without participating in the stressful process of a trial, involving examination and litigation. This is particularly important for women on campus, who may regularly encounter their perpetrator and desperately need protective measures to facilitate their educational goals.

These commitments and specialized trainings further correspond to the justice interest of habitability as they ensure survivors are not re-victimized through their attempt to access justice for sexual violence.

C. Disadvantages

There are also several disadvantages associated with campus sexual assault policies and mechanisms. These include:

1. the limited participation of survivors in the process;
2. limits on offender accountability;
3. the potential trauma of disciplinary hearings; and
4. the risk of gatekeeper functions excluding legitimate complaints.

i. Survivors have limited participation in the process

One disadvantage of campus sexual assault processes is that survivors may have limited opportunities to participate in the investigation and the outcome. For example, survivors may not be informed of the investigations' findings. Although at McGill a copy of the investigation report is sent to survivors,[149] U of T administrators receive the report from an investigator and then "inform [the survivor] in writing of the result of the investigation."[150] This does not necessarily provide the survivor with any understanding of why that result was

[149] *Ibid* at s 30.
[150] University of Toronto, *supra* note 117 at s 72.

reached, which may be particularly challenging when the investigation concludes that no offence occurred.

Further, survivors are not informed of accountability mechanisms, and have apparently limited or no opportunity to have input into the appropriate consequences. For example, at McGill, survivors may not even find out whether an offender has been subject to disciplinary measures. They may only be informed of the disciplinary outcomes with the offender's "express permission" or when "measures [are] imposed on the Respondent that pertain to the Survivor's safety on campus."[151] Not informing survivors about the results of the investigation at every stage of the process can leave them confused and excluded.

There are some exceptions to survivors' lack of general involvement in the process: at McGill, a disciplinary decision may consider, among other factors, "the impact of Sexual Violence on the Survivor, as expressed through a written statement that the Survivor shall have the option to submit to the relevant disciplinary authority."[152] This limited participation, however, may not adequately accomplish survivors' interest in participation and control.

Finally, the investigations process can be confusing and exclusionary. Many survivors at postsecondary institutions have spoken publicly in recent years about their universities' ineffective response to their sexual assault report. Students have reported processes taking longer than a year, being left out of the loop, and receiving unhelpful advice (such as being discouraged from reporting to the police).[153] These stories demonstrate that, even with

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[151] McGill University, *supra* note 103 at s 43.
[152] *Ibid* at s 38.
[153] See e.g. Tamsyn Riddle, "While I Filed a Human Rights Complaint against U of T" (25 September 2017), online: *The Varsity* www.thevarsity.ca/2017/09/25/why-i-filed-my-human-rights-complaint-against-u-of-t/; Anonymous, "I Was Sexually Assaulted. I Turned to My University For Help. Here's What Happened" (29 August 2018), online: *University Affairs* www.universityaffairs.ca/features/feature-article/i-was-sexually-assaulted-i-turned-to-my-university-for-help-heres-what-happened/.

excellent written policies, campus response mechanisms may not always be followed in practice, which can negatively impact women's experiences of the process.

ii. Limits on offender accountability

As noted earlier, sexual assault mechanisms may impose a range of penalties on offenders. At U of T, these may include: a formal written reprimand, order for restitution or damages, a fine, requirement of public service not exceeding 25 hours, and denial of access to certain services or activities. Suspensions and expulsions may be imposed if "the offence committed is of such a serious nature that the student's continued registration threatens the [university's] academic function […] or the ability of other students to continue their programs of study."[154]

These sanctions do not include any criminal penalties or penalties beyond the context of the university. Many universities may not share the information about penalties with survivors, meaning that survivors will not satisfy their interest in public censure of the perpetrator. Further, universities do not publish information about how frequently these punishments are imposed. Lack of transparency about outcomes can also leave women feeling uncertain that the offender has been held to account at all. They similarly provide survivors with very little input into the offender consequences. This contrasts with, for example, the human rights model in which complainants can seek particular remedies, including institutional remedies.

This may be compounded by the limits on survivors' capacity to speak about their own experiences. Some investigations may be subject to explicit or implicit nondisclosure agreements. Policies are often not explicit about their rules on confidentiality. However, Professor Karen Busby of the University of Manitoba conducted a study of 22 sexual violence

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[154] University of Toronto, *supra* note 118 at s E.

policies and found that most policies are "extremely prohibitory" and "have some kind of gag order."[155] The policies, in some shape or form, "prohibit sharing before the investigation, after the investigation—some prohibit sharing anything such as the fact of an investigation, the names, the details, the findings, the summaries, the sanctions."[156] While the U of T policy does not explicitly mandate strict confidentiality, one former student who reported her sexual assault to the administration noted that nondisclosure was the expectation throughout the investigation and hearing process.[157]

iii. Disciplinary hearings may be traumatizing

As noted in other sections of this report, some university policies involve a hearing to determine whether the perpetrator committed sexual misconduct. As is reviewed in Part 1 of this report, participating in a hearing can re-traumatize survivors, particularly where they are subject to aggressive cross-examination or confronted with victim-blaming and rape-promoting myths. Moreover, by treating survivors as witnesses, hearing processes can also interfere with women's interest in exercising some measure of control over the process.

iv. Gatekeeper functions can exclude legitimate complaints

While complainants at McGill[158] and UBC[159] directly contact an investigator, Ryerson's Human Rights Office[160] conducts the initial screening of reports before redirecting them to an investigator. At U of T, reports are made to the sexual assault centre, redirected to and

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[155] The study has not yet been published. See Emma Jones, "Why sexual assault survivors can't say #MeToo at some Canadian universities" (12 April 2018), online: *The Discourse* www.thediscourse.ca/gender/why-sexual-assault-survivors-cant-say-metoo-at-some-canadian-universities.
[156] *Ibid.*
[157] *Ibid.*
[158] McGill University, *supra* note 108 at s 5.
[159] The University of British Columbia, *supra* note 115 at ss 2(1), 3(1).
[160] Ryerson University, *supra* note 101 at s 4(a).

assessed by the Office of High Risk and Safety, and then referred to an investigator, following which a hearing may still be held.[161]

While the primary purpose of initial screening is to confirm the policy's jurisdiction over the incident, not to assess the report's evidentiary basis,[162] these gatekeepers may exclude some legitimate complaints. As discussed in Part 1 of this report, gatekeeper models in professional bodies risk allowing systemic biases about how women respond to sexual assault to impact the assessment of the report. There is very little data available to evaluate the impact of such gatekeeping in the university context, but this arguably presents a similar risk.

Moreover, this gatekeeping can unduly lengthen the process, contributing to the stress and uncertainty survivors face in lodging a complaint.

D. Conclusion

Campus sexual assault mechanisms can have an important role in the justice system as university-aged women are at a higher risk of experiencing sexual assault. These mechanisms may not achieve accountability for perpetrators as effectively as other justice mechanisms, but they can address the specific needs of survivors in the context of an educational institution. However, there is considerable discrepancy between the procedures in place on different campuses. The policies can also be vague and difficult to navigate, and anecdotally, it seems they are often improperly followed, plagued by delays, and often insensitive to the experiences of survivors.

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[161] University of Toronto, *supra* note 117 at ss 42, 57, 62, 73.
[162] See e.g. *ibid* at s 58.

Restorative and transformative justice approaches

A. Overview

Some activists and feminists advocate for justice practices that take place outside of the traditional justice system as a possible way for sexual assault survivors to obtain meaningful justice.[163] Restorative justice (RJ) and transformative justice (TJ) approaches, described as "responses to gender violence that challenge punitive, retributive criminal responses to gender violence," fall under the umbrella of these alternative justice practices.[164] Beyond offering an alternative justice *process*, RJ and TJ in fact offer an alternative *theory* of justice altogether as they fundamentally challenge the principles of adversarial justice. Justice is not understood as an elusive end goal—justice is achieved by participating in the process in and of itself.[165]

RJ and TJ, while similar in their foundational principles and practices, should not be conflated. Defining RJ can be difficult because it is a philosophical framework or a way of thinking about crime and conflict, rather than a distinct model or system of law. Tony Marshall, a key British RJ advocate, offers a useful *description* of RJ as "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[166] In so doing, RJ attempts to restore the survivor and community to their pre-crime conditions while at the

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[163] See the following organizations that engage in RJ and TJ work: FOR CRYING OUT LOUD www.forcryingoutloud206.wordpress.com/; Communities United Against Violence www.cuav.org; INCITE! www.incite-national.org; Philly Stands Up www.phillystandsup.wordpress.com/; SAFER www.safercampus.org/.
[164] Mimi Kim, "From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cultural Diversity in Social Work 219 at 226.
[165] Jennifer Llewellyn and Robert Howse, "Restorative Justice: A Conceptual Framework", prepared for the Law Commission of Ontario, online: www.dalspace.library.dal.ca/bitstream/handle/10222/10287/Howse_Llewellyn%20Research%20Restorative%20Justice%20Framework%20EN.pdf?sequence=1 at 20.
[166] As quoted in *ibid*.

same time holding the offender accountable for the harm that they have caused through acknowledgement of that harm and atonement.[167]

TJ takes RJ a step further by not only attempting to *restore* but to also *transform* the actors as well as their communities for the better.[168] While governments are often actively involved in RJ processes, TJ practices are entirely community-driven. The TJ framework recognizes broader systems of oppression as the root cause of harmful behaviours. To avoid replicating oppressive dynamics in the justice process, TJ pursues a "liberatory approach," which can be defined as "seeking safety and accountability without relying on alienation, punishment, or State or systemic violence, including incarceration and policing."[169]

It is critical to acknowledge the labour and contributions of Indigenous, Black, racialized, trans, queer, and disability activists and communities in the areas of RJ and TJ. This discussion of alternative justice practices (and RJ and TJ in particular), however, is not intended to draw on Indigenous justice practices, as those are embedded in independent and unique values of Indigenous communities and cultures.

B. Restorative justice

Legal scholar Melanie Randall cautions that not every alternative legal approach can be classified as RJ. While procedures vary among RJ programs, scholars and practitioners generally agree about the common "foundational principles, goals, and values" underpinning

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[167] *ibid.*
[168] *ibid.*
[169] "Toward Transformative Justice: A Liberatory Approach to Child Sexual Abuse and other forms of Intimate and Community Violence" (2008), online: generationFIVE www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf [generationFIVE] at 5.

RJ. These are "the normative values of respect, peacefulness, and responsibility" and "some kind of encounter developed to repair and transform."[170]

RJ practices generally emphasize repairing *harms* as opposed to punishing for *crimes*.[171] The adversarial justice system seeks to punish *perpetrators* for *offences*; on the other hand, RJ seeks to hold the *"responsible person"* accountable for the *harm* that they have caused to the individual survivor, as well as to relationships and communities affected by the harmful incident. The terminology of "harm" and "responsible person" or "wrongdoer" is commonly used in RJ literature and practice to signal a shift away from the view of justice as a dualistic conflict between a victim and a perpetrator.[172] The remainder of this chapter uses the RJ terminology. In the sexual assault context specifically, the focus on "harm" also allows for a broader definition of sexual violence, which is consistent with the definition provided by the Due Justice For All project's proposal.

RJ processes give survivors and responsible persons the opportunity to engage in dialogue around the harm, assess its impact on the survivor and community, and outline the steps necessary for ensuring accountability of the wrongdoer and meeting the survivor's needs. Unlike the criminal justice system, the aim of RJ is not punishment but restoration, rehabilitation, and the healthy reintegration of all parties back into the community.[173]

Moreover, as a political movement, RJ seeks to limit the role of the state in responding to crime and increase the involvement of personal, familial, and community networks in

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[170] Melanie Randall, "Restorative Justice and Gendered Violence; From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law" (2013) 36 Dalhousie LJ 461 at 471.
[171] "Restorative Justice", online: Department of Justice www.justice.gc.ca/eng/cj-jp/rj-jr/index.html.
[172] "What is Restorative Justice", online: Alberta Restorative Justice Association www.arja.ca/what-is-restorative-justice.
[173] Loretta Frederick and Kristine Lizdas, "The Role of Restorative Justice in the Battered Women's Movement" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (Oxford, Oxford University Press: 2009) 39, 41.

repairing harm.[174] In fact, RJ principles and processes are also grounded in critiques of incarceration, as many RJ advocates believe that incarceration not only fails to offer a meaningful form of redress but in fact exacerbates harm, particularly gender-based harm. In the sexual assault context specifically, the tendency to divest from the state also stems from the persistent failure of the criminal justice system in providing meaningful remedies to survivors.[175]

i. Restorative Justice in Practice

Canada's Office of the Federal Ombudsman for Victims of Crime notes that the following RJ processes exist in Canada:

a) **Victim-offender[176] reconciliation or mediation programs:** trained mediators bring survivors and wrongdoers together to discuss the crime, its impact, and any agreement to address it. Indirect variations (such as exchange of letters between victim and offender) also exist;
b) **Conferencing:** the victim, the offender, their supporters (e.g., family members), and community members work toward reparation, facilitated by an independent third party;
c) **Victim impact panels:** a group of victims speaks to an offender about the impact that a crime has had on their lives;
d) **Victim-offender panels:** victims come together with offenders who have committed a similar crime to that which they have experienced (also sometimes referred to as "surrogate RJ");

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[174] James Ptacek, "Resisting Cooptation: Three Feminist Challenges to Antiviolence Work" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (Oxford, Oxford University Press: 2009) i at ix.
[175] Barbara Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 25:2 JL & Soc'y 237 at 245.
[176] This particular source used the victim/ offender terminology, and this report has replicated that language.

e) **Circles (e.g., sentencing, healing, releasing):** meetings where victims, accused persons, and community members come together to discuss the offence, its underlying causes and its impacts on the victim and the community, and identify a path forward. Circles vary based on the specific community and context.[177]

In Canada, RJ is often administered alongside the traditional justice system at various stages of a prosecution (pre-charge, post-charge, post-conviction, post-sentence), primarily for young and Indigenous offenders.[178] For example, in British Columbia, the police and the Crown both have discretion to refer young offenders to RJ programs.[179] The BC government has created a document to assist in developing RJ programs, called "Community Accountability Programs." In BC as in other provinces, sexual assault and domestic violence are mostly excluded from RJ programs for reasons that will be discussed below.[180]

ii. Restorative Justice in the Sexual Assault Context

There remains significant debate among feminists as to whether RJ processes are appropriate for sexual violence, and these concerns will be discussed more fully in the "disadvantages" section of this report. Randall, an advocate for RJ for sexual assault, believes that most such criticisms are waged at programs that are in fact not RJ at all and are poorly designed. She notes that such failings can be addressed if RJ programs are created and led by feminist academics and researchers who are experienced and attuned to the needs of sexual assault survivors.[181]

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[177] "Restorative Justice", online: Office of the Federal Ombudsman for Victims of Crime www.victimsfirst.gc.ca/res/pub/gfo-ore/RJ.html.
[178] "The Effects of Restorative Justice Programming: A Review of the Empirical," (18 Jan 2018) online: Department of Justice www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p3.html [DOJ Literature Review].
[179] British Columbia, Ministry of Public Safety and Solicitor General, *Community Accountability Programs Information Package*, Catalogue No PSSG 04028 (Victoria: 2004), online: https://s3.amazonaws.com/tld-documents.llnassets.com/0004000/4400/community%20accountability%20.pdf at 28.
[180] *Ibid* at 45.
[181] Randall, *supra* note 170 at 487.

Randall writes that, as is the case for other RJ processes, a gender-based RJ process should be carefully planned and monitored. Specifically, sexual assault RJ processes should prioritize survivors' safety and autonomy; entail a careful screening mechanism to ensure only suitable cases proceed to RJ; include risk assessment and safety planning, especially for domestic violence survivors; involve only community members and facilitators who have specialized knowledge in sexual violence, trauma sensitivity, and dynamics of domestic violence; and require "extensive preparation for all participants," which Randall notes is "the most critical, and, indeed, the most transformative" aspect of the process.[182]

Scholars such as Randall and Mary Koss have identified the conferencing model as potentially suitable for sexual offences. Generally speaking, at the initial stage, conferencing consists of a preparatory interview with the survivor, responsible person(s), friends and family, and others impacted by the harm. RJ practices are voluntary for all parties; if the survivor initiates or consents to the process and the responsible person declines, the case may proceed within the traditional criminal justice system.[183] Since RJ operates outside the mainstream justice system, it does not entail the risk of incarceration or criminal penalties, which may incentivize the responsible person to take more accountability for his actions.[184] In fact, responsible persons need to accept responsibility as a pre-condition to participate in the RJ process.[185]

The crux of the RJ process is an expert-facilitated meeting—often referred to as a "conference"—between the survivor, responsible person, their family and friends, and community members. The purpose of the conference is to consider the best ways to compensate or make the survivor whole, and to consider various forms of treatment or

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[182] *Ibid* at 489-490.
[183] Llewellyn and Howse, *supra* note 165 at 57.
[184] Randall, *supra* note 170 at 475.
[185] Mary Koss, "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes" (2014) 29:9 Journal of Interpersonal Violence 1623 at 1624.

reintegration of the responsible person into the community. Since the process does not entail incarceration and begins with the responsible person's admission of harm, RJ does not involve procedural safeguards such as traditional fact-finding procedures, weighing of evidence, or determinations of fault.[186] As such, responsible persons are expected to directly engage in the proceedings (rather than remain silent, as they have a right to do in the adversarial model).[187] Survivors are able to play a central role, but are not required to forgive or even interact directly with the responsible person.[188]

The ultimate goal of the RJ process is reintegrating survivors and wrongdoers into the community.[189] To that end, participants reach a remedial outcome that includes an acknowledgement of the harm caused by the responsible person and its impacts on the survivor and the community, and then develop a response and remedial plan. The restorative outcomes of the process may include restitution, community work service, and any other program or response designed to accomplish reparation of the survivor, and the reintegration of the survivors and/or responsible persons.[190] Since these decisions are reached collectively, power is not located in a single judge, and the norms of the process may be negotiated and interpreted given the specifics of each case.[191]

The remainder of this section on RJ discusses two specific RJ programs devised to respond to sexual violence.

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[186] *Ibid.*
[187] Randall, *supra* note 170 at 482.
[188] *Ibid.*
[189] *Ibid* at 473.
[190] *Ibid.*
[191] Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?" (2007) 3 Annual Rev L Soc Science 10.1 at 10.8.

iii. RESTORE Program (Pima County, Arizona)

Arizona's RESTORE project, operative between 2003 and 2007, was a conference-based RJ program made possible through a collaboration of the Southern Arizona Center Against Sexual Assault, the Pima County Attorney's Office and the University of Arizona. Program administrators defined RESTORE as "a pretrial diversion program using a community conferencing model"[192] for prosecutor-referred sex crimes involving adults.[193] As with other conference-based RJ processes, the program included screening, preparation, and participation in a conference followed by a "redress agreement" and monitoring to ensure follow-through. Researcher Mary Koss evaluated RESTORE's outcomes. The study is limited in that RESTORE produced the small sample size of 22 cases,[194] and it is difficult to replicate the study again since the use of RJ for sexual assault is forbidden in much of the US. RESTORE ended due to the termination of federal funding.[195]

RESTORE operated in four stages. At the first stage, prosecutors referred cases to the RESTORE program. Prosecutors' referral criteria excluded repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault. Potential enrollment in RESTORE was then further subject to the policies of the University of Arizona Institutional Review Board.[196] If a case fit all these criteria, then the RESTORE staff met with the survivor for intake.[197] At this meeting, program staff explained the process, outlined the survivor's options (criminal or civil proceedings or RESTORE), and offered her the opportunity to consult with a civil lawyer. If the

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[192] "R.E.S.T.O.R.E. A Restorative Justice Approach to Selected Sexual Offences in Pima County Arizona", online: Center for Justice and Reconciliation www.restorativejustice.org/rj-library/restore--a-restorative-justice-approach-to-selected-sexual-offences-in-pima-county-arizona/2504/#sthash.ssJ6WD1T.dpbs.
[193] Koss, *supra* note 185 at 1632.
[194] Of these 22 cases, 11 had a survivor present and 11 had a "surrogate survivor," who is a person chosen by the survivor to be present at the conference on their behalf.
[195] Koss, *supra* note 185 at 1655.
[196] *Ibid* at 1632.
[197] *Ibid* at 1628.

survivor consented to engage in RESTORE, the program met with the responsible person. Upon his consent, they assessed his suitability in terms of mental wellness and prior offences, as participation was not open to repeat sexual offenders or domestic violence offenders. If either of the parties declined to participate, the case was referred back for conventional prosecution. Even after agreeing to participate, the survivor had the option to pursue criminal or civil responses instead of continuing with RESTORE.[198]

At the second stage, program personnel met with both parties to assess risks, establish conduct rules for the conference, and ensure both parties were ready before facing each other.[199] More specifically, preparation could have included describing what happens at a conference, helping plan what to say, and guiding decisions about redress. To ensure survivors' safety, an important goal of preparation was to ensure responsible persons had "achieve[d] sufficient understanding of their acts to participate without traumatizing others through denial or blame."[200] Program staff also met with and prepared the survivor's and responsible person's family and friends who planned to attend the conference. The length of the preparation stage varied as survivors need different timetables to heal and be ready to participate in the process.[201]

The third stage of RESTORE was a face-to-face conference professionally facilitated by screened and trained professionals in social work, law enforcement, counseling, and probation.[202] If the survivor did not wish to participate, they had the option to request that someone deliver their impact statement and participate in redress planning on their behalf, but the responsible person's participation was required. The conference began with all participants describing their experience of the incident, and the survivor decided the order at

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[198] *Ibid.*
[199] *Ibid* at 1629, 1631.
[200] *Ibid* at 1631.
[201] *Ibid.*
[202] *Ibid* at 1630-1631.

which participants would have their turn. The survivor described the incident and its impact on herself, friends, and family, and the responsible person described the incident and his responsibility, then repeated the survivor's account back to her, allowing for the survivor's corrections. The friends and family of each party could also describe the incident's impact.[203]

The conference ended with the drafting of a "redress agreement," which was a "formal document of accountability that resulted from the conference and summarizes the activities that the responsible person will undertake to repair harm and rehabilitate."[204] These actions could include sex offender therapy, other interventions recommended by the forensic assessment (addictions treatment or anger management), face to face meetings with a case manager, weekly check-up phone calls, quarterly meetings with the Community Accountability and Reintegration Board, community service, and stay-away orders. The survivor's input into the redress agreement could include selection of the type of community service, contributions to charity in the survivor's name, input into rehabilitative activities required of the responsible person, and payment of expenses for survivors' therapy.

The final stage of the RESTORE program was accountability and reintegration. The program staff monitored the responsible person's progress on the redress agreement for a year. After a year, at the final meeting of the program, the responsible person read a prepared apology and reflection letter indicating his progress throughout the year, intended to serve as his reintegration into society.[205] The meeting was open to the survivor, friends, and family. If the responsible person did not complete the program or reoffended, the survivor would have been informed and the responsible person would have been referred back for conventional prosecution.[206]

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[203] *Ibid* at 1632.
[204] *Ibid* at 1626.
[205] *Ibid* at 1632.
[206] *Ibid.*

iv. Dalhousie Dentistry's Restorative Justice Process (Halifax, Nova Scotia)

In December 2014, female students at Dalhousie University's Faculty of Dentistry filed complaints under the university's *Sexual Harassment Policy* after they became aware that some of their male colleagues had posted offensive comments about them in a private Facebook group. The comments reflected misogynistic, sexist, and homophobic attitudes. The university did not pursue formal investigations under the *Sexual Harassment Policy* and instead responded to the incident by initiating an RJ process, culminating in a final report published in May 2015. The report noted that the RJ process aimed to "investigate the matter, address the harms it caused and examine the climate and culture within the Faculty that may have influenced the offensive nature of the Facebook group's content."[207]

The male students and the female complainants were members of the Faculty's 2015 class, and the RJ process was open to all class members. That is because "the complaint also concerned the climate and culture at the Faculty of Dentistry reflected in the Facebook site and to which the comments on the site contributed."[208] Twenty-nine out of 38 members of the 2015 class participated, including 14 women, 12 of the 13 men active in the Facebook group, and 3 other men. The report does not specify how many female participants were the subjects of harassment in the Facebook comments.[209]

Despite its wider participation base, the RJ process focused primarily on the members of the Facebook group, who were required to participate pursuant to measures imposed by the Faculty's Academic Standards Class Committee. According to the report, participants began by writing a detailed account of their involvement in the Facebook group and events

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[207] Jennifer Llewellyn, Jacob MacIsaac, & Melissa MacKay, "Report from the Restorative Justice Process at the Dalhousie University Faculty of Dentistry" (2015) at 2, online: *Dalhousie University* www.cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf.
[208] *Ibid* at 31.
[209] *Ibid.*

following discovery of its content.[210] From January to May 2015, these students attended 150 hours of regular and ongoing meetings to explore harms and impacts to their fellow students, the Faculty, the University, the dental profession, and the public. These meetings addressed issues such as psychological and personal safety and responsibility; bystander intervention; power and privilege; inclusion and equality; intersections of race, culture, gender, sexuality, and sexual orientation and identity; public trust; and rape culture and sexualized violence.[211] The report highlights that, throughout the process, participants recorded their learning and reflections "on the harms caused by their actions, and the issues of equality, inclusion, discrimination and professionalism they raised."[212] The participants also attended regular—"mostly weekly, sometimes daily"—check-ins and received feedback.[213]

An important outcome of the RJ process was organizing a "Day of Learning," open to the Faculty and University communities, dental profession, and the wider community. On the Day of Learning, the male participants shared "valuable lessons" they had learned about "the culture and climate that contributed to the harms and impacts associated with the Facebook group," as well as thoughts and recommendations for the way forward and next steps.[214] The RJ report concluded that "participants came to understand fully what happened and the significance and impact of these events."[215]

While the final report from the RJ process noted that RJ was initiated "at the complainants' request," four women from the 2015 class released an open letter to the University administration condemning the use of RJ, writing, "The university is pressuring us into this process, silencing our views, isolating us from our peers, and discouraging us from

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[210] *Ibid* at 4.
[211] *Ibid* at 36.
[212] *Ibid* at 18.
[213] *Ibid* at 56.
[214] *Ibid* at 37.
[215] *Ibid* at 36.

choosing to proceed formally."[216] One woman who had been subject of the offensive comments told the CBC that the University did not consult her before initiating the RJ process.[217] Moreover, Dalhousie was criticized as it refused to launch proceedings under its *Sexual Harassment Policy* or other codes of conduct altogether, and it did not reveal the names of the Facebook group's members.[218]

C. Transformative justice

According to legal scholar Angela Harris, TJ shares two fundamental principles with RJ. First, it accepts that the punishment-oriented criminal justice system is not meeting the needs of survivors or the community, and "does not effectively rehabilitate, incapacitate, deter, or provide retribution against the offenders."[219] Second, TJ focuses on remedying *harm* as opposed to punishing for a *crime*.[220] Nonetheless, TJ "takes [RJ] one step further by aiming to not only respond to individual acts of violence, but to also transform communities so that structures that enable and perpetuate violence are eradicated."[221]

One important distinction between RJ and TJ is that, while RJ is often administered in collaboration between governments and community organizations, TJ programs are entirely community-led and actively avoid any type of governmental involvement in their

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[216] Letter from "4 women from the DDS Class of 2015" to Dr Richard Florizone, President of Dalhousie University (6 January 2015) as published by *CBC News*, online: www.cbc.ca/news/canada/nova-scotia/dalhousie-students-condemn-restorative-justice-in-facebook-scandal-1.2891365.

[217] "Dalhousie dentistry student calls restorative justice plan 'shocking'", *CBC News* (18 December 2014), online: www.cbc.ca/news/canada/nova-scotia/dalhousie-dentistry-student-calls-restorative-justice-plan-shocking-1.2877922.

[218] "Is Dalhousie dentistry Facebook scandal 'ideal' for restorative justice?", *CBC News* (18 December 2014), online: www.cbc.ca/news/canada/nova-scotia/is-dalhousie-dentistry-facebook-scandal-ideal-for-restorative-justice-1.2877740.

[219] Angela Harris, "Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation" (2011) 37 Wash UJL & Pol'y 13 at 57.

[220] *Ibid.*

[221] Sarah DeYoung, "Transformative Justice Workshop Resources" (26 February 2015), online: Barnard Center for Research on Women www.bcrw.barnard.edu/transformative-justice-workshop-resources/.

processes.[222] In that sense, the TJ framework is based on criticisms of imperialism and modern nation-states. GenerationFIVE, a San Francisco-based organization aimed at ending child sexual abuse through TJ, expresses its opposition to governmental involvement as based in "the violent nature of the modern State, the oppressive history and current reality of the US State, and the actual failures of State systems to fulfill their violence prevention and intervention mandates."[223]

Harris goes even further in her criticism of the RJ framework, noting that RJ relies "uncritically on either state institutions and practices or the traditional practices and institutions of civil society, including the family and 'the community.'"[224] Indeed, Harris criticizes the very notion of "the community" and who it is represented by, and notes that family and community participants in the RJ process may harbour oppressive and prejudicial attitudes. She notes that TJ recognizes that "all these stakeholders are embedded in unjust relations of power, including pervasive racism, economic exploitation, xenophobia, and heteropatriarchy."[225]

Harris's criticism of RJ also highlights a second major distinction between RJ and TJ: the TJ framework draws a direct link between an incident of abuse and the broader systems of violence and domination (such as racism or sexism) affecting all communities and societies.[226] Scholar and advocate Mimi Kim writes that TJ "explicitly recognizes that interpersonal forms of violence take place within the context of structural conditions including poverty, racism, sexism, homophobia, ableism, and other systemic forms of violence."[227] As generationFIVE notes, "People that commit violence are not born that way;

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[222] generationFIVE, *supra* note 169, at 5
[223] *Ibid* at 9.
[224] Harris, *supra* note 219 at 58.
[225] *Ibid* at 59.
[226] generationFIVE, *supra* note 169 at 29.
[227] Kim, *supra* note 164 at 226.

they are created by their histories and given permission by the inequitable practices and arrangements of power within the society in which we live."[228]

To truly end harm and violence, there is a need to address not just the specific incident but also the historical dynamics of abuse embedded within a certain community that supported and contributed to the incident.[229] This means that "rather than assign narrow blame on individualized 'criminals,' the Transformative Justice model seeks to expand the very notion of who is responsible by mobilizing bystanders, challenging collusions with power, and situating individual interventions in the larger context of social justice movement."[230] As such, in addition to healing those affected by violence and holding responsible persons accountable, TJ also seeks transformation within the community in which the abuse occurred to equip the community with the tools and knowledge needed to challenge the sexism, homophobia, and other forms of oppression that exist within them.[231]

GenerationFIVE notes that, by emphasizing the possibility of changing harmful behaviours and breaking abusive cycles, the TJ process offers "a sense of hope and a reason to shift our own lives and relationships toward greater health."[232] It is in that sense that TJ proponents call the framework "liberatory," as it aims to provide individuals and communities with the opportunity to end precursors to violence and meaningfully transform their lives, relationships, and communities to be free from harm and violence.[233]

i. generationFIVE model (San Francisco, California)

This section discusses the work of generationFIVE, a San Francisco-based TJ collective that "works to interrupt and mend the intergenerational impact of child sexual abuse on

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[228] generationFIVE, *supra* note 169 at 29.
[229] *Ibid* at 40.
[230] *Ibid* at 27.
[231] Harris, *supra* note 219 at 59
[232] generationFIVE, *supra* note 169 at 45.
[233] *Ibid.*

individuals, families, and communities" through "survivor and bystander leadership development, community prevention and intervention, public action, and cross-movement building."[234]

GenerationFIVE outlines its philosophy and model in a document it published in 2008 as "a call to action for the Left and the sexual and domestic violence sectors."[235] The first stage of generationFIVE's TJ framework is forming a "collective."[236] Collectives are groups within a community with close ties to the incident of abuse as well as to the individuals affected by the incident. In developing their response to an incident, generationFIVE proposes that collectives first pause to assess the following metrics: the severity and resulting level of concern about an incident, possibilities for community transformation as a result of engaging with the incident, and the community's capacity and resources to respond to the incident.[237] A response informed by these considerations is less likely to be based on individuals' emotional reaction to the incident, and more likely to be consistent with social justice commitments.[238]

After an initial community assessment, the collective should strive to develop a response that addresses the safety needs and healing of those impacted by the incident, holds the responsible person accountable, and provides an opportunity for community transformation. First, the response should ensure the survivor's safety, such as physical safety (food, shelter, freedom from abuse) and political safety (freedom from deportation). Importantly, the response should also ensure the responsible person's safety—for example from state violence or vigilante responses—because generationFIVE believes that responsible persons only have incentive to engage in the TJ process if they do not risk

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[234] "About us: generationFIVE Mission," online: generationFIVE http://www.generationfive.org/about-us/.
[235] generationFIVE, *supra* note 169 at 1.
[236] *Ibid* at 32.
[237] *Ibid* at 40.
[238] *Ibid.*

demonization or carceral punishment.[239] Moreover, the organization holds that "[…] only a compassionate accountability that challenges the dehumanization of [responsible persons] can create the conditions for longer term safety [for everyone]. When people deny their own humanity as a result of shame, they often act in ways that confirm their lack of humanity."[240] Collectives subscribing to the generationFIVE model also provide support to those who may potentially be abusive to proactively prevent harmful incidents.[241]

GenerationFIVE also notes that the collective's response should prioritize survivors' healing. Collectives should be attuned that each survivor heals differently: some may need to disengage from the community where the abuse took place while others may want to build a relationship with responsible persons and their communities.[242] TJ work should also strive to heal others who are have also been harmed by the incident such as other children, siblings, and adults close to the harmful incident. Perhaps most controversially, collectives should aim to heal responsible persons as those individuals "are in need of a process of healing to enable them to make the changes they need to make in order to not perpetrate again."[243] According to generationFIVE, by breaking the "isolation" of responsible persons and "recogniz[ing] and reach[ing] to their humanity," collectives can challenge "the dehumanization that is so central to systems of oppression."[244]

Second, a collective's response to incidents of sexual abuse should hold the responsible person accountable with the aim of their transformation so that they may not perpetrate again.[245] An effective process of accountability may require the responsible person to repair broken relationships, provide reparations, and respect standards of behaviour and

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[239] *Ibid* at 36.
[240] *Ibid* at 43.
[241] *Ibid* at 35.
[242] *Ibid* at 45.
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid* at 46.

sanctions.[246] To ensure the success of the process, the collective should monitor the responsible person's behaviour and develop a tiered accountability plan consistent with the responsible person's compliance.[247]

While it values empathy for responsible persons, generationFIVE also insists on applying pressure on them when necessary. This pressure can look like leveraging relationships that the responsible person cares about and exposing the responsible person's actions to challenge his reputation, status or employment.[248] Despite its abolitionist commitments, the collective may, as a last resort, accept the "current conditions that may make it necessary to leverage the State as a form of coercion in community-based justice processes."[249] The "minimal principle" must inform all these uses of leverage, meaning that only enough leverage should be used to ensure accountability,[250] and use of leverage should be regularly reviewed and adjusted.[251] Furthermore, attempts at the reintegration of responsible persons into families, institutions, and communities cannot come at the expense of the survivor's or community's safety.[252]

Lastly, the collective's response to incidents of harm should prioritize strengthening collective resistance to oppression by providing an opportunity for community action, reflection, learning, consciousness raising, and relationship building.[253]

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[246] *Ibid* at 48.
[247] *Ibid* at 49.
[248] *Ibid* at 43.
[249] *Ibid* at 48.
[250] *Ibid* at 43, 48.
[251] *Ibid* at 43.
[252] *Ibid.*
[253] *Ibid* at 51-52.

D. Advantages of restorative justice and transformative justice

There are several different advantages of restorative justice and transformative justice. These include:

1. survivor satisfaction;
2. survivor participation;
3. survivor validation;
4. accountability for the responsible person;
5. inclusion of community;
6. flexibility of the alternative justice process;
7. lower rate of recidivism; and
8. habitability.

i. Survivor satisfaction

According to a review of the literature on RJ prepared by the Department of Justice, survivors participating in RJ programs generally express high levels of satisfaction with the process and its outcomes.[254] The review noted that survivors often find the RJ process fair, while "[t]here are strong indications that victims are much less satisfied within the traditional court system."[255] For example, a literature review by the Department of Justice highlighted that survivors have associated the following benefits with the RJ process: decreased fear and anxiety about new victimization, decreased anger, and, in some cases, a decrease in post-traumatic stress symptoms.[256]

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[254] DOJ Literature Review, *supra* note 178.
[255] *Ibid.*
[256] Jane Evans, Susan McDonald & Richard Gill, "Restorative Justice: The Experiences of Victims and Survivors" (2018), Victims of Crime Research Digest No 11, online: www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p5.html.

In addition, survivors' satisfaction level appears to be related to the fulfilment of the redress agreement, and not to the conference process itself. In RESTORE, all survivors agreed or strongly agreed that "the conference was a success" and that the "redress agreement was fair."[257] More than 90% of participants—including survivors, responsible persons, and friends and family—were satisfied with their preparation, the conference, and the redress plan, and the most satisfied group was the group of survivors who attended their conference.[258]

There is also an indication that a high proportion of responsible persons in RJ programs follow through on their agreements; in fact, they are more likely to comply with their agreements than are offenders with court-ordered restitution.[259]

ii. Survivor participation

Alternative justice processes rely on expertly-facilitated discussions with significant input from the survivor, and as such have the potential to allow survivors to express themselves,[260] voice their story, and make decisions with regards to the justice process.[261] In RESTORE, for example, survivors could decide whether they wished to participate in the process and to what extent. They could also choose to have another person participate on their behalf or have family and friends accompany them. During the conference, survivors had the opportunity to discuss the harm and its impacts, which is an important justice interest for many survivors. Indeed, after their conference, all 11 of the survivors in the

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[257] Koss, *supra* note 185 at 1646.
[258] *Ibid* at 1647.
[259] DOJ Literature Review, *supra* note 178.
[260] Not all survivors would be able to fully express themselves or give voice to their story. Women with mental disabilities, those with dementia, and younger girls may face limits on their ability to do so.
[261] Kathleen Daly and Julie Stubbs, "Feminist Engagement with Restorative Justice" (2006) 10 Theor Criminol 1 at 18; Donna Coker, "Crime Logic, Campus Sexual Assault, and Restorative Justice" (2016) 49 Tex Tech L Rev 147 at 188 [Coker, "Crime Logic"]

RESTORE project noted that a reason they participated in the program was to "say how I was affected/explain my side."[262]

Alternative justice processes also receive survivors' input into the redress agreement. Over half the survivors interviewed in RESTORE noted that part of the reason for their participation in RJ was to give input about the redress.[263] Overall, survivors engaging in alternative justice processes are more likely to have the opportunity to participate in the justice process. This is in contrast to traditional justice models where there are strict rules and procedures and power is centralized in one decision maker.

iii. Survivor validation

Responsible persons need to admit that they have engaged in the harmful incident as a precondition for their participation in RJ and TJ. As explained in Part I of the Due Justice for All report, the interest in validation involves accepting the survivor's account of events as true, and acknowledging the significance of the survivor's experience. In the RJ and TJ processes, the responsible person is expected to acknowledge the harm that they caused to the survivor. Moreover, as Koss notes, "RJ also aims to facilitate community affirmation of the norm violation and condemnation of the wrongdoers' acts," since friends, family, and community members who are included in the process are also expected to validate the survivor's experience.[264]

By contrast, the adversarial system is premised on the offenders' denial of or attempt to reduce culpability or liability for the incident, which is harmful to survivors.[265] The adversarial system also emphasizes finding the "truth" and assigning blame and punishment,

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[262] Koss, *supra* note 185 at 1643.
[263] *Ibid.*
[264] Koss, *supra* note 185 at 1624.
[265] Daly and Stubbs, *supra* note 261 at 18; Clare McGlynn et al, "I Just Wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice" (2012) 29 J Law Soc 2 at 216; Randall, *supra* note 170 at 473.

both based on evidentiary rules and procedures. According to generationFIVE, these pillars of the adversarial system not only invalidate survivors' experiences but also incentivize those survivors who are disbelieved to not disclose further or to revoke their disclosure.[266] The responsible person's and community's acknowledgement of harm may be less powerful than a finding of guilt or liability in a court of law, but they may nonetheless serve the survivor's interest in validation of harm.

iv. Accountability for the responsible person

The responsible person's willingness to be accountable for the harm is a precondition to participate in RJ, and the process relies on their completion of the redress plan. Moreover, the RJ process can provide forms of accountability unavailable in the traditional process. For example, RESTORE and the Dalhousie program required responsible persons to undergo education and training, such as enrolling in sex offender training or attending workshops on consent, equity, and bystander intervention. Generally, in RJ, if a responsible person fails to follow through with the redress agreement, he will be referred back to the traditional legal system. However, according to the Department of Justice's review of the literature, "[…] a high proportion of offenders referred to restorative justice programs follow through on their agreements and are more likely to comply than are offenders with court-ordered restitution."[267] Indeed, 91% of all responsible persons in RESTORE fulfilled all redress plans and supervision requirements and exited RESTORE successfully.[268] The Dalhousie RJ report also highlighted that that responsible persons completed the program diligently.

In addition, according to generationFIVE, accountability extends beyond an individual incident of harm; it has the potential to meaningfully transform responsible persons so that they may not harm again. Indeed, the most common incentive for survivors' participation in

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[266] generationFIVE, *supra* note 169 at 39.
[267] DOJ Literature Review, *supra* note 178.
[268] Koss, *supra* note 185 at 1654.

RESTORE were found to be "making sure the responsible person doesn't do what he did to anyone else" and "making sure the responsible person gets help."[269] In a way, responsible persons are accountable to the survivor for their behaviour, but they are also accountable to the survivor and the wider community for "transforming oppressive and abusive dynamics that prevent us from being in integrity with and realizing our visions of justice."[270] In other words, under TJ and to some extent RJ, accountability is not merely subscribing to a redress agreement but is the willingness to "interrupt problematic behaviors or dynamics and then support a process for transforming those behaviors."[271]

v. Inclusion of community

RJ and TJ are premised on community involvement, and as such have the potential to support survivors through the process and shift some of the burden off of them in holding responsible person accountable.

The alternative justice frameworks also hold the community accountable for the survivor's health and well-being as well as for the responsible person's harmful behaviour. That is because TJ, and to a certain extent RJ, recognize the community's role in creating harm and responsibility in preventing harm.[272] Further, by including the wider community, alternative justice processes, especially TJ, have the power to shape community perceptions of sexual violence. As generationFIVE notes, the aim of the TJ process is not to merely

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[269] *Ibid* at 1643.
[270] generationFIVE, *supra* note 169 at 29.
[271] *Ibid.*
[272] Amanda Nelund, "Policy Conflict: Women's Groups and Institutionalized Restorative Justice" (2015) 26 Crim Justice Policy Rev 1 at 68; Sandra Goundry, "Restorative Justice and Criminal Justice Reform in British Columbia: Identifying Some Preliminary Questions and Concerns" (30 April 1998) at 11, online: BC Association of Specialized Victim Assistance & Counselling Programs www.endingviolence.org/files/uploads/RJ__FINAL_Report_.pdf; Randall, *supra* note 170 at 479.

respond to an individual harmful incident but to "engag[e] people in collective action to challenge the conditions of oppression and violence experienced by communities."[273]

vi. Flexibility of the alternative justice process

Since they do not have the same procedural requirements as the criminal justice system, RJ and TJ models can be adjusted to fit the individual survivor's needs.[274] In RESTORE, for example, the survivor has significant control over the process: she can determine what she wants to say, whether she wants to meet the responsible person face-to-face, and what kind of redress would serve her justice interests. The process can also advance at a pace that more sensitively acknowledges her experience. This flexibility contrasts with the operation of the traditional legal model, which often follows a very regimented process and timeline, and provides a limited and predetermined range of remedies.

vii. Lower rate of recidivism

In comparing rates of recidivism in RJ and traditional legal models, the Department of Justice concluded that "[…] these results do indicate the possibility of decreases in recidivism for programs with restorative features."[275]

In a 2003 research summary, Public Safety Canada reported similar findings after conducting a literature review about RJ programs as well as an assessment of a RJ program in Winnipeg.[276] The summary noted that RJ programs "can have an impact on offender recidivism that ranges from a two to eight per cent reduction in recidivism. Thus, it is worth considering restorative justice approaches in the development of criminal justice policies."[277]

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[273] generationFIVE, *supra* note 169 at 27.
[274] Daly and Stubbs, *supra* note 261 at 18; Goundry, *supra* note 272 at 11.
[275] DOJ Literature Review, *supra* note 178.
[276] Public Safety Canada, "Restorative justice and recidivism", Research Summary, vol 8, no 1 (January 2003), online: www.publicsafety.gc.ca/cnt/rsrcs/pblctns/jstc-rcdvs/index-en.aspx.
[277] *Ibid.*

Participants in the Winnipeg study exhibited dramatically lower rates of recidivism—15% compared to 38% for the control group one year after completing the completing the RJ program, 28% compared to 54% by the second year, and 35% compared to 66% by the third year. The report attributes the success of the Winnipeg program to the responsible persons' participation in treatment and programming, concluding "[…] that the effectiveness of restorative justice approaches may be accentuated by the inclusion of offender treatment."[278]

viii. Habitability

Much of what renders traditional justice mechanisms so uninhabitable is their adversarial nature. As noted in Part 1 of this Report, the adversarial system creates a disincentive for offenders to acknowledge wrongdoing and depends on evidence, credibility, testifying, cross-examination, and proof—these features can lead to victim-blaming, gaslighting, and re-victimization of the survivor. Survivors cite the desire to avoid these features and consequences as a reason they eschew the criminal justice system for sexual assault redress. Outside of Victim Compensation Programs (VCPs), alternative justice processes are the only model with the potential to avoid these pitfalls.

Moreover, RJ facilitators ideally receive specialized training. For example, as noted earlier, the third stage of RESTORE was a face-to-face conference professionally facilitated by screened and trained professionals in social work, law enforcement, counseling, and probation.[279] It appears that these professionals were quite successful: all survivors participating agreed or strongly agreed that they felt safe, listened to, supported, and treated fairly and with respect.[280] In their study of an RJ program in Australia, Shirley Jülich et al noted that an ideal RJ process would "intervene and challenge all explanations for sexual offending that are gender-based, blaming the victim, minimizing the behaviour or

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[278] *Ibid.*
[279] Koss, *supra* note 185 at 1630-1631.
[280] *Ibid* at 1646.

contributing to the construct of denial."[281] These measures, if properly implemented, could render RJ and TJ significantly more habitable than other processes. Further, VCPs do not engage the offender, so RJ and TJ appear to be the only existing models that can achieve some level of accountability and vindication while avoiding the significant stress and trauma of the adversarial system.

E. Disadvantages of restorative and transformative justice

There are also several disadvantages of restorative justice and transformative justice, including:

1. Survivor coercion;
2. insufficient accountability;
3. inappropriate community involvement;
4. flawed administration of justice; and
5. lack of habitability.

i. Survivor coercion

According to legal scholar Donna Coker, alternative justice measures has two faces of coercion problems: coercion through forcing the survivor's participation and coercion in the process. First, survivors may be subject to mandatory participation in an RJ mechanism. This concern is mostly relevant in family law mediation—which is not necessarily an RJ process but a legal process with restorative mechanisms—but is important to keep in mind.[282] Second, the responsible person may use intimidation or other coercive tactics within the RJ process

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[281] Shirley Jülich et al, "Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence" (May 2010) at 23, online: Auckland University of Technology www.rpe.co.nz/wp-content/uploads/2013/09/The_Project_Restore_Report.pdf.

[282] Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47:1 UCLA L Rev 1 at 77 [Coker, "Enhancing Autonomy"].

to achieve a lighter sanction. Coker particularly highlights this concern for domestic violence cases.[283]

Cameron also expresses concern that using alternative justice mechanisms for domestic violence sexual assault "tak[es] intimate abuse out of the more public venue of the courtroom and decriminalizes and privatizes intimate violence."[284] This would in turn shift the burden to prevent and condone sexual violence from the government on to private entities and individual survivors.[285]

On a related note, Coker questions whether RJ can properly address the "structural inequalities of race, gender, and class"—particularly those related to sexual and intimate partner violence—or if these processes reinforce those inequalities through their focus on one-time instances of criminal conduct.[286] Indeed, this is a criticism of RJ that TJ proponents share and seek to remedy. What Coker calls the "normative problem" could exacerbate this challenge: some facilitators may approach the incident in "neutral" terms and without acknowledging the power imbalances that lead to sexual violence.[287] As Coker notes, "For battered women, this creates the risk that mediation will reinforce the batterer's belief in the rightness of his behavior, minimize the harm of his violence and control, and undermine the victim's belief in her right not to be beaten."[288]

ii. Insufficient accountability

Some critics maintain that using alternative justice mechanisms may not provide sufficient accountability. While a variety of punishments could potentially be available in

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[283] *Ibid* at 75.
[284] Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10(1) Theoretical Criminology 49 at 57.
[285] *Ibid.*
[286] Coker, "Crime Logic", *supra* note 261 at 197.
[287] Coker, "Enhancing Autonomy", *supra* note 282 at 89.
[288] *Ibid* at 89.

alternative processes, the penalties may be too soft to reform a responsible person.[289] Moreover, critics also contend that alternative processes may suggest that sexual offences are not serious enough to warrant the intervention of the criminal justice system. The solution to the failures of the criminal justice system is not to redirect sexual offenders into "lighter" justice processes that may actually perpetuate and reinforce sexist and misogynistic discrimination.[290]

On a similar note, Coker identifies what she calls the "cheap-justice problem": the tendency in RJ processes to overemphasize the responsible person's rehabilitation over the survivor's needs.[291] Indeed, in the most egregious cases, "The victim becomes merely a means to the end of 'healing' the offender," for example through pressuring the survivor to forgive or accept the responsible person's apology.[292] As Coker notes, some facilitators may value apologies more than material changes and remedies.[293] However, almost one third of survivors reported that the reason they partook in RESTORE was not to hear an apology. While RESTORE discouraged apologies during the conference, some responsible persons did apologize, which survivors viewed as insincere. Even though a meta-analysis of juvenile responsible persons found that apologies were significant to survivors, Koss noted "forcing apology may be misguided with sexual assault."[294] Indeed, half the survivors in RESTORE believed that the responsible persons' apologies were insincere.[295] This is why Randall argues that it is premature to extend RJ to cases of ongoing violence in intimate relationships.[296]

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[289] Daly and Stubbs, *supra* note 261 at 17.
[290] Daly and Stubbs, *supra* note 261 at 17; *Koss, supra* note 185 at 1626; Nelund, *supra* note 272 at 68; Randall, *supra* note 170 at 484.
[291] *Ibid* at 85.
[292] Coker, "Enhancing Autonomy", *supra* note 282 at 85.
[293] *Ibid.*
[294] Koss, *supra* note 185 at 1652.
[295] *Ibid* at 1646.
[296] Randall, *supra* note 170 at 476.

iii. Inappropriate community involvement

Some feminists are also concerned about RJ and TJ's emphasis on the community's involvement. There remains uncertainty over who the "community" is in this process, what their role is in practice, and if they have the appropriate resources to support the parties.[297] Further, as Daly states, "community norms may reinforce, not undermine male dominance and victim blaming."[298] Rape myths, as well as prejudice against women in the sex trade or women with mental health issues, may shape the community's response to the responsible person's wrongdoing. Coker goes further, noting that "the community" may in fact fail to accept its own responsibility in maintaining and contributing to the violence or providing survivors with appropriate remedies. Such unproblematized approach to "the community" and family is particularly dangerous in sexual violence cases where such violence has been normalized within a family or community.[299] As noted earlier, TJ proponents hold similar criticisms of RJ.

Moreover, integrating the community can be done in culturally inappropriate ways. Legal scholar Angela Cameron divides restorative justice into two categories: "western RJ" or "Aboriginal justice," and writes that some Indigenous women's groups have argued that western RJ practices are "male-centered and culturally inappropriate."[300] Cameron argues that much of Canada's justice reform has followed a western RJ model, led by non-Indigenous judges and lawyers, and sometimes applied to Indigenous communities where these practices are actually inappropriate and ignore women's traditionally important role in the community.[301]

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[297] Daly and Stubbs, *supra* note 261 at 17; Nelund, *supra* note 272 at 68.
[298] Daly and Stubbs, *supra* note 261 at 17.
[299] Coker, "Enhancing Autonomy", *supra* note 282 at 97.
[300] Cameron, *supra* note 284 at 54.
[301] *Ibid* at 50.

The case of *R v Morris*[302] demonstrates Cameron's criticism. Morris, a former Indigenous chief of Liard Band in Watson Lake, Yukon, was sentenced to two years' probation for violent assault and unlawful confinement of his common law spouse. The Provincial Court of British Columbia ordered that sentence after considering the sentencing circle's recommendation for counselling over incarceration. However, at the same time, the Liard Aboriginal Women's Society had submitted a letter, signed by 50 people, expressing concerns over the sentencing process. The letter noted that the Nation's women had "extreme feelings of anxiety and vulnerability" in light of the case, and expressed fear that, due to Morris's social status, the Nation's leadership will "use their power and authority to retaliate against those who find the courage to speak out against violence."[303] The Court of Appeal set aside the original sentence and ordered 12 months' incarceration and 2 years' probation.

iv. Flawed administration of justice

RJ and TJ are unavailable for many survivors as the process depends on women being emotionally ready to confront the responsible person, and on the responsible person being willing to take responsibility for his actions. Moreover, many RJ frameworks depend on referrals from police or prosecutors, which means that survivors will have to report an incident to the police first, and have their case referred by police to prosecutors. As outlined in detail in Part 1 of this Report, reporting to police is inaccessible to many survivors, and only a small portion of reports lead to a prosecution, rendering the entire process unavailable to many survivors.

In a report for the BC Association of Specialized Victim Assistance & Counselling Programs, lawyer Sandra Goundry identifies various procedural ambiguities about the RJ process. These include: how police identify candidates for a RJ process; what kinds of

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[302] *R v Morris*, 2004 BCCA 305.
[303] "Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System," (16 October 2018), online: Department of Justice https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p3.html.

wrongdoers and offences RJ is best suited for; RJ's relationship to due process, procedural fairness, and constitutional obligations under the *Charter of Rights and Freedoms*; the quality of the voluntariness of both the wrongdoer's and survivor's participation; how the concept of double jeopardy squares with the ability of Crown to prosecute wrongdoers who breach their diversion/alternative measures contracts; and appropriate course of action in cases where no agreement is reached.[304] Goundry concludes, "the RJ framework or theory remains incomplete until these and other questions are identified, researched, debated, and resolved to the satisfaction of all stakeholders."[305]

v. Lack of habitability

Alternative justice mechanisms may re-victimize and jeopardize survivors' safety as they necessarily involve some engagement with the responsible person. While RESTORE gives survivors the choice to have another person participate on their behalf, this option may not be available in other RJ programs, requiring survivors to sit down with responsible persons and giving responsible persons the opportunity to explain their behaviours. As noted, careful planning and highly skilled professionals are needed to ensure the process itself does not revictimize survivors and allow the responsible person or community to engage in victim-blaming, denial, or minimization of the harm. However, RJ and TJ programs may be poorly-run due to a lack of resources and support, potentially rendering the process dangerous for survivors and the community.[306]

F. Conclusion

There is a clear divide in the literature concerning the appropriateness of alternative processes in the case of sexual violence. Feminists have raised concerns around safety, re-

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[304] Goundry, *supra* note 272 at 14.
[305] *Ibid.*
[306] Cameron, *supra* note 284 at 58.

victimization, and the message that using RJ sends to the public about gendered violence. Nevertheless, alternative justice processes may offer potential advantages in addition to the traditional court processes for those survivors who choose it with full knowledge of its potential benefits and pitfalls.

An alternative model such as RJ or TJ will not eclipse other options and would certainly not be appropriate in every situation and for every survivor. Traditional justice mechanisms will continue to exist alongside any alternative process that may be developed, and need to be effective, robust, and responsive to survivor justice needs. The interrelation and interaction between justice options, as appropriate, needs to be part of any considered discussion of a new alternative justice process.

Conclusion

LEAF's two Due Justice for All reports provide an overview of Canada's existing legal models, and three prominent alternatives that have been piloted in Canada and internationally to improve sexual assault survivors' access to justice. These reports provide potential guidance for options and pilot projects moving forward.

Future pilots should focus on responding to justice interests that are not already met by the existing models. This would ensure that Canada's system comes closer to meaningfully responding to the justice needs of *all* survivors and would thereby increase their access to justice. Any such pilot should be survivor-focused, should ensure they have fulsome access to legal advice about the various avenues that are available, and that they are given sufficient information about what they can expect to achieve out of those processes so that they are well positioned to make an informed choice about what avenue to pursue.

To determine appropriate potential pilots, LEAF highlights the following findings.

1. First, with the exception of the VCPs and the campus complaint mechanisms, Canada's existing legal responses are all adversarial in nature. As thoroughly reviewed, the adversarial trial has inherent features that make it inappropriate for some women. The Canadian system could benefit from including a non-adversarial process that still responds to survivors' needs for vindication and accountability.
2. Second, any process that involves the wrongdoer providing a personal remedy to the complainant, such as a civil trial or a human rights complaint, involves adversarial procedures. The non-adversarial options do not lead to personal remedies from the accused.
3. Third, Canada's legal responses are very disjointed, and women are unlikely to achieve all their goals through one process. For example, a survivor of sexual abuse by a doctor may seek compensation for the financial harm of the sexual assault, the removal of the doctor's medical licence so he can no longer practice medicine and harm other patients, and other personal safety remedies such as a stay-away order. Each one of these remedies would require the survivor to pursue a different legal process. The Canadian system could benefit from a unified process with broad jurisdiction to order the kinds of remedies women seek out of the justice system.
4. Fourth, while there are avenues available to pursue that engage a lower standard of proof, only one of them is available in the context of a sexual assault that happened outside of prescribed environments. For those women, only the most expensive option – the civil trial – is available to women who seek justice outside of the criminal system. The legal system could benefit from greater options for women who were sexually assaulted outside of a protected relationship such as those covered by human rights legislation, professional standards, or the university.

Two models emerge as possible alternatives that could respond to the unmet needs in Canada's legal system: restorative or transformative justice processes or a sexual assault

tribunal. A sexual assault tribunal could operate similarly to a Human Rights Tribunal, and integrate the civil process for seeking personal remedies from the offender into a more accessible and efficient tribunal system. This would benefit women who were sexually assaulted outside of a relationship protected by the *Human Rights Code*.

A restorative or transformative justice model could be similarly beneficial: it could provide a non-adversarial avenue to justice for women who are seeking some acknowledgment of responsibility on the part of the offender, but do not want to deal with the stress and adversarial nature of the traditional trial process. Further, a restorative or transformative justice model can provide a broad range of remedies such as financial compensation, stay-away orders, and personal accountability mechanisms including anger management or sex offender counselling, which are generally difficult to achieve through one legal proceeding.

A third option is to draw on the advantages and disadvantages reviewed in this report to propose a totally new alternative. Any of these models should be viewed as part of the larger system of legal responses to sexual assault, that would exist alongside the traditional models and seek to provide legal avenues for women for whom the existing models are inappropriate or do not meet all their needs.

Finally, the information contained in these two reports should provide meaningful context for where reforms to existing models would be appropriate and the options for such reforms. This could include judicial education, increased trauma sensitivity in the hearing process, establishing minimum standards for sexual assault proceedings, or encouraging human rights and civil law mediators to engage with restorative justice principles that attend to survivors' needs.