AVENUES TO JUSTICE

Restorative & Transformative Justice for Sexual Violence

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EXECUTIVE SUMMARY

This report explores the barriers and availability of restorative and transformative justice (RJ/TJ) options for sexual violence in Canada. Over the last several decades, many mainstream feminists and anti-violence organizations have been wary of the ability of RJ/TJ to adequately respond to sexual violence. More recently, there has been a growing interest on the part of feminist organizations, such as LEAF, to embrace RJ/TJ as a legitimate avenue of justice for survivors of sexual violence.

RJ/TJ has been developed and used for decades in diverse communities across Canada including among Indigenous, Black, and other racialized communities, Mennonites, sex workers, and the 2SLGBTQQIA+ community. It is also critical to acknowledge and advance Call to Action 50 in the Truth and Reconciliation Commission of Canada report which calls for Indigenous law revitalization for First Nations, Métis, and Inuit communities, some of whom rely on restorative legal traditions.

This report is based on interviews with subject matter experts from across Canada. Interviews were conducted throughout 2022 to 2023. A legal analysis of section 717 of the *Criminal Code* was completed as well as a thorough review of relevant academic and grey literature. The findings of this report will advance LEAF's work to ensure that survivors of sexual violence have access to justice within the criminal legal system and outside of it, if they so choose. As demonstrated throughout the report, while there are promising projects and practices emerging across the country, many legal actors are still unaware of the availability of alternatives and are often limited by state-mandated moratoriums on restorative justice for sexual assault charges. Furthermore, there are significant resource constraints for both RJ/TJ not-for-profit organizations and grassroots RJ/TJ practitioners that limit the availability of RJ/TJ for survivors.

LEGAL BARRIERS TO ACCESSING RJ/TJ

There are several legal barriers that limit the availability of RJ/TJ for sexual violence. The two most critical addressed in the report are:

- While section 717 of the *Criminal Code* allows for Crown Attorneys to divert cases into alternative measures programs, many provinces have implemented moratoriums on sexual violence cases under this provision. This report argues that the moratoriums need to be critically revisited and revised for a more nuanced and permissive approach that will allow survivors to access RJ/TJ if they desire. Any potential revisions to the moratoriums need to be done in full collaboration with diverse feminist and social justice organizations across sectors.

- Information shared during RJ/TJ must be protected to ensure the safe participation of those involved in the process. For example, people who cause harm may be concerned that admitting to their actions and taking accountability could potentially put them at risk of criminalization. Alternately, survivors could face a defamation action if the person who caused harm denies the allegations. To encourage all parties to meaningfully engage, RJ/TJ needs to have legal protection against use of what occurs in these processes in other legal proceedings.

NON-LEGAL BARRIERS TO ACCESSING RJ/TJ

There are several non-legal barriers that prevent the availability of RJ/TJ options for survivors of sexual violence. One of the pressing issues is attitudes about RJ/TJ as appropriate for sexual violence among the public, the legal community, and anti-violence advocates. For the last several years, there has been growing concern about the criminal legal system's response to sexual violence resulting in a desire to examine the possibility of RJ/TJ and whether it is more in alignment with the justice needs of survivors. The major barriers identified from this research were public perception and anti-violence sector attitudes towards RJ/TJ for sexual violence, the urgent need for critical resources for survivors of sexual violence, the creation of resources for people who cause harm, and capacity building among RJ/TJ practitioners.

Historically, there has been a strained relationship with competing perspectives about the applicability of RJ/TJ to cases of sexual violence. Interviews with key informants highlighted that there has been an ideological shift about RJ/TJ in recent years within the feminist anti-violence movement. Key informants, while hopeful about this shift away from carceral solutions for sexual violence, identified that there was still a lot of work to be done for it to be a safe and accessible option for all survivors. Interviewees also noted that mainstream RJ practitioners and organizations can also enhance their learning about the specific nuances of sexual violence and ensuring that their RJ practices are trauma-informed and safe for survivors of sexual violence.

Significant resource constraints on organizations that offer RJ/TJ as well as anti-violence organizations are another barrier. For survivors to be able to meaningfully engage in RJ/TJ, they require access to resources such as shelters and housing, counselling, and childcare. Such resources need to be accessible, culturally relevant, and have low barriers to access. Resource constraints are further pronounced in rural, remote and First Nations communities. Moreover, key informants noted that even when people who cause harm would like to engage in an RJ/TJ process, there are very few organizations that will work with people who have caused harm. This is a major gap in services that needs to be addressed to meaningfully provide avenues of justice for survivors as well as for the prevention of sexual violence in the future.

CAMPUS SEXUAL VIOLENCE

Interviews with key informants revealed that there is a growing interest for RJ/TJ options for sexual violence on campus. Overall, experts reported that campus sexual violence policies tend to be overly complicated and confusing for survivors. Most often, the only available option for resolution is by making a formal report and participating in an investigation. Key informants found that these investigations were often harmful and rarely resulted in consequences for the person who caused harm. While most of interviewees were hopeful that RJ/TJ could be a viable option on campus, especially for students who experience intersecting forms of marginalization, most also raised concerns about how university administrators were approaching RJ/TJ. There is an urgent need for improved supports on campus both for survivors and people who cause harm.

GLOSSARY

Alternative Measures: Section 717 of the *Criminal Code* recognizes that where it is not inconsistent with the protection of society and certain conditions are met,[1] Crown counsel can exercise discretion to deal with persons who are alleged to have committed offences through the use of measures that are alternatives to judicial proceedings and conventional prosecutions. Addressing an offender's conduct through measures outside of the traditional court process is commonly known as "diversion". A program of alternative measures can consist of a range of acceptable measures that can vary among communities, including restorative/transformative justice.[2]

Container Theory: For RJ/TJ to work effectively, the information revealed in these processes must be protected in some manner to ensure that parties are not going to use what they have learned in another legal proceeding. This is particularly important as RJ/TJ requires an admission of responsibility from the person who caused harm. Such a statement could be incredibly damaging in a criminal case and the person who caused harm has little incentive to participate in RJ/TJ unless they are sure that their sincere attempts to make amends are not going to be used against them.

Person who Caused Harm/ Responsible Person: Terms such as accused and offender are legal expressions that are often associated with negative stereotypes. Using the terminology "person who caused harm" or "responsible person" resists reducing a person to one event in their life. Additionally, we often use he/him pronouns in this report when referring to people who caused harm as a reflection of the statistics on sexual violence. However, anyone can be a perpetrator of sexual harm. We also recognize that survivors of sexual violence and people who cause harm are not necessarily separate categories—for example, someone who caused sexual harm may also be a survivor of sexual violence.

Restorative-Transformative Continuum (RJ/TJ): Both restorative and transformative justice have long histories of use and complex definitions; however, for the purposes of this report, we have looked at the various types of justice processes that fall under these headings together. In particular, RJ/TJ processes are non-adversarial, generally non-carceral, and recovery-focused ways of understanding justice. There are many different structures RJ/TJ can take, and some are connected to the state while others are entirely community-based.

Sexual Assault: Sexual assault in Canada is broadly defined and includes any unwanted sexual touching, from sexual groping to rape.[3] The *Criminal Code* in Canada categorizes sexual assault into three levels, ranging from "level 1"[4], which involves minor physical injuries or no injuries to the victim; "level 2,"[5] sexual assaults that involve a weapon, threats, or the causing bodily harm; and "level 3,"[6] aggravated sexual assaults that result in wounding, maiming, disfiguring or endangering the life of the victim.

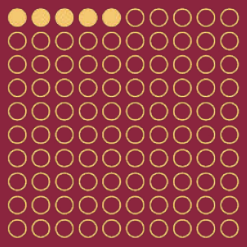
Sexual Violence: The World Health Organization (WHO) defines sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."[7]

Survivor: There are many ways to refer to someone who has experienced sexual violence and no particular terminology is without debate. In this report we use "survivor" as it is one of the most commonly used terms by feminist advocates. However, some prefer "victim" or "survivor-victim". When dealing with criminal proceedings, complainant is used as well. We also often refer to survivors with she/her pronouns in acknowledgement of the gendered dynamic of sexual violence. That is not to say that men and gender-diverse people are not also affected by sexual assault. Anyone can experience sexual assault.

BACKGROUND

According to the General Social Survey on Victimization, over 940,000 Canadians were sexually assaulted in 2019.[8]

Since 1999, the rate of sexual assault has remained stable (though it has recently begun to increase in the post #MeToo era) when most other crime rates have decreased.[9]



In Canada, only 5% of sexual assaults will ever be reported to the police.[10]

Indigenous women, members of the 2SLGBTQQIA+ community, and people with disabilities are more often targets of sexual violence.[11]

Black, Indigenous, and racialized women often report being re-victimized by the experience of reporting sexual violence to the police.[12]

Little to no data is available on the experiences of gender-diverse survivors of sexual violence.[13]

INTRODUCTION

We live in a time where myths, stereotypes, and sexual violence against women—particularly Indigenous women and sex workers—are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can—and must—do better.[14]

Sexual violence has been an increasingly prevalent topic given moments like #MeToo.[15] Survivors have, in large numbers, been talking about their experiences being sexually assaulted and what occurred in the aftermath of that violence. One of the most common criticisms to come out of these conversations is how the legal system is failing them. Despite the high number of sexual assaults that occur in Canada every year,[16] only a portion of these are reported to the police and fewer still proceed all the way to a trial.[17] Many survivors have stated that the process of reporting an incident of sexual violence and engaging the legal system is re-traumatizing and does not offer them what they want or need after being assaulted.[18] In three studies completed by the Department of Justice with survivors of sexual assault, participants were asked to rate their level of confidence in the police, court processes, and the criminal justice system overall, regardless of whether their cases went to trial. Two-thirds of the participants stated that they were not confident in any of these institutions.[19] Experiences can be even worse for survivors who face structural marginalization, such as sex workers, immigrants and refugees, Indigenous and racialized people, those affected by disability and 2SLGBTQQIA+ community members.[20]

Survivors may choose not to report their assault for many reasons, including not being aware of what happened to them counts as sexual assault, not thinking that the assault was serious enough to warrant police attention, not wanting to subject the person who caused them harm to the criminal legal system and potential incarceration, shame and embarrassment, as well as fear for their own safety and the people they love (often including vulnerable children).[21] Given these myriad of reasons, as well as the failure of the state to respond adequately to sexual violence and the lack of trust the state has cultivated with certain groups of people, there is a demand for more options to address sexual assault.[22] Consequently, RJ/TJ are increasingly being discussed and sought out in response. After all, these processes are focused on healing the harm survivors have experienced, encouraging people who caused harm to be accountable for their actions, and preventing future sexual violence, both of which are common goals of those seeking redress in the wake of an assault.[23] They also allow for increased participation and control over the justice process, and include more opportunities for validation than are usually offered in the conventional legal system.[24]

RJ/TJ also respond to the many criticisms of the criminal legal system that are being discussed in recent years. For example, it has been an increasing concern that incarceration is not an effective tool for preventing future criminal behaviour as it does little to address the reasons why violence occurs, nor does it give offenders the skills and resources they need to better themselves.[25] Prisons are also frequently a site of sexual violence themselves.[26]

Following a thorough literature review, we conducted semi-structured interviews with not-for-profit and community-based practitioners, campus sexual violence experts, and legal actors. Questions were asked to determine how and if RJ/TJ mechanisms are utilized for sexual violence in Canada, if legal barriers discourage practitioners from engaging in these types of processes, and, if so, how law reform measures could be used to better address those barriers and allow survivors additional methods of seeking justice depending on their needs and desires.

These interviews allowed us to explore the varied experiences and perspectives of those in the field of sexual violence response and prevention.

We were also supported by an advisory board of seven experts from across Canada from varying occupational fields, including lawyers who work with survivors of sexual violence, a therapist who works with survivors and people who cause harm, grassroots community experts, and not-for-profit staff. From this research our team was able to better understand the barriers survivors face in accessing RJ/TJ for sexual violence including the structural and legal barriers that make it difficult to access, or at times, poorly facilitated.

KEY TAKEAWAYS

- Despite decades of legal reform to encourage the reporting of sexual violence, survivors continue to report being harmed by the criminal legal system.
- Many activists and scholars have critiqued the expansion of the criminal legal system to respond to sexual violence because legal actors often perpetuate harmful and discriminatory stereotypes about survivors who face intersecting forms of structural marginalization.
- Many survivors report seeking outcomes that are more consistent with RJ/TJ in comparison to the objectives of the criminal legal system, but making a formal report to the police is often the only option presented (or known) to survivors.

DEFINING RESTORATIVE AND TRANSFORMATIVE JUSTICE

LEAF has been interested in the potential of RJ/TJ for sexual violence for several years. It participated in a collaborative project on improving the experience of justice for survivors funded by the federal government called ***Due Justice for All***. Out of this work, LEAF published two reports looking at justice opportunities in the conventional legal system,[28] as well as exploring a variety of alternatives, including specialized courts, campus sexual assault investigations, and RJ/TJ.[29]

This study was conceptualized as an expansion to these initial ***Due Justice*** *reports*, and originally carried forward the concept of "alternative justice", using it as an umbrella term for RJ/TJ. However, in the interviews with key informants across Canada, it was apparent that this is neither a common way of referring to these types of justices, nor is it one that experts in the field supported.

For many of the key informants, alternative justice included anything outside of the Canadian legal system. According to one lawyer from central Canada,

> ***Justice to me means fairness. Which, what does fairness mean? It means an equality and equity-based approach that considers all perspectives and brings people together for a healing solution. That's how I would define justice. And I think the reason we refer to alternative justice is because the ability of the justice system to deliver that sort of justice is rare. It does happen. And there are times in my career when it has happened when the adversarial process has led to results that are like that. But they're very rare. And so I think what we refer to as alternative justice, what we mean is an approach outside the justice system.***

While this interviewee spoke about fairness and equality as part of alternative justice, including everything outside of the justice system is too broad a focus for this report.

According to law professor Melanie Randall, not every form of alternative justice can be classified as restorative or transformative either.[27] RJ/TJ, while often talked about as processes, are philosophical approaches to justice. RJ/TJ require a commitment to non-adversarial and recovery-centric methods. For example, having a person who caused harm participate in anger management could be part of RJ/TJ, but would not address the requirements of these types of justice on its own.

Key informants in this field do not want RJ/TJ to be considered only if the criminal legal system fails, but as an equally important and valid approach to take depending on the needs of the people involved.

Other experts spoke about their discomfort with labelling RJ/TJ processes as "alternative". They worried that such a label implies that justice in the legal system is the normal and expected way to respond to harm and anything else is less legitimate. Alternatives are also often framed as options to be explored after the so-called normal legal system response fails.

Key informants in this field do not want RJ/TJ to be considered only if the criminal legal system fails, but as an equally important and valid approach to take depending on the needs of the people involved.

Because of these issues with the phrase "alternative justice", we use restorative and transformative justice (RJ/TJ) in this report as they are accepted terms among experts and practitioners, and more specific as well. However, there are challenges when trying to define these two separate concepts. Though related, both have distinct histories and there are substantial debates about how they differ from one another. For example, according to one key informant,

> ***I think there's a larger conversation to be had about the ways in which transformative justice and restorative justice are related or not related. And I think that significantly depends on a few factors. There is a difference, I think, in terms of culture, legal system, and sort of evolutions of political systems and the way societies work between the US and Canada that gets lost in the current and oversimplified debate between transformative justice and restorative justice.... There's this simplified line where people say, "I do transformative, not restorative because I don't want to restore to the past." Well, I don't actually know many really thoughtful scholars or program developers or practitioners in restorative justice that that's their goal either. And I don't know that we really advance things much by saying restore means return. I'm like OK, well, transform means transform to what? So this feels a bit like a turf war that is unhelpful to the ultimate goal.***

For some, transformative justice implies reaching for deeper social change, but this approach is also embraced by many RJ practitioners. The conversation about these forms of justice differs depending on who is having it and where the discussion is occurring.

As suggested by the above interviewee, the American debate over restorative and transformative justice happens in a different legal system and socio-political context. For example, conversations about transformative justice are largely led by racialized individuals, particularly Black Americans, in response to the inequities and violence enacted by the police and legal systems upon them.[30] They have purposely separated justice from state-based institutions given the violence their communities endure from the United States government. While there are comparable issues in Canada, the conversations about these differing forms of justice are not quite the same. Here, for example, there are numerous First Nations, Métis, and Inuit legal and cultural traditions that incorporate various forms of restorative justice that are separate from state-controlled RJ processes. This is not to suggest that Black Canadians or Indigenous people in the United States are not part of these conversations and dialogues, but that the focus in each country is a bit different and has shaped the way RJ/TJ are understood.

Thus, instead of trying to separate these two concepts of justice, this report uses the idea of a restorative-transformative continuum. There is a myriad of ways that these forms of justice can be practiced, though they share many base philosophies. According to the Canadian federal government, restorative justice is "an approach to justice that seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate about and address their needs in the aftermath of a crime".[31] This definition applies across the RJ/TJ continuum. Consequently, RJ/TJ approaches to justice tend to be non-adversarial and less focused on fact-finding than the formal court system.

Instead of pitting the parties involved against one another, the person who was hurt and the individual that hurt them are brought together in some manner to discuss what happened and what must be done in the aftermath of violence. Responding to the harms of sexual violence in an RJ/TJ process, therefore, can be substantially broader than the methods taken in the courts. As the purpose is to address the needs of the parties involved—and unlike in criminal law where survivors are just witnesses—punishment is not the primary focus of RJ/TJ.

According to one lawyer from Western Canada,

> ***...even if their attackers are convicted, then they're sent to this carceral system that separates them and teaches them to be harder and kind of breaks the hurt people who hurt people more which reconstructs this pattern. So there's no good remedy in the justice system. It's a question of law and punishment. It's not about justice...***
>
> ***Community action [is] about holding people accountable for their actions and not punishing them but expecting some kind of remedy. And what those agreements look like is an apology from the person who hurt you, some admission that it happened, some commitment for the person to put you back in the place that you were in, and this can include covering the cost of counselling and wage loss because you were broken about it. And sometimes making a statement to the community about what happened and taking accountability for that. That's better.***

RJ/TJ processes are meant to offer remedies to the harm and to prevent future violence by addressing the causes of the behaviour. The needs of both the responsible person and the survivor are considered as this is the only way to ensure that past harm to the individual and oftentimes the broader community is repaired, and future harm is prevented.

Since RJ/TJ processes are meant to respond to the specific needs of the parties involved, there are a numerous ways they can be organized and run.[32] The following are some examples of RJ/TJ options:

VICTIM-OFFENDER MEDIATION

Led by trained mediators; brings survivors and people who have caused harm together to discuss the harm, the impact of the harm, and identify resolutions to address the harm; may also include indirect variations such as exchanging letters.

RESTORATIVE CONFERENCING

Led by a trained facilitator or mediator; includes the survivor(s), the person who has caused harm, their supporters (such as family, friends, colleagues, community members) who all work toward reparation.

CIRCLE SENTENCING[33]

Operates within Canadian common law; Elders or Knowledge Keepers are often involved; this approach has been criticized because there is an absence of Indigenous concepts of justice or Indigenous legal traditions embedded in these frameworks.[34]

COMMUNITY JUSTICE COMMITTEES (CJCs)[35]

CJCs are in operation in three Inuit Nunangat regions. An accused person or someone on probation can access CJC through the Alternative Measures program. The nature of the measure is determined by a committee in consultation with the offender and not by the courts.

HEALING CIRCLES

Led by a circle keeper and rooted in Indigenous legal traditions and cultural practices. Healing circles are a fundamental component of many Indigenous traditions and approaches to healing.[36] Healing circles are sometimes done in conjunction with circle sentencing.

POD SYSTEMS OF ACCOUNTABILITY:

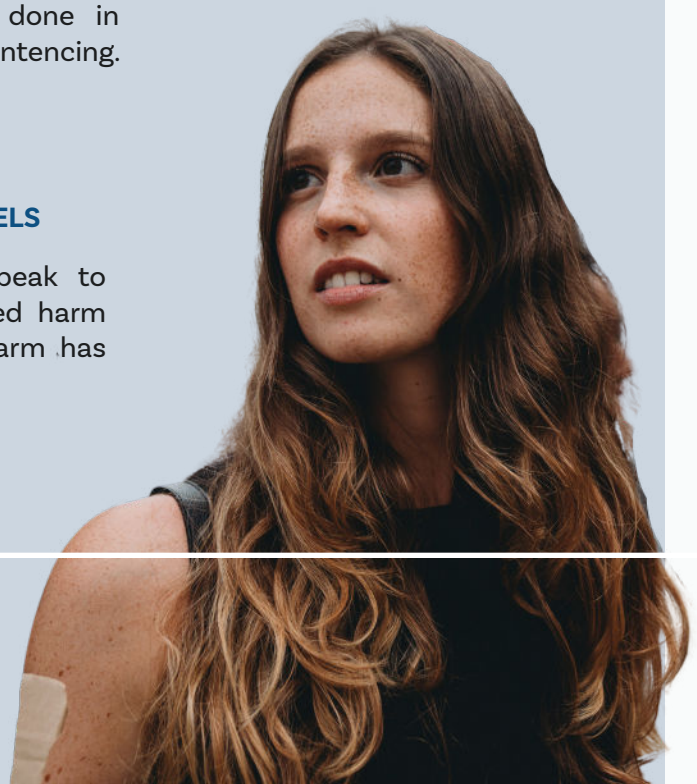
Small groups of support are organized for both the survivor and responsible person to help them individually heal, as well as work towards redress for the harm caused.[37]

VICTIM-OFFENDER PANELS/ SURROGATE RJ

When the survivor or the person who caused harm is unable or unwilling to participate in RJ/TJ, they can engage in an open discussion with a surrogate. For example, a survivor may have a conversation with someone who has caused similar harm, or a person who caused harm may speak with a person who has experienced sexual assault.

VICTIM IMPACT PANELS

A group of survivors speak to someone who has caused harm about the impact the harm has had on their lives.



In some (but not all) RJ/TJ, survivors and the people who caused harm will be brought together to converse face-to-face. Prior to an in-person meeting, however, significant individual work is often done with both parties to ensure that everyone shares similar objectives, and that any discussion will be productive and safe for those involved. Some of these processes will bring in additional affected parties as well, including community members and leaders, cultural or spiritual leaders, family, and anyone else that was impacted by the violence that occurred. RJ/TJ processes can also be structured to avoid any face-to-face meetings. For example, in some forms of conferencing, the parties will be separated, and dialogue will take place through a mediator or facilitator. Others may prefer communicating through letters, text messages, or videos. RJ/TJ can function even in situations where one party is unable or unwilling to participate by instead using surrogates, referred to as surrogate restorative justice.[38]

One lawyer from central Canada believed that RJ/TJ would "[allow] the survivor to craft that [her own justice] a little bit more. To not just be guided by the rules." In the criminal legal system, the complainant is regarded by the legal system is a witness to the sexual assault and the crime is first and foremost a crime against the state. The Crown represents the interests of Canada as a whole, not those of the survivor. While there may be overlap, there can also be conflicts and contradictions between these interests. As a result, there is little room for a complainant to exercise control over what happens once a report of sexual assault has been made. There are a series of formalized rules, procedures, and outcomes that must be followed regardless of how the survivor feels about them. Given the flexibility and adaptability of RJ/TJ processes, however, survivors can seek out a path that responds to their needs.

RJ/TJ processes also have varying relationships to the state which can be beneficial for those who do not trust the criminal legal system. As stated above, Black Americans often define transformative justice as a form of responding to harm that is entirely community-based.[39] The state has no role in these justice mechanisms as many of the communities that engage in these practices have suffered discrimination and harm from the systems that are built to control and criminalize them. However, given increasing public demand for justice reforms, states have been attempting to incorporate RJ/TJ principles and processes in the conventional legal system. Some of these are fully integrated in the systems of the state, while others are affiliated, but still somewhat separate from the state itself.[40] For example, Correctional Services Canada offers restorative justice programs in the prison system which are delivered by RJ facilitators retained by the organization.[41] On the other hand, when RJ/TJ processes are used as diversion in the criminal courts, they are often handled by external agencies that specialise in these types of justice mechanisms. While Crown Attorneys will be involved in the process, it is most often handled by an independent practitioner or a not-for-profit staff who is not a state employee or representative.

One of the more contentious areas of discussion about RJ/TJ is over when—or if—the legal system should be engaged by survivors attempting to access these types of justice for sexual violence. For example, a long-time anti-violence advocate from western Canada felt that RJ/TJ for sexual violence was only appropriate after a conviction:

> ***"We concluded that the only way you could do an alternative to criminal justice is post-conviction because otherwise you're going to have offenders that are lawyering up and they're not going to take responsibility for the harm they created. They're not going to be listening to the deep emotions and humiliation that survivors are wanting to talk about at those tables, or those one-on-ones. And so we actually did some pretty cool work with [a not-for-profit organization that advocates for offenders], and they agreed that in cases of sexual and domestic violence, the only way you can do this is post-conviction.***

On the other hand, several other key informants working in not-for-profit organizations disagreed and preferred if the parties wanted to engage in RJ/TJ that the criminal legal system not be engaged at all.

> ***Whenever the [criminal legal] system remains involved, it is always a problem because you have two diametrically opposed ways of thinking that are working, and even though we have great Crown attorneys who will really think that this is about cooperating... But there's really not cooperation here. So if a charge is being held over someone's head, it's so much better if this can be done prior to a charge being laid, and as early as possible in the process.***
>
> — RJ ORGANIZATION EXECUTIVE DIRECTOR, CENTRAL CANADA

> ***People continue to tie restorative justice like it is in the criminal system to the criminal system. It's a diversion but you still have to get into the system in order to get it. And so I think the biggest policy thing that can be done is to say it is its own thing. It is legitimate on its own. It doesn't have to have any tie to the complaint system. Because if it did people would be afraid to talk. Anything you say will be held against you in this other thing. It needs to be completely separate. It needs to be done—I mean once we get to a point where someone wants to make a complaint, it's probably already too late for restorative justice. They've already taken a position. "I want punishment." So if we can keep those things out as separate, legitimate, viable options on their own and make sure that they're completely independent of each other, I think that's the biggest thing.***
>
> — CAMPUS SEXUAL VIOLENCE ADMINISTRATOR, PRAIRIES

Another key informant shared that allowing survivors access to RJ/TJ options without the necessity of reporting to the police is crucial for providing trauma-informed options:

> ***I don't think the legal system should get to have the sole ownership of issues of harm and violations of accountability. I think it is so extraordinarily, abundantly clear at this late date of the poverty of the legal response to sexualized violence. And you know I've seen spin in my life, but I've never seen anybody able to spin the legal system into looking successful at this topic. And so I'm not at all frankly in favour of there being any kind of program requirement that survivors have to endure the trauma of a court system before they get to explore their own version of justice.***
>
> — RJ ORGANIZATION EXECUTIVE DIRECTOR, WESTERN CANADA

Practitioners had varying perspectives on how and by whom an RJ/TJ process could be initiated. For some, they stressed that a trauma-informed practice means that RJ/TJ for sexual violence should only be initiated by the survivor and not the person who caused harm.[42]

> ***[RJ] has to be survivor initiated – we don't do offender initiated. [...] If [the offender] is wanting to talk to the person they caused harm to, no. That's a trauma-informed boundary that we put in place.***
>
> — RJ PRACTITIONER, CENTRAL CANADA

This perspective was due to concerns from practitioners from a consent perspective. Given the dynamics of sexual violence, they felt that survivors may perceive the contact as another violation of their consent. One practitioner expanded on how to contact the party who had been harmed with the least possible potential for further injury:

> ***A big barrier in the TJ work is just figuring out how do we safely and in a good way, when we get referrals from the community, engage the other person involved. […] There's almost always a connection between these folks, even if they're just acquaintances or know of each other. We typically rely on a trusted third party or friend which is very risky and not going well. We've had [to], because we don't necessarily want the release of personal information to us either, or to be reaching out to people directly. We've done that too, and we've gotten lots of push back around that. So you know that that's just a whole huge area of capacity building. What are best practices around this? How on earth, if we're not going to rely on the legal system to resolve these matters, how on earth, in a good way in the community, do we go about setting up and inviting and have the required supports for us? Partnering with organizations [like the sexual assault centre] is really important.***
>
> — RJ ORGANIZATION EXECUTIVE DIRECTOR, WESTERN CANADA

In contrast, another practitioner shared that they would contact survivors on behalf of someone who caused harm to initiate a RJ/TJ process, but in cases of sexual assault, a lot of care goes into how to approach the survivor to assess their interest. In one state-affiliated program available to people who have pleaded guilty, the initial contact with the survivor is done by a case worker and is sent via email to assess interest about setting up a phone call to learn more.

Another important perspective is that of grassroots organizations, specifically those working with structurally marginalized populations such as those who are racialized, unhoused, Indigenous, 2SLGBTQQIA+, sex workers, and people who use drugs. These populations often do not report to the police for a myriad of reasons, including the potential for harm and criminalization. For example, a peer support worker for a sex worker advocacy organization in Western Canada argued that until sex work is decriminalized, it is too precarious for sex workers to report sexual violence to the police, even if state-affiliated or integrated RJ/TJ was an option. This key informant highlighted the need for peer-led and community-driven RJ/TJ:

> ***A thing that strikes me as someone who hasn't had a lot of experience with having successful actual experiences of TJ/RJ in a formalized setting… At least the things that I've seen that seem the most mutually beneficial to a victim and not victim are projects that are led by, run by people who are peers. Which is also a huge thing to ask people with lived experience of that type to do. And so, I think it has to be really well paid, good benefits, and stuff. I just feel there are so few programs that exist. There are so few people who go through with TJ/RJ that I know of in Canada. […] I think having people with lived experience who want to do the work… I just think that that's going to be the most beneficial for all the people involved. I think peer-based work is always the most beneficial.***

Another community-based activist also spoke about their concerns over how the concept of community has been co-opted by the not-for-profit sector, their relationship to the state, and its impact on funding specifically for non-carceral responses to sexual violence:

> ***[Community] is institutionalized. Like community means community organizations, so community organizations that are funded and have a mandate to work on certain issues. So when we talk about transformative justice being brought in order to respond to sexual violence and we talk about non-profits, I'm just skeptical because they're being funded by the State to carry on these projects. And when you engage with transformative justice, pushing it, like that component of pushing against the State and not engaging with the State is central because the State, you know, if you look at the roots of sexual violence, the State is a perpetrator. And so for me, it gets kind of muddy.***
>
> — **COMMUNITY-BASED ACTIVIST, CENTRAL CANADA**

Regardless of what path one might take to RJ/TJ, many key informants stressed the importance of sexual violence prevention as a foundational aspect of RJ/TJ. The prevention of sexual violence often relies on community-building, and this can take a range of forms including but not limited to:

- All sectors adopting restorative policies and approaches. For example, in human resources and codes of conduct.
- Public education on sexual harm.
- Promoting healthy masculinities.
- Expansion of funding for sexual violence prevention work that is community-led and tailored to specific community needs.
- Opportunities for relationship building between sectors as well as RJ/TJ organizations and anti-violence organizations.
- Anti-oppression initiatives that target root causes of sexual violence such as racism, colonialism, gender discrimination, ableism, homophobia, and transphobia.
- Decriminalization of sex work.

While there is certainly much debate over the goals of restorative and transformative justice, both are centered on changing the way justice is understood and opening up the possibilities of what we can do in the aftermath of sexual violence for both the survivor and the person who caused harm. By addressing the root causes of why the harm occurred, RJ/TJ processes encourage social change as opposed to the legal system's focus on punishment and deterrence.

"Restorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives,... our practice of politics,... [and] the way we do justice in the world."

— JOHN BRAITHWAITE[43]

KEY TAKEAWAYS

- The term "alternative justice" is problematic because it assumes that "justice" within the colonial criminal legal system is superior to other approaches to achieving justice.
- In the context of this report, we view RJ/TJ as a continuum of similar approaches instead of trying to separate and distinguish these justice models.
- One reason for this continuum-based approach is that there are Indigenous restorative practices that exist outside of the Canadian legal state. This complicates one of more common methods of distinguishing RJ/TJ in the literature as TJ is seen as a form of justice that exists outside of the purview of the state, while RJ is often connected to the state.[44]
- RJ/TJ can take a wide range of forms and do not always need to involve the person who caused harm.
- RJ/TJ seek greater social change to address the root causes of behaviour that causes harm.
- An oft-touted benefit of RJ/TJ is that it responds more fully to the needs of both survivors and responsible persons, giving survivors more options and control over their search for justice, and offering people who cause harm support for their own growth and healing as they attempt to make amends for the harm that they have caused.
- There is no agreed upon time when/if RJ/TJ is appropriate. Some key informants argue that it should only be offered post-conviction, while others believe it should be an option without needing to access the criminal legal system at all.

RESEARCH METHODS

Several different methods were used to gather the information for this report. First, a literature review of academic and grey sources was conducted. Given the lack of Canadian research on some aspects of RJ/TJ, international literature from the US, UK, and Australia was also used. A case review of jurisprudence on section 717 of the *Criminal Code* was also undertaken using CanLII.

We established an advisory board of seven experts from across Canada and different occupational fields. Their role was to oversee the construction of the research project, the finding of data, and the writing of the report. Two meetings were held to discuss the project at different stages, and each member was also sent a draft of the report to comment on.

The bulk of the data for this report was gathered through interviews. Research ethics approval for the project was granted from the University of Calgary Conjoint Health Board.[45] The authors of this report conducted 41 semi-structured qualitative interviews with key informants on RJ/TJ issues from late 2022 to early 2023.

The key informants[46] worked in a range of roles including:

- **Private practice and not-for-profit RJ/TJ**
- **Lawyers including private bar (civil and criminal) and Crown attorneys**
- **Therapists & Academics**
- **Frontline support workers**
- **Community-based RJ/TJ practitioners**
- **Staff and management at campus sexual violence centres**

Individuals who had expertise in RJ/TJ processes were picked through snowball sampling. This is where some experts are identified and then asked to provide additional contacts to the researchers.

The key participants came from all areas of the country, with representatives from almost all provinces and territories.[47]

Two interview guides were created and used for this project: not-for-profit and community-based practitioners and campus sexual violence experts, and lawyers. Interview questions were kept quite broad and flexible, and key informants were encouraged to discuss the full scope of their experiences and perspectives as they saw fit (Appendix A).

The interviews were recorded, transcribed, and analyzed to determine several central themes. This analysis was conducted by the authors and two research assistants. The final themes were presented to the advisory board for their approval.

In the interviews, we asked key informants about:

- **Legal challenges and barriers for RJ/TJ in cases of sexual violence, such as moratoriums.**
- **Best practices for RJ/TJ in response to sexual violence.**
- **Why survivors may opt for RJ/TJ as opposed to the criminal legal system.**
- **RJ/TJ for specific populations (for example, university students, Indigenous peoples, sex workers, 2SLGBTQQIA+ community).**
- **Their experiences using s.717 of the *Criminal Code*.**
- **Current resource constraints or resources needed for RJ/TJ.**

SECTION 1:
Legal Perspectives on RJ/TJ and Sexual Violence

RJ/TJ AND THE CANADIAN LEGAL SYSTEM

***Criminal Code*, 717 (1)** Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;

(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;

(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;

(d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and

(g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person

(a) denies participation or involvement in the commission of the offence; or

(b) expresses the wish to have any charge against the person dealt with by the court.

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

(4) The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is laid against that person in respect of that offence,

(a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and

(b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.

(5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.

Within criminal law, the legislative basis for the use of RJ/TJ processes is found in section 717 of the *Criminal Code*. This provision details the use of **"alternative measures"** (AM) for those who are alleged to have committed a crime.[48] Another commonly used term for this is **diversion**. Alternative measures can refer to different interventions that are used to divert an accused out of a conventional trial process.[49] These can include community service, restitution, mediation, diversions to specialized programs (such as drug or alcohol treatment), Aboriginal justice committees, or restorative processes.[50] Not all AMs fall within the boundaries of RJ/TJ, but this is where RJ/TJ processes can be used when a criminal charge has already been initiated. When an AM is used, criminal proceedings are suspended until the accused completes the mandated tasks that the Crown has assigned—for example, the completion of an anger management program.

The AM provision was introduced during the 1996 sentencing reforms that aimed both to better standardize sentencing across Canada, as well as encourage non-carceral responses to crime.[51] This was deemed particularly important to address the over-incarceration of Indigenous people, a reality that this population was (and currently still is) facing.[52]

Within the criminal law system, the Crown[58] can recommend that an AM be used if the following conditions are met:

- Use of an AM is not inconsistent with the protection of society
- The AM is part of an authorised program
- The Crown is satisfied that use of an AM would be in the interests of the person alleged to have committed the crime, society, and the victim
- The person alleged to have committed the crime has consented to participate in an AM and has also been advised and given the opportunity to be represented by independent counsel
- Said person admits responsibility for the offence in question
- There is sufficient evidence to proceed with the prosecution of the offence and no legal reason barring prosecution[59]

Additionally, according to the *Code*, if an AM is used, "no admission, confession or statement accepting responsibility" on the part of the person alleged to have committed the crime is admissible as evidence against that person in any civil or criminal proceedings.[53] If the court believes, on a balance of probabilities, that the accused complied with and completed the terms of the AM, the charges against them will be stayed.[54] If the accused was unable to complete the requirements of the AM, charges may still be dropped if the court believes continuing with prosecution would be unfair given the accused's circumstances and their attempts to fulfil the requirements of the AM.[55] If an accused fails to fulfil the requirements of an AM, the original charges will be unsuspended and criminal proceedings take place.[56]

There is not much case law on section 717 of the *Criminal Code*. This is not surprising as section 717 is intended to divert cases out of the court. There are, however, a few key issues in the jurisprudence. The most significant arises over the exclusion of evidence resulting from AMs for use in other proceedings. The *Criminal Code* specifically prohibits the use of admissions of responsibility in AMs for other proceedings, but the case law is conflicted on what this means in practice. For example, the content of documents from an AM are generally considered inadmissible. In ***British Columbia Nurses' Union v Vancouver Coastal Health Authority (Health Employers Association of BC)***, the Arbitrator refused to admit into the arbitration proceedings portions of an apology letter written by the employee to a third party as part of an AM.[57] He stressed that these were not only prohibited from being used by the law, but that the excerpts of the letters lost their full context when looked at outside of the AM.

However, what has challenged the courts is whether a person's participation in an AM can be used as evidence in another proceeding. There are several instances of courts and tribunals emphasizing the importance of encouraging and supporting the use of diversion programs. For example, in ***R c Laberge***, the accused had originally been charged with firearms prohibitions, but was offered and completed an AM, allowing the court to dismiss the charge.[62] The Crown, however, wanted to seek the forfeiture of his firearms under section 491 of the Criminal Code. The court denied this stating that:

> ***It is easy to understand that it is repugnant to the mind that confessions made in a context of diversion are taken into account for consequences other than those which the legislator wanted to avoid. It must be kept in mind that these confessions are made within a program that aims to make the suspect responsible and the penalty adapted to the victim or to society. In short, allowing these confessions made to settle a case - resulting in the dismissal of the charges - to be used for other legal purposes that would penalize the suspect would run counter to the objective of alternative measures. Allowing this could also leave a sour taste for the suspect who qualifies for the program and realizes the conditions and that is why this provision was passed by the legislature.***[60 61]

Though the court admitted that it was understandable that the Crown wanted to pursue the forfeiture of the accused's firearms, that was a process for the criminal courts. To apply criminal consequences after an AM was agreed upon would undermine attempts to get people to engage with these types of diversion.

Other case law stresses that there is often inadequate information arising from AMs to be able to use them in other proceedings. In ***Basic v Barjaktarovic***,[63] the judge was asked to take judicial notice of the fact that the defendant was the subject of an assault charge that was dealt with through section 717, and this meant that he accepted responsibility for committing the assault. The judge declined to take judicial notice of this fact because of the requirements of section 717(3) of the *Code*, but also because he did not know anything about the AM used, and what type of admissions the defendant made.[64] This was echoed in ***Abbasnejad v Leifsson***[65] where the plaintiff requested that the defendant's agreement to participate in an AM for the same assault at the centre of the current civil case should be used as evidence in the civil trial. The judge declared this evidence inadmissible due to the prejudicial impact it might have on the defendant.[66]

Not all case law found the fact that an accused participated in AM to be inadmissible evidence. In ***Ontario (Attorney General) v Lok***[67], the defendant brought motions under the *Canadian Charter of Rights and Freedoms*, as well as the *Ontario Rules of Procedure* to exclude some of the evidence the Attorney General tendered in their case on forfeiture of property related to criminal activity. These motions were rejected as Lok was originally charged with criminal offences, but proceeded with an AM. In doing so, he admitted responsibility to these acts.

The judge stressed that:

> ***Lok was not denied an opportunity to make full answer and defence, rather it was by virtue of his choosing that his criminal charges were resolved through an alternative measures sentence instead of a trial. To permit his Charter motion to be heard would in my view amount to an abuse of process; the sentencing judge has exercised his discretion in determining whether on the facts and on the law, the threshold issue of the availability of an alternative measures sentence was met. It was determined on the representation of Lok's counsel that there is "no legal bar" to any criminal proceedings and no appeal was taken from this determination and imposition of sentence. Accordingly his Charter motion to exclude evidence should no[t] be considered at this time and is dismissed by this court.***[68]

This was a very cautious interpretation that the court issued to balance the need to prevent the legal system from undermining section 717, yet also prevent individuals from trying to "game the system".

In ***R v Nagashbandi***,[69] the accused did not have a criminal record, but had been previously charged with the same type of offence and undergone an AM. Defence counsel argued that the court should not be allowed to take this prior participation in an AM into consideration when imposing a sentence. The judge stated that this would be an overbroad interpretation of section 717(3).[70] Evidence of participation in a diversion program was information that should be considered by a judge at the sentencing stage, though it was not to be understood as the offender having been found guilty of a prior offence.[71] Section 717(3) was meant to block evidence of admissions given in AMs from being used in cases relating to the same incident.[72] As this case was dealing with sentencing for a separate charge, evidence of participation in an AM for a similar offence was another factor for the judge to consider when looking at the history of the offender. This type of evidence, however, should not to be used as an aggravating factor.[73]

There are also cases concerning access to information regarding alternative measures. In ***The Canadian Broadcasting Corporation v British Columbia (Attorney General)***,[74] a group of journalists were requesting access to records involving an individual charged with sexual assault who was later discharged based on his participation in an AM. The court refused to grant the disclosure of these records as they were never made public in an open court. To allow for the release of AM records "would have a chilling effect on the cooperation of complainants and accused persons".[75] The judge stressed that while it is important for the media to have access to information about what occurs within the criminal courts, alternative measures are not part of the open court principle, and allowing anyone to access these types of documents and records would undermine the proper administration of justice.[76]

In the context of this report, another interesting case is that of ***R v Boudreau***[77] wherein the accused wished to apply for an adult diversion program but was denied because of the specific crime he committed: domestic assault. In Nova Scotia, charges of violence against a spouse or intimate partner are excluded from diversion programs. Boudreau challenged this as a breach of his section 15 equality rights guaranteed by the *Charter*. The court dismissed this claim, stating that Nova Scotia had excluded these types of cases because of the seriousness of this type of violence and to protect a segment of the population that was particularly vulnerable.[78] Boudreau was not discriminated against based on his personal characteristics, but on his behaviour.[79] Further, as the program was designed to protect a disadvantaged group and Boudreau belonged to a group of people that had been "historically advantaged", no discrimination was found.[80]

Similarly, in ***Okimow v Saskatchewan (Attorney General)***,[81] the accused was denied access to an AM program and consequently filed a *Charter* claim alleging any refusal was discriminatory. The judge responded that the "applicant's argument bewilders me. He wants into the alternative measures program but because entry is denied he wants to strike it down. I am reminded of Aesop's fox."[82] Further, he stated that an "alternative measures program into which everyone had a right of admission would be self-defeating and self-destructive. And of course, totally unmanageable."[83] Both of these decisions highlight that participation in an AM program is not guaranteed, and there are several considerations that are taken into account aside from the accused's desires.

The last case of note is ***R v Henwood***.[84] This decision dealt with the interpretation of section 717(4) and when the Crown can refuse to withdraw charges after an accused person has completed an AM program. In Alberta, while the Crown is the one to approve an accused person's access to an AM, the Correctional Services Division is responsible for delivering these programs and ensuring that the accused completes all requirements.[85] In this case, the Crown refused to withdraw the charges against Henwood despite the fact that the Correctional Services Division stated that she had satisfactorily completed all requirements associated with the AM. At issue was whether the Probation Officer properly assessed the completion of the required AM tasks.

In their referral document, the Crown raised the need for restitution as part of the AM but did not provide any documentation from the complainant as to an appropriate amount. As this information was missing from the Crown referral, the Probation Officer decided to forgo making restitution a part of the AM contract offered to Henwood. Henwood was not, at any point, made aware that restitution was ever a potential part of the AM requirements.

In her AM contract, the accused was required to write a letter of apology to the complainant. The Crown felt that her efforts were not adequate in showing remorse and acceptance of responsibility, though the letter was accepted by the Probation Officer as sufficient for the purposes of completing the AM.[86]

The court found that although there were some complications over whether the requirements of the AM were completed, it is important to promote confidence in alternative measures programs. Henwood entered an AM contract in good faith with a Probation Officer who was empowered to make agreements on behalf of the state. By allowing the Crown to intervene after a contract was signed and completed "would create unnecessary doubt in the minds of accused persons about whether the promises of the benefits of engaging in an Alternative Measures Programme Agreement will eventually be honoured by the Crown prosecutorial service".[87]

KEY TAKEAWAYS

- Section 717 of the *Criminal Code* is the legal foundation for the use of RJ/TJ within the criminal law system.
- This provision prohibits the use of admissions made in alternative measures in other legal proceedings.
- There is not much jurisprudence on section 717, though what exists is inconsistent on whether participation in an alternative measures program can be used in different legal proceedings.

LEGAL BARRIERS

MORATORIUMS

Section 717 of the *Criminal Code* allows for Crown Attorneys to divert cases into an AM program. This is one of the primary avenues where state-affiliated and state-integrated RJ/TJ can occur. However, one of the most significant barriers to the use of RJ/TJ in the context of sexual violence is that these types of offences are often excluded from alternative measures programs.

This section of the report profiles three provinces (Nova Scotia, British Columbia, and Ontario). These provinces were selected partially based on availability of interviewees.[88] Additionally, Nova Scotia was picked as it has the longest running state-affiliated restorative justice program in the country, Ontario has been the site of recent media attention about restorative justice and sexual violence in recent months, and British Columbia offers regional variation as well as a more nuanced approach to moratoriums than many other provinces.

NOVA SCOTIA

Nova Scotia has one of the oldest and most developed state-run restorative justice programs in Canada. Starting as a pilot program for youth in 1999, the province's restorative justice program became permanent in 2001, and expanded to include adults in 2016.[89] While provinces generally have a variety of programs and resources for different types of diversion, this long-running program for restorative justice is unique. Unfortunately, the province declared a moratorium in the 1990's on the use of restorative justice for offences dealing with sexual and intimate partner violence.[90] According to one key informant, this was a logical restriction to apply in the early days of the program because,

> ***...these kinds of cases are complicated. They require specialised attention. We should figure this out and ensure that we are not just sending them as if they're cases—because we know the system finds them tricky. We know there's lots of cases. So, unless we have thought really long and hard about this, and in a collaborative way, we ought not to do this. A moratorium is, by definition, a hold. It was "don't send those now".***

RJ/TJ has not always been embedded in the Canadian legal system and the provinces had to learn how to best incorporate these processes. Given the challenges presented by sexual and intimate partner violence, there were legitimate concerns about ensuring that these new justice mechanisms could respond adequately to these offences.

However, this moratorium remains in place to this day. As the key informant stressed, this was not meant to be a permanent tool, but a stop-gap measure. The exclusion of sexual and intimate partner violence was done to give the province time to adapt and structure their program to be able to handle these types of cases. Continuing the moratorium allows the government and the legal system to abdicate their responsibility to respond to the challenges of this area.

Further, a government worker in Nova Scotia admitted that,

> ***We still clearly bump into people who have been impacted by those issues [sexual violence and IPV] in doing the work of the program. It necessitates being trauma informed and really being thoughtful about how to deal with folks who might disclose that they've had past experiences of sexual violence or domestic violence. So in that vein there is... There's not a lot of active work in terms of actual files responding to sexual violence in the province. But there are other areas of work that are kind of contemplating it that I know of.***

It is difficult, if not impossible, to completely exclude certain types of cases from the restorative justice program, as people seeking justice are often dealing with multiple forms of harm. They will gravitate towards solutions that they see as appropriate for their situations. Complete bans on the use of alternative measures including RJ/TJ for sexual violence ignores these complicated situations and leaves service providers struggling to address the needs of clients while still respecting the rules set out by the province.

ONTARIO

Ontario also implemented a moratorium on the use of RJ/TJ processes for cases involving sexual violence during the 1990s.[91] This moratorium has been garnering a substantial amount of attention recently as sexual assault survivors and their advocates have been pushing back against the exclusion. In 2018, the Ontario government announced that it was considering the use of restorative justice for cases of sexual assault, though no policy change was implemented.[92]

Since then, several cases have been profiled in the news. In one situation, the complainant, Marlee Liss, strongly advocated for a restorative approach to be used in her case.[93] Though she had reported her assault to the police and gone through a preliminary inquiry, the experiences she had were traumatizing and she no longer wanted to participate in a trial process. One senior Crown Attorney was adamant that if Liss chose not to testify, then the Crown would withdraw the charge to end the proceedings as sexual assault was too serious a crime to be dealt with outside of the courts.[94] This Crown wanted to push survivors to testify, even if the process was uncomfortable. They did not believe RJ/TJ was appropriate even if the alternative was dropping the case altogether. Fortunately, a different Crown stepped in and was able to arrange a restorative process with an external agency that proved to be productive and successful for both Liss and the man who harmed her.[95] The Crown who organized this process was later formally disciplined for their actions.

In a second case, the complainant Robin Parker, a lawyer from Toronto, successfully advocated for a restorative option to be used in her case.[96] The Crown's office never disclosed an official reason for why they agreed to a restorative process in this situation, though Parker noted they were reluctant and did not want this decision to become widely known.[97] Parker, however, felt compelled to speak out about her experience. She recognized that her status as a lawyer on the inside of the system allowed her to push for changes and reforms. She argued that it was unfair for her to be able to access these opportunities, yet not be able to get the same access for her clients. In the Toronto Star, she was quoted as saying "the unequal application of justice is injustice, and this has created a situation of injustice for other survivors."[98]

Several other survivors spoke about their experiences in trying to convince Ontario Crown attorneys to use RJ/TJ processes in their cases.[99] In interviews with the Toronto Star, complainants talked about feeling patronized by Crown counsel. One of the survivors, Nathalia Comrie, stated that the prosecutor in her case told her that she was not being brave enough when she said she did not want to testify against her ex-partner. Comrie replied "your idea of justice and my idea of justice are completely different, so please stop assigning your idea of justice to my sexual assault".[100] Others spoke of similar arguments and admonishments when they decided they wanted to pursue different methods of redress. Rather than support these survivors in exploring RJ/TJ possibilities, the Crown withdrew the charges in these cases.

There is significant tension among legal actors in Ontario over the moratorium. According to one lawyer who works with both complainants and accused individuals,

> ***[The Ministry of the Attorney General is] a big, cumbersome bureaucracy. It's slow to become responsive to contemporary social needs. And so they're still working on an understanding formulated in the 1990s where there's a ton of misogyny going on here and women are routinely disbelieved, so we have to up our game. Therefore, that meant to them we have to be aggressive about prosecuting every episode of sexual violence and treating it seriously.***

While the moratoriums may have been useful at some point, there has been significant movement on understanding how to respond to sexual violence and that deserves recognition in the modern legal system. This lawyer further argued that,

> ***...there should be more liberal use of alternative measures because the criminal justice system is kind of like an ICU or an operating room set to do open heart surgery. It's built and equipped for the highest end kind of stuff and it's not necessarily the best place to run through a lot of stuff that is not high end.***

While sexual assault is a serious crime that is still often trivialized in society and the legal system, it is also, unfortunately, a common occurrence. There are hundreds of thousands of sexual assaults every year in Canada.[101] The legal system is not necessarily the best method of redress for every situation. Many of the lawyers interviewed stated that their goal was to help their clients find resolution to the harm that was caused and that could look very different for every person. By excluding sexual assault from alternative measures, the legal system ignores the very needs of the survivors it is supposedly trying to protect.

Some Crowns also feel constrained by the moratorium. According to one Crown interviewed, it is not fair to tell survivors that their options involve testifying in a criminal trial or having all legal charges dropped. They argued,

> ***...we are encouraged to do more restorative justice. And, if you look at all the research and everything out there, it sounds like we are doing it. And we definitely do resolve cases short of trial and guilty plea. And so why not offer something more? I think that a more structured program is a lot better than just the luck of the draw. So if you get me as your Crown, I'll do it. But if you get somebody else, they'll say, "No, you either show up for court or he walks free." It shouldn't be that random and also that unresponsive.***

As Parker stated in the Toronto Star article mentioned above, justice should not be dependent on who you are, or, according to this Crown, whoever happens to become involved in your case.

Crowns also spoke about how alternative measures, even in serious cases of violence, are a normal part of their jobs, even if not spoken about in those terms. The burden of proof in a criminal trial is very high and there are many cases where the evidence is not necessarily strong enough to result in a conviction. As both Crown and defence counsel (and even sometimes judges) work through a case, there are negotiations about the best avenue of achieving justice in the circumstance. According to one Crown, instead of prosecuting every case, sometimes the solution is that the accused must go to counselling or engage in community service work. If the accused completes an agreed upon set of tasks, then the charges may be withdrawn. This might be done without ever officially talking about diverting a case. Crown Attorneys are meant to uphold the administration of justice, a task which requires flexibility to respond to the unique scenarios they encounter. Complete moratoriums on the use of alternative measures for sexual violence ignores this fact.

BRITISH COLUMBIA

British Columbia started to have conversations about RJ/TJ and other non-carceral justice options after the 1996 sentencing reforms. At this time, several women's organizations and gender-based violence advocates were calling for offences involving sexual and intimate partner violence to be excluded from the use of alternative measures.[102] A key informant from a BC anti-violence organization was highly critical of using RJ/TJ to respond to sexual violence, specifically due to concerns that the RJ/TJ community did not have the expertise to identify the unique power dynamics in sexual violence cases that substantially differ from other types of crimes. Furthermore, they raised concerns about the use of RJ/TJ for repeat offenders and the specific circumstances in First Nations communities that lacked adequate women's shelters or resources.[103] In response to the labour of concerned feminist advocates during the 1990s, a moratorium was created around "power-based offences" which included sexual violence, intimate partner violence, and hate crimes, though it does not remain in this form today.

Key informants reported that the province began to increase its partnerships with a variety of restorative justice agencies in the late 2000s. Organizations that wanted to work with the government had to negotiate and sign agreements with the Ministry of the Attorney-General outlining their capacities and responsibilities. However, most of these agreements were dissolved a few years later when new privacy legislation was enacted, and the province had to re-evaluate how documentation would be handled when they referred cases to external agencies. This took several years, and it is only recently that new agreements are being signed.

Like Nova Scotia and Ontario, British Columbia also excludes many cases of sexual assault from alternative measure programs, including RJ/TJ.[104] However, they do not currently have a complete ban. Cases of aggravated sexual assault[105] are never to be considered for alternative measures, while cases falling under section 272[106] can be referred with approval, and cases under section 271[107] face no such restrictions (though must meet a list of criteria).[108]

Even though a full moratorium is not in place, it is still difficult for the Crown to refer cases involving sexual violence to agencies offering RJ/TJ services. The main barriers are the lack of organizations prepared to work on these types of serious offences, as well as underdeveloped relationships between the Crown and external RJ/TJ organizations. Several key informants, including lawyers and RJ/TJ practitioners, stated that relationships between RJ/TJ practitioners and Crown Attorneys were rare. Thus, even when a Crown has a suitable case that could be diverted to a restorative process, it is likely that the appropriate agency-to-state relationship does not exist to facilitate such a process. Key informants working within the legal system and in RJ/TJ organizations both shared a desire to work together to offer these types of processes, but also noted that there are still relationships to be built and a need to enhance capacity. There are some regions of British Columbia where there are established agencies with a long history of working with the Crown. But these types of robust and experienced organizations are rare given a historic lack of funding for AM programs and years of confusion over whether sexual assault charges are eligible for alternative measures.

Of the three provinces canvassed in this report, British Columbia has one of the more developed alternative measures programs that engages with the issue of sexual violence. These policies could be used as a useful template for other provinces should they start to re-evaluate their moratoriums. British Columbia is also in the process of revisiting the use of RJ/TJ for gender-based violence and has been canvassing anti-violence agencies on their opinions and experiences in this area.[109]

MORATORIUMS AND THE REST OF CANADA

These three provinces are not the only ones to have formally (or informally) instituted a moratorium on the use of RJ/TJ processes. For example, like Ontario, Alberta,[110] Quebec,[111] and Newfoundland[112] fully exclude cases involving sexual assault from their AM programs. Saskatchewan[113] and New Brunswick,[114] on the other hand, are like British Columbia in that they exclude only certain types of sexual assault (such as those proceeding by indictment) or require additional layers of approval. Prince Edward Island[115] and Manitoba tend to exclude sexual assault, though allow for exceptions to be made depending on the circumstances. Manitoba has been trying to build its restorative justice programs across the province[116] and is currently experimenting with the use of RJ in cases of intimate partner violence.[117] From our interviews, while there are RJ/TJ programs in the territories,[118] particularly given the Indigenous populations that reside there, capacity and resources are still major resource barriers in offering these types of processes.[119]

Thus, there is great hesitance in all of Canada to embrace RJ/TJ for situations involving gender-based violence. As key informants stressed in the interviews, by sustaining the moratoriums for so long, the provinces have greatly diminished the capacity of RJ/TJ practitioners to respond to sexual violence. One RJ practitioner from the Prairies stated that,

> ***There's an absolute poverty of qualifications to do this work in the restorative justice field because who, over the last 20 years, would bother to take training on how to do cases?[...] And so we are as a field—the restorative justice community—ignorant of this whole field because we're told don't even ask to take a case like this, right?***

The key informant noted that Alberta is trying to expand their restorative justice program but lacked enough trained individuals to take on cases involving serious levels of violence such as sexual assault. They said that across the prairies, there were only a handful of people qualified to take on such work, and all of them were already working at capacity.

Though moratoriums were originally created so that the provinces would be able to increase their capacity to handle complex cases, their existence created a situation where the RJ/TJ field was not able to engage in the training and capacity building needed. One RJ practitioner from the Prairies stated that,

> ***There was a whole bunch of really good reasons for that moratorium to be put in place, but you don't just slap the lid on and then lift the lid and expect we'll just go on as we were. It's created a lot more work that needs to go on. In addition to the relationship building, rebuilding after the gender-based violence community blocked the door to the restorative justice room for two decades. So yeah, this is a relationship to repair.***

Instead of addressing the problems involving using RJ/TJ in the context of sexual violence, moratoriums have meant that these issues could be ignored indefinitely. This informant also noted the tensions that exist between those working in the field of gender-based violence and those in RJ/TJ areas. Those advocating for the end of gender-based violence have been vocal in calling on governments to take these types of offences seriously. Some have expressed concern that RJ/TJ practitioners did not have the appropriate experience to be able to deal with these cases. RJ/TJ communities, on the other hand, felt frustrated that their justice mechanisms were framed as more lenient and less legitimate. Fortunately, many organizations and agencies working to end gender-based violence are re-designing their programming to explore the potentials of RJ/TJ so perhaps this relationship can be mended and pressure can be focused on the provinces to re-consider their moratoriums.

There is also pressure for reform mounting from within Attorney Generals' offices.

According to a former Crown,

> ***[…] the blame is not on these individual [Crowns]. They get hung out to dry by their Crown policy manuals and if they deviate one iota… And they've got managers who have no imagination and have no ability to see the need for change, and much less to imagine what that change might look like. […] And the whole ethic of being a Crown is that you are an impartial minister of justice. Heaven forbid you should have opinions or much less visions for how to do things better […] If you don't have an imagination and want to work within an institutional context? Fine. Not a bad gig. But if you have an imagination and really care about doing things better, it's a very frustrating place to be.***

Several Crowns expressed frustration about limiting policy directives that they felt undermined their ability to effectively do their jobs. Many are pushing for their offices to reconsider the use of RJ/TJ in cases of sexual violence and finding small ways to slowly shift the internal politics of the Attorney Generals' offices across Canada.

Though RJ/TJ processes can always occur in community-based situations, moratoriums against the use of alternative measures for sexual violence mean that the legal system refuses to engage with these approaches to justice. While there were good reasons for these exclusions to be implemented, the time has come to re-evaluate the situation. According to one RJ/TJ expert,

> ***I would resist policies that I think lock us in to only one kind of solution. I would resist policies that create carte blanche moratoriums if there is no commitment to figure out how we should do this right…. If a moratorium is a ban, that is not nuanced. It does not allow us to determine the factors in which we could do this now, should do this in [the] future, how we can grow into this, that all systems are not alike… So I think I would focus on the policies that help people use and structure their discretion in good and safe ways for those who are impacted.***

KEY TAKEAWAYS

- Moratoriums are one of the biggest barriers for accessing RJ/TJ once a sexual assault charge has been laid.
- There are moratoriums across Canada, but they have different histories and contexts in which they operate.
- Key informants in a range of roles would like to see a more nuanced approach to the moratoriums that would allow for RJ/TJ to be more readily available for survivors who wish to pursue this option.
- While moratoriums are a barrier and should be revisited, they should not necessarily be entirely lifted until more work has been done to build systems-level capacity.

CONTAINER THEORY

One of the biggest challenges that key informants identified as a barrier to the use of RJ/TJ processes was the lack of protection these justice mechanisms had surrounding the information produced during these sessions. To work, an RJ/TJ process requires that the person who caused harm admit responsibility for their actions. However, making such an admission could potentially cause problems for them in other legal proceedings. According to one RJ practitioner from the Prairies,

> ***I think we need to ask some really tough, justice-oriented questions about if somebody who's accused of something and in a restorative justice context says, "yeah, I did it", do we all have to call the cops now? Does that person now have to go to court or what? What is the response? And how do we make sure that survivors are not required to go through demonstrably traumatizing justice procedures in order to have even the remotest of hopes of meeting any of their needs?***

For all parties to be able to participate in an RJ/TJ process fully, several key informants stressed that there must be protections build into the process. These protections would create a container around what was discussed and revealed, keeping these dialogues separate from other legal processes.

This container is necessary to encourage responsible persons and survivors alike to participate in RJ/TJ. By keeping the information disclosed in these processes protected, this allows the parties to be able to be honest and vulnerable with each other without worrying that what they are saying can be used against them in a legal proceeding. For example, for those who have sexually assaulted someone, the fear of being accused and charged with such a crime is significant. An advocate for prisoners from central Canada stated that,

> ***Disclosure is the biggest issue, right? Even if somebody does want to engage with it [RJ/TJ], the stakes are so high. You're being told that your entire life is going to be taken away from you now. And so are you willing to actually engage in any restorative justice process in any way?***

Criminal law is intentionally adversarial and incentivizes those who do harm to avoid accepting accountability for their actions. The punishments are harsh and if there is the possibility that an admission of responsibility in an RJ/TJ setting could be used later in a criminal law proceeding, then it is very unlikely that responsible persons will want to participate in them.

This is not just a concern for people who caused harm, but survivors as well. In recent years, there has been a noted increase in defamation actions against survivors by men accused of sexual violence in order to silence them.[120] One lawyer from central Canada was concerned that a survivor's words,

> ***Could very well be flipped [by] a savvy, criminal defense lawyer. And a complainant who doesn't really know her rights or doesn't have legal counsel or good, independent, legal advice, accepting that [that a perpetrator's admissions cannot be used against him] and then that being flipped and turned into a defamation piece [against the survivor]. And then what? You're putting the complainants into a really scary place unwittingly. [...] I think there needs to be a lot of safeguards in place for the complainants as well.***

RJ/TJ processes require a significant amount of vulnerability from both sides. They are not constrained by the criminal law's requirements and structures, and what is said during these sessions can be complicated and difficult to understand outside of the context of the process. Just as people who cause harm may be concerned about their admissions of responsibility being used against them, the claims survivors make against the person who hurt them could be used as the basis for a defamation case against them.

Though the construction of a container around RJ/TJ raises many questions, several key informants stressed that there are already models being used by practitioners that can be learned from and adapted. A lawyer from central Canada who offers RJ/TJ-style services to individuals who do not want to engage the conventional legal system noted that,

> ***I already have the model which is that it's confidential. Everything's privileged. Everyone has to sign off. The accused needs to be able to talk about what happened openly and honestly. And not necessarily to her. Those conversations at the beginning don't need to be with her. We have these models. They already exist. They're expensive, right? They'll be expensive. They'll be time consuming. And there's a lot of training and learning that people need to do in order to create the process.***

Many practitioners in this area spoke about using confidentiality agreements modeled after those used in mediations and settlement negotiations when conducting RJ/TJ processes outside of the structures of section 717 of the *Criminal Code*. Several also designed their processes so that the person who caused harm and survivor had individual sessions before coming together (if they came together at all). This allowed for the different parties to deal with some of the more complex issues on their own before having to talk them through with each other. This also gives practitioners the space to judge whether the parties are going to be able to come together in a meaningful way. This preparatory work reduces concerns over admissions as they would only be made once it was determined that the parties were both willing to engage fully with the process.

Those working in this area admitted that concerns about disclosure of information are common. Though confidentiality contracts are used, no one can legally waive their right to report a crime. According to an RJ/TJ practitioner in central Canada talking about RJ/TJ processes outside of the section 717 regime,

> ***You can say it's settlement privileged. It's mediation privilege. That what I learned here, what I share here can't be used against someone. You can make confidentiality agreements about it. But ultimately someone could learn something in a mediation process and turn around and go to the police and say: this happened to me, and I was in this process, and this person admitted it. Whether ultimately you would be able to use that against that person at court has never, as far as I know, been directly decided in Canada.***

The privilege[121] that those working in this field attempt to construct is never going to be perfect, and the uncertainty surrounding confidentiality agreements in RJ/TJ processes is made worse by the fact that there is no direct Canadian case law or legislation on the topic. It is a novel area of law and that introduces some inherent risk for the parties involved.

Part of these difficulties can be managed by the lawyers and RJ/TJ practitioners who are guiding the parties through the process. A lawyer from central Canada stressed that,

> ***...if you get an admission that you want to then use in a civil court to whack someone for a big boatload of money as a result of that very issue? I'm not going in the room. I'm going to tell my client don't go in the room under those conditions. Or if you do go in the room, you have to resort to talking points.***

This lawyer recognised his role in helping set expectations for RJ/TJ processes for his clients. He was open about the fact that he was not going to engage in these types of justice mechanisms in bad faith. RJ/TJ practitioners also talked about how important it was that they assess the involvement of the parties throughout any process to ensure that the parties were committed to RJ/TJ principles and not trying to game the system to get the best result for themselves. Though it is impossible to accurately judge another person's motives in all situations, those working in the field did note that time and experience helped them understand what to look for when working with parties participating in these processes.

One key area of contention, however, was the difficulty of these assessments when dealing with gender-based and sexual violence and how many practitioners are truly capable of engaging in such determinations. Others noted that the final say in any progression of an RJ/TJ process should be in the hands of a survivor and their assessments of the readiness or sincerity of the person who caused harm are irrelevant.

Documentation is one of the other central concerns in container theory. A verbal admission does not represent the same level of risk as one that is written down. Consequently, many key informants working in this area stressed that the documentation produced in RJ/TJ processes needed to be kept confidential or even destroyed once the process was over. For example, a lawyer in central Canada argued that,

> ***I myself am a fan of that space being defined in advance as safe. In other words, there are no notes taken, or if there are notes taken just to aid in the ongoing dialogue in the room, the notes don't leave the room. No statements can be utilized in subsequent proceedings because it allows everybody to stop being strategic and to start being themselves. Their most vulnerable selves.***

To help the parties feel that RJ/TJ is safe, documentation should be kept to a minimum. For this lawyer, the privacy of the process was what allowed for it to be productive, and everything possible should be done to make the parties believe in the confidentiality of their discussions, even limiting the production of records.

Another RJ/TJ practitioner from central Canada agreed with the need for caution over the production of documents. In their practice,

> ***We don't keep those notes. I document and then at the end of the process the notes get deleted and destroyed. They never get put into the institutional... like a proper database. But they are within my laptop. And then there is an agreement at the end that is co-written [so] that people have comfort around what language [gets] cut and gets included.***

While agreements are often written during RJ/TJ processes, these can be carefully crafted by the parties involved, giving them control over how things are stated, and any admissions made. This helps ensure confidence in the confidentiality of the process.

Some key informants noted that, depending on the process and the needs of the parties, not all records can be destroyed or kept solely within the process. One RJ practitioner from central Canada spoke about an experience with a letter written by an offender to the survivor:

> ***"We had someone share a letter, and he was terrified that it was going to end up on Facebook. And so we went through all of these pieces of the process where we said, 'Well, what if we read it to her?' And then she came back and said, 'You know, I'd really like a copy'[...]***
>
> ***"She talked about that letter being almost like a lifeboat and she read it every single night before she went to bed. It was something that just really helped her process her own trauma because he was finally taking responsibility. He wasn't shying away from it. It was very, very vulnerable what he wrote, and she needed that. She needed a copy of it. And when we talked to her about having to keep that to herself, she was like, 'of course, I would never share that with anybody.'"***

For some, the permanence of an admission is important. A written admission can be a way for the responsible person to prove his sincerity and provide the survivor with something tangible for her own healing process.

Sometimes the person who has caused harm can show his acceptance of responsibility by admitting to the harm that was done in front of others. This is why community is often involved in RJ/TJ processes.[122] It ensures that the harm is not hidden away and that the community can hold the responsible person to account, and help both him and the survivor heal. This is a common practice in Indigenous healing circles.

However, a key informant from central Canada noted that issues with confidentiality also arise when dealing with community disclosure:

> ***"We've had to have conversations with other cases—they haven't been the sexual violence ones. But we've had other cases where the victims have wanted to share with their communities how well this has gone and how happy they are with them! It's conversations like, you can talk about this in general, but you can't talk about specifics or anything that would identify them or anything. You can say that this went well, and you participated in an RJ process, and you feel better. There are things that you can say, and there are things that you can't. It's sort of tackling those conversations very carefully.***

Knowing exactly what the parties are comfortable sharing is important to work out and clarify during a process. This can be a determining factor in whether RJ/TJ will be beneficial for the parties involved. Further, these sorts of discussions should also include conversations about what the parties expect they will get from the process. There should be few surprises in what information is allowed to be revealed and parties must be able to come to an agreement on what can be spoken about after RJ/TJ is complete.

Some key informants were also concerned that a lack of records could cause problems for the survivor and society at large. One gender-based violence advocate from western Canada argued that RJ/TJ processes with no records did not give survivors any recourse should the person who caused harm renege on the agreement made. Further, this advocate added that a lack of records also meant that long-term monitoring of the person's behaviour was not possible:

> ***That was another thing that's a problem with it is that there's no case tracking. So at least in the criminal justice system, if you're charged with sexual assault and even if you haven't been convicted, […]the police look you up […] and it's there that you've been charged, or even if you've been investigated, not charged. Even if the police stop you on the street, it's all there. And so if you have a case [where] there's no tracking? The offender comes to the table, and he goes through restorative justice, and even let's say she feels okay about it, or they feel okay about it. And they go on to commit the same crime in another community or in the same community, who's tracking that? There has to be years and years of tracking in order to see if this is effective. And so, even from one restorative program to the next, let's say you have a guy. Let's say his name is John Doe. There should be some kind of database that you can look into to see has he ever been provided with a restorative opportunity anywhere in the country before that? Because these should be processes… Are they being used for hardened, repeat serial criminals and would you think that would be appropriate?***

While RJ/TJ processes are meant to address the root causes of the harms, some women's organizations and gender-based violence advocates raised the issue of repeat offenders and ensuring the safety of potential future victims of violence.[123] They worried that responding to sexual violence outside of the public court system would allow for offenders to hide their behaviour and potentially allow them to continue hurting people. This concern mostly applies to community-based RJ/TJ because any RJ/TJ process run through section 717 of the *Criminal Code* is recorded. Such cases would be documented by the court system and committing a crime after having already completed an AM for a similar offence is a common reason for the court to deny access to diversion.

In some RJ/TJ processes, a partial container has already been constructed. As discussed earlier in this report, cases that are diverted from the conventional legal system through section 717 of the *Criminal Code* have special protections against the use of admissions from alternative measures in other criminal or civil proceedings. However, there is very limited case law in this area and some recent jurisprudence[124] has called attention to how little guidance there is on how and when information from AMs should be disclosed and for what purposes. An RJ practitioner from western Canada expressed many concerns over this gap in jurisprudence. She noted that there were no standards for how different RJ/TJ agencies and practitioners should treat documentation and these uncertainties create a very risky environment for practitioners and individuals seeking RJ/TJ as an option:

> ***What types of information gathering are RJ programs even doing? What documents do they use? How do they keep their notes? What are they? What type of information are they even gathering on the people that they work with?… [Who do] documents belong to when referrals come from the criminal legal system? Who owns those documents? Who has the authority to protect them? Who has the right to? Who has the requirement to disclose them when FOIA requests are done or those sorts of things? Because that is totally not clear.***

This key informant highlighted that RJ/TJ practitioners who work with the legal system on section 717 cases need to understand that their records may no longer belong entirely to their agencies anymore. Being affiliated to the legal system introduces another set of complications in an already complex area.

A lawyer from western Canada highlighted the fact that the criminal law system already has several sets of rules in place to deal with third party records being used as evidence. They stated that,

> ***I think with respect to whether or not it affects future criminal proceedings, I would say that it's very well settled.... We have inadmissible statements that come to the attention of the system all the time, and we have to deal with those accordingly. When it comes to maybe a prior and inconsistent statement by the complainants, I would say that this would be dealt with through the third party records regime, and it would be again the same.***
>
> ***So, I don't see the alternative justice mechanisms as any different from the fact that we have police interviews and [employment tribunal] interviews and victims going to counselling and victims going to keeping diaries. There is a plethora of kinds of third-party records and statements that we have established legal mechanisms for dealing with.***

Though use of evidence from RJ/TJ processes has not yet expressly been dealt with in Canadian law, there are models of disclosure around other types of records that can be used to help craft protections for RJ/TJ. For example, alongside the provisions in the *Criminal Code* on third party records, one key informant also suggested that protections for RJ/TJ could be built into provincial legislation on apologies.[125]

KEY TAKEAWAYS

- RJ/TJ processes require that the responsible person admit to causing the claimed harm, though few want to do this if there is a chance that such an admission could be used against them in another legal proceeding.
- RJ/TJ processes require openness and vulnerability from the parties involved which is difficult to encourage if the information shared during these sessions can be shared with anyone else.
- There are few legal protections for those participating in an RJ/TJ process save for those offered by section 717 of the *Criminal Code*.
- Though some experts recommend not keeping records during RJ/TJ processes, others argue that this is not always possible or even desirable. There remain tensions over the best way to address this problem.

INFORMATION SILOS

Another major barrier to the use of RJ/TJ is the lack —or perceived lack—of information available about these types of approaches. This is an issue for both lawyers and their clients. Those we interviewed talked about how few legal actors were informed about these different justice mechanisms or prepared to talk about them. This is a huge problem for survivors who are often relying on police or lawyers to give them a comprehensive look at all their options.[126] According to one lawyer in central Canada,

> ***"In the places where it is an option [RJ/TJ], I think it needs to be up front and centre for survivors to know. So when you go and seek legal information, or if you go to the police, this should be one of the first things that's told to them."***

Navigating the legal system is known to be difficult, especially for those without formal legal training. Survivors do not necessarily know what to ask for or what to expect beyond criminal trials and incarceration.[127] They may get swept up in a conventional legal process even if that is not going to address their needs simply because that seems like their only option. While RJ/TJ processes are slowly becoming more common knowledge, one Crown counsel stressed that "99 times out of 100, [you're] going to be the first time they've ever heard about it". This places a huge responsibility on legal professionals (and police) to, at the very least, know that RJ/TJ are available options and to refer survivors to other practitioners if needed.[128]

Consequently, lawyers must be better educated about the existence of RJ/TJ processes, even though the use of these for sexual assault remains contentious in many provinces. Though Crowns are not the only ones that must better understand these justice mechanisms, they are one of the primary ways that survivors often interact with the legal system, and it is imperative that they be prepared to speak about processes. According to one Crown attorney,

> ***"There's a big education piece and Crowns are highly qualified to describe what is going to happen to them [survivors] if they go to the through the traditional route. What are the odds of this, that, and the other thing? How long is it going to take? But what we are not, what we have no idea what we're talking about, is what the other path looks like. And so it would be up to the RJ agencies or I'm imagining that we need to have either some kind of written material created, or an intake interview, or something. Preferably obviously not written material. But I think that that's going to be a hurdle. What is that process? How could we do this properly, supporting victims in making informed choices?***

RJ/TJ processes must be normalized, and lawyers trained to be able to discuss them in the same way they do any other legal process. This is going to take targeted legal education campaigns to ensure that legal professionals are informed and able to speak with clients about RJ/TJ.

Part of the challenge in this area is the lack of connections many RJ/TJ organizations have with the legal system. As discussed in the section on moratoriums above, this has been a difficult and fraught experience in many provinces. Even non-Crown lawyers admitted that their relationships to RJ/TJ professionals were often ad-hoc and personal. Their ability to help clients navigate RJ/TJ was dependent on connections that they forged themselves. One lawyer in the Prairies stressed that there needs to be better ways for lawyers to be able to make contacts with RJ/TJ practitioners when necessary:

> ***Well, one thing that I think is heavily lacking in [my province] is that… it's almost like having a magazine or a directory where you could just like look up anger management, see everything that's listed… domestic violence, see everything that's listed. So not only having kind of the information all at hand and updated on a regular basis, so that if somebody did close down or reopen or split up, that we would have that, because it would allow us to very quickly, easily see what options are available to the clients. And then, from that perspective, it would just give us more information to provide, not only to the clients, but to the Crown, and say, "Look, if you look at Page 2, we've got this program, page 6 has this program, and then this one. What if he did all these things, would that be something that would change your position?" Whereas right now it just honestly feels like you kind of just gather experience based on your own personal journey and law. And so other firms may have lots of references where some have none. So I think just that would be the most important thing, because if we knew all of the resources available out there, we can know what we could use.***

Though the power to divert cases to an AM lies with the Crown, defence counsel could better serve their clients if they were able to accurately assess what kinds of RJ/TJ resources were available so that they could present them as viable options. Defence counsel already regularly speaks to the Crown about options such as anger management and counselling. Expanding to more comprehensive RJ/TJ processes gives everyone involved more responses that might be better suited to the situation. To properly provide these opportunities, a directory or similar list should be maintained that helps connect lawyers to RJ/TJ practitioners and organizations. By making connections easy to find, resources are managed more effectively, and clients are better served.

Part of having a directory, however, would mean maintaining one and ensuring that those who are listed have the capacity to do the work. As mentioned above, one of the reasons why moratoriums were implemented in so many provinces was because of legitimate concerns over inadequately trained RJ/TJ practitioners and the damage that could be done in cases dealing with sexual assault, intimate partner violence, and other like crimes. If the state is going to affiliate itself with an RJ/TJ agency, then the state must ensure that this agency can do the work that they are claiming they can do. One Crown explained how difficult this can be in practice:

> ***What it doesn't really address head-on is the capacity of those organizations to actually take sexual assault referrals. So just because you have an [agreement] with an alternative justice agency in your jurisdiction or anywhere in the province doesn't mean that you're actually going to make a sex assault referral to that agency. Because as Crowns, we're trying to achieve the ends of justice here, and we need to know that the people that we're referring it to are going to do that.***
>
> ***So what that boils down to is do you, as Crown, have a relationship with a local restorative justice or alternative justice or Indigenous justice, or whatever agency such that you feel confident referring a case to them?… And what I would say is the issue is that [most] Crown Counsel don't have those relationships with such agencies[…].***

As discussed in the section on moratoriums, Nova Scotia has a restorative justice program run by the province.[129] It is staffed by regionally based teams who help facilitate the creation of restorative processes between interested parties and practitioners that deliver these types of services. As such, these teams have developed working relationships with the various agencies offering restorative services across the province. Thus, they are aware of the resources in their areas and are also familiar enough with these agencies and practitioners to be able to assess their competency and capacity. This type of program would be able to create and maintain a directory of RJ/TJ resources and could be a model for other provinces to consider.

Given the divisions between various legal actors, systems, and RJ/TJ agencies and practitioners, there needs to be significant relationship building before there is enough trust for the different parties to effectively work together. For lawyers, they must be convinced of the utility and effectiveness of RJ/TJ. One lawyer from central Canada stated that,

> ***The people we direct survivors to are either counsellors or their lawyers. So we direct them to certain professionals—and I'm not trying to throw anyone under the bus here—but I think the same people we direct them to are also very self-interested in some ways, or they're not aware of these other alternatives. Or you have these preconceptions about what is the right process. You might just want an apology and a healing thing, or you might want to do this. But I'm telling you this is the better option. So I think our own biases, the people we refer to, and then how we kind of rank justice. I think that actually is a huge barrier because then… if survivors don't know, and the people they're talking to have their own ideas, then they're never going to see those as options.***

While lawyers will have opinions on what sort of process may work best in each situation, without having a good understanding of what RJ/TJ practitioners do, they cannot give clients a good assessment of these options.

Additionally, there remain tensions between RJ/TJ communities and those working in the violence against women sector that have helped shape the legal response to the use of RJ/TJ in cases of sexual assault. Feminist groups called for caution when section 717 was introduced to the *Criminal Code*. They were concerned that the same rape myths and sexist stereotypes that plagued the criminal legal system were likely to be reproduced in RJ/TJ processes without the protections offered by the courts.[130] As stated by a RJ facilitator in central Canada,

> ***I think abolitionists, violence against women workers, and restorative justice practitioners have not worked together at the very least, and been suspect of one another for sure. And I see these ideas coming together and supporting one another. So we need to be doing that in our own communities, talking to each other about our values, how we work, and learning from one another. Because there's so much rich stuff. And together, I think that's a really strong community base to challenge what's been so entrenched around how we're supposed to address sexual harm.***

There is space for legal actors to take a leading role in trying to bring these different parties together. As was argued earlier in this report, moratoriums should be re-evaluated, and this will involve bringing different groups together to talk about what has been learned about sexual assault and RJ/TJ in the past thirty years. This will help break down information silos and build much needed connections between the various agencies, organizations, and people who help survivors and responsible persons find justice in the aftermath of violence.

KEY TAKEAWAYS

- There is a lack of education on RJ/TJ among police and legal actors.
- Legal actors also often do not have robust connections with those working in the field of RJ/TJ, limiting their ability to access these processes when requested by clients. Building relationships between these communities is essential for breaking down information silos.
- Lawyers have identified a need for a directory they can use to look up RJ/TJ practitioners. This list would need to be consistently maintained and those included on it would need to be vetted to ensure that they were capable of doing the work being referred to them.

INDIGENOUS SOVEREIGNTY AND INDIGENOUS LAW REVITALIZATION

The Truth and Reconciliation Commission of Canada Call to Action 50 demands that the Federal Government, in collaboration with Indigenous organizations, fund and develop Indigenous laws and access to justice in accordance with the distinct First Nations, Métis and Inuit cultures of Canada.[131] The TRC encouraged the revitalization of Indigenous laws, which are the laws and legal traditions of First Nations, Inuit, and Métis peoples.

The National Inquiry into Missing and Murdered Indigenous Women and Girls identifies two calls for justice specific to access to restorative justice.[132] Call 5.1.1 requires all levels of government "to increase accessibility to meaningful and culturally appropriate justice practices by expanding restorative justice programs and Indigenous Peoples' courts." The Métis specific Call to Justice 17.27 states that all levels of government must develop Métis specific restorative justice and rehabilitation programs in Corrections that will address the root causes of violence, reduce recidivism, and support healing for victims, offenders, and their families and communities.

Indigenous legal traditions are frequently and incorrectly conflated with "restorative justice". Although RJ/TJ share many similar values to Indigenous legal traditions, they must be seen as distinct from one another.[133] Unlike the colonial legal systems which identify the Crown or the state as the source of rightness and judicial authority, Indigenous laws exist within their own worldview and draw upon natural law and Creation Stories as their source of authority.[134] It is critical to resist pan-Indigenous approaches to governance such as the Band Council system under the Indian Act, and judicial bodies originally rooted in patriarchy like common law courts.[135] Indigenous nations and communities have always been diverse in terms of cultural practices, legal traditions, and governance structures.[136] Indigenous key informants and those who are non-Indigenous but work primarily with Indigenous peoples and nations were from a range of territories with differing cultural practices and legal traditions, whereas restorative justice programs are often based in cookie-cutter models vetted by the government of the day.[137]

For decades, Indigenous women across Canada have voiced their concerns about RJ/TJ for gendered violence being deployed in their communities without adequate resources to support survivors and their families.[138] More recently, in 2020, the Federal Ombudsman for Victims of Crime traveled to the Northwest Territories for a community forum for victims of crime. NWT has a small but predominantly Indigenous population that are geographically dispersed. One of the key issues the attendees agreed on was that RJ needed to be critically re-evaluated and made more culturally relevant.[139] Similar concerns were raised by the key informants we spoke to. An Executive Director of a women's organization in Northern Canada reflected on her experience of monitoring RJ/TJ development in the North, which is often lacking resources to support people experiencing violence:

> ***When resources are as scarce as they are, and when violent offenders are people who do or enact a significant level of harm are let back into the community, we're taking away resources from folks who are in the present moment being harmed by trying to protect the people who have been harmed by that person that was now released. Restorative justice feels more like a cheap phrase. Now that is an artificial optics way to try to demonstrate Indigenizing systems that we know are fundamentally unindigenizable because of their nature, how they were built and who they were built for, and it just feels cheap, and it feels like gaslighting for those communities. Because those communities are then left to essentially clean up the aftermath.***

A key informant spoke about how urban Indigenous people experience their own unique barriers when trying to access RJ/TJ. Those living in larger cities often come from a diversity of territories which can make it difficult for the urban Indigenous population to access RJ/TJ options that align with their own cultural practices. A plurality of Indigenous communities represented in a locale may make it difficult to incorporate the traditions of specific nations or the inclusion of Elders and Knowledge Keepers from a person's home territory.

There are also structural barriers when offering RJ/TJ for Indigenous survivors of sexual violence. For example, a justice worker at a First Nations organization in a major Canadian city who has experience leading healing circles for Indigenous clientele highlighted how the state's refusal to officially allow for RJ/TJ to be used for sexual violence was a manifestation of anti-Indigenous racism:

> ***But within the constraints of the specific alternative measures program that exists in [province], the government does not want [domestic violence] matters within that because what I find in [province] is that the government does not recognize Indigenous traditional practices or methods of conflict resolution as valid, […] So that's frankly institutional racism that I see from the government.***

To avoid the co-optation of Indigenous RJ by the state, key informants stressed the importance of RJ/TJ being Indigenous-led and relying on facilitators, Elders, and Knowledge Keepers from the nations of the survivor and the person who caused harm whenever possible.

Another recurring theme among the interviews with Indigenous key informants and key informants who work closely with Indigenous peoples was the urgent need for Indigenous-specific social, housing, and legal resources to prevent violence against Indigenous women, girls, and gender-diverse people. This included:

- Access to long-term and sustainable funding for Indigenous-led anti-violence programs.
- Access to programs and services that are culturally safe.
- Indigenous-specific and culturally safe domestic violence shelters and low-barrier, low-cost housing.
- Indigenous justice support workers.
- Expanded translation services for those involved in the legal system.
- Support with transportation costs for court dates and healing activities.

Many of the resources identified by the key informants echoed the MMIWG calls on provincial and territorial governments to provide adequate resources for Indigenous victims of crime, as well as families and friends of Indigenous murdered or missing persons.[140]

KEY TAKEAWAYS

- It is critical for Canada to provide ample support and funding for Indigenous law revitalization which may include Indigenous-led RJ/TJ options.
- Key informants noted that for RJ/TJ to be a viable option, Indigenous clientele often required additional services and supports for meaningful participation.

OTHER LEGAL BARRIERS

The following are a series of different legal barriers brought up by the various people interviewed for this project. Though the exploration of these topics in this report is brief, all deserve more attention and consideration to help improve access to RJ/TJ in Canada.

INDEPENDENT LEGAL ADVICE

For survivors to be fully informed of their options after experiencing sexual violence, they need to be able to talk with people who can guide them through the systems and choices that they must make. This is not the job of Crown counsel as they represent the state, though oftentimes this is the only lawyer a survivor will have contact with. It is imperative that survivors have access to their own lawyers. This need for independent legal advice (ILA) has been increasingly recognised in recent years, and most provinces are either piloting or have already piloted programs that provide survivors with a few hours of pro-bono services from lawyers.[141] These hours can generally be used at any point during a survivor's engagement with the legal system, whether she has reported her assault or is progressing through a trial.

While the creation of ILA projects across the country is an important first step in ensuring that survivors can access legal representation, there are still many improvements that need to be made to these services to make them effective.[142] Most ILA services provide only a few hours of pro-bono services and most lawyers who provide these services readily admit that they spend far more time helping clients than they are actually paid for. According to one lawyer from Ontario, there are a variety of challenges facing the ILA program in her province and the lawyers who are part of it:

> ***It's just a lot of pro bono. […] They put out an invitation for people to apply to be on the list 5 or 6 years ago. They did not publicize it. The application process was open for like 5 min. They've never added anyone to the list since then.***

> ***Most of the lawyers who actually on that list—I'm sure you're speaking to them—are like I can't take any more of these on. And there's no one else they can send it to because they won't open up the list. It's Machiavellian.***
>
> ***So now if complaints call me for early intervention/early advice, it's like, can I take this on a pro bono basis? It's a relationship that is a long term relationship if, like me, you want to bring a trauma-informed approach to how you practice with complainants. I actually think there should be a legal aid clinic just for this with funded lawyers and social workers who have advanced trauma-informed training.[143]***

Interviews with key informants revealed that the ILA programs need to be extended beyond their pilot initiatives and also be better funded to recognize the amount of labour needed to serve the needs of survivors.

CONTACT BANS

One potential legal reform in the context of RJ/TJ deals with the issue of contact bans. Police and judges will often issue no contact orders in cases of gender-based violence which prevent an offender from contacting the survivor. An experienced RJ practitioner from the Prairies, however, pointed out that such contact bans can make it difficult for an offender to instigate an RJ/TJ process:

> ***I would like to see it become very standard practice when in sexualized violence cases where judges are issuing no contact orders as part of the sentence, that they just insert a nice little qualification that "except for purposes of restorative justice or family mediation", or some sort of list of things like that. And maybe…if everybody wants to maximize safety about it, maybe saying something like that the survivor themselves initiate?***

While contact bans are often needed as a safety precaution to protect the survivor from continued harassment and unwanted contact from the person who caused them harm, this key informant stressed that there should be a way to contact survivors as many may only find out about the possibility of RJ/TJ post-conviction if they are invited to a process. This expert noted that contact could be made by facilitators of official programs so survivors can still feel protected and keep the offender at arm's length unless they want to engage in such a process. However, this recommendation is contentious and, as we noted earlier in this report, many who work in this field are hesitant to accept offender-initiated RJ/TJ. Thus, this suggestion requires further examination and consultation with survivors and other professional experts.

POTENTIAL FOR DEFAMATION CLAIMS

Another legal barrier to consider prior to engaging in RJ/TJ is the risk of a defamation claim initiated by the person who caused harm. Mandi Gray's research on defamation lawsuits against survivors and active bystanders following a report or disclosure of sexual violence showcases that defamation actions are becoming a more common tool used by people accused of sexual violence to silence allegations and further harm the survivor.[144] Gray's study included survivors who attempted to engage the person who caused them harm in a community-based RJ/TJ. The men responded by initiating a defamation claim against the survivors and sometimes their supporters, alleging the claims of sexual violence were false.

In Canada, there is a low threshold for what constitutes a defamatory statement. If a communication "would cause the plaintiff to lose respect or esteem in the eyes of others," that communication can be cause for a defamation action.[145] The onus is on the defendant (the person who is being sued) to justify their statements which can be particularly challenging in sexual violence, especially in a legal system that is shaped by discriminatory rape myths.

The invitation to engage in an RJ/TJ process could potentially allow for defamation actions against survivors of sexual violence, as well as any organizations or supporters that repeat any communications alleging sexual violence. While provinces such as British Columbia and Ontario have adopted legislation to protect defendants from frivolous defamation actions intended to silence speech, the legislation has not yet proven to be useful for those who report or disclose sexual violence.[146]

SECTION 2:
Non-Legal Community Perspectives on Restorative & Transformative Justice

This section of the report moves away from a focus on legal barriers to accessing RJ/TJ for sexual violence and introduces non-legal challenges and opportunities for advancing RJ/TJ options primarily from the perspectives of community-based, grassroots, not-for-profit, and state-affiliated RJ/TJ practitioners and feminist anti-violence experts. This section examines:

- The diversity of perspectives for the use of RJ/TJ to respond to sexual violence
- Sexual violence prevention as critical to advancing RJ/TJ
- RJ/TJ options on Canadian campuses

NON-LEGAL PERSPECTIVES ON RJ/TJ AND SEXUAL VIOLENCE

Most of the key informants interviewed for this report were supportive of the use of RJ/TJ to respond to sexual violence.[147] However, there was still a range of perspectives among key informants, often related to their occupations and the associated politics with their positions. In specific, this report highlights three areas of tension that present an obstacle to the availability of RJ/TJ for sexual violence in Canada: the feminist anti-violence sector, public opinion, and the ongoing distrust of legal systems among structurally marginalized populations.

FEMINIST ANTI-VIOLENCE SECTOR

Since RJ/TJ was first introduced as an option within the criminal legal system, there has been considerable debate about whether it is appropriate for sexual violence. This criticism is often rooted in the belief that RJ/TJ is an "easy way" out for people who cause harm and that such responses do not reflect the severity of the crime and contribute to the trivialization and potential privatization of gendered violence.[148] Given the way that sexual violence is often minimized or ignored by the legal system, feminist anti-violence advocates have expressed caution and wariness over these forms of justice.

Key informants in this area noted that a recent ideological shift is occurring in the feminist anti-violence sector. This may be attributed to growing attention on the failures of the criminal legal system to meet the needs of survivors of sexual violence.[149] These failures are often heightened for survivors who experience intersecting forms of structural marginalization, and those from minority communities have been some of the most vocal in calling for justice outside of what the conventional legal system offers.[150] However, despite the recent recognition of the need for non-adversarial avenues for survivors of sexual violence to seek justice, tensions among experts, activists, and practitioners still exist.

Many of the key informants we interviewed spoke about the historical and ongoing friction between RJ/TJ organizations and feminist anti-violence organizations. A key informant working in the anti-violence sector spoke about her experience attempting to bring RJ/TJ into the rape crisis centre where she worked. She received significant pushback from her more senior colleagues:

> ***"I tried to bring folks that have an expertise on [RJ/TJ] to rape crisis centres when I was working there, and the women that work at the rape crisis centres were like... for them it's like we fought in the eighties for legislation that criminalized sexual violence and y'all are trying to bring us back? And so it's really really, really hard."***

Among the key informants working in the anti-violence sector, several of them identified a generational divide between the feminists. In particular, the movement that fought for state recognition of gendered violence during the 1980-90's has been rightfully critiqued for centering white, middle and upper class, cis-gendered, and straight women. A new generation of feminist advocates and scholars, on the other hand, have recognized the need for an intersectional lens that recognizes the potential harms of the criminal legal system for survivors who face interlocking forms of systemic oppression.[151] In recent years the need for an intersectional lens to gendered violence has also been adopted by many mainstream organizations and government documents.[152]

Many feminist advocates have spent years trying to make various levels of government as well as the public understand the serious nature of sexual assault. It can be difficult to reconcile the need to ensure that sexual violence is seen as a horrific occurrence while also acknowledging that addressing even terrible harms does not always need to result in punitive, carceral solutions.

Although there is growing recognition of the need for RJ/TJ options for survivors, some of the central concerns of feminist anti-violence advocates as described by the interview participants are:

- Viewing both parties as equals is inappropriate in cases of sexual violence where an analysis of power is required.
- Processes not being survivor-centered which is a concern when dealing with sexual violence.
- RJ/TJ practitioners do not necessarily have specialized training in gender-based and sexual violence which are unlike any other types of crimes and require unique considerations.

Many of the key informants felt that these concerns could be addressed by meaningful partnerships and knowledge sharing between anti-violence and RJ/TJ organizations that do not have experience working with survivors of sexual violence. While these barriers were challenging, they were not insurmountable, and experts identified that there has been a lot of movement in recent years towards reconciliation between these different sectors of workers.

PUBLIC OPINION

A 2018 public opinion survey on Canadian perceptions of RJ found that people are generally not familiar with RJ.[153] The survey found that:

52%

of Canadians reported low familiarity with RJ and 30% noted moderate familiarity.

62%

of participants felt—after RJ was explained to them—that RJ could provide victims of crime with a more satisfying and meaningful experience than the criminal legal system.

64%

of Canadians indicated that RJ should be available to all victims and offenders, regardless of the offence type, as long as both parties consent and the offender admits their guilt.

In a focus group, participants indicated more support for RJ when the crime was not sexual in nature.[154]

Key informants stressed that there is general discomfort among the public when RJ/TJ options are identified as a possible response to sexual violence. One RJ practitioner spoke about the uneasiness there often is when trying to discuss the wide range of severity of sexual violence without looking as if one is minimizing the serious of any particular incident:

> ***Over the years there have been times that we have lost supporters because we've taken sexual assault cases. That goes back a number of years when I think this was more taboo. […] People have such visceral reactions to the idea of restorative justice and sexual violence cases. But there are huge ranges in what that charge can be. […] We've had referrals that have been everything from a drunken boob grab at a bar to a kid falling down off a bicycle and accidentally hitting somebody on the bum on his way down. We've had sibling referrals where there's been inappropriate [behaviour]. […] A sexual violence charge, it's anything and everything in between, and you can't always assume that the offender is the worst of the worst and deserves punishment. There's huge capacity and potential for these cases.***

Another recurring theme within the interviews was an overarching desire for Canadians to imagine possibilities for accountability and justice for sexual violence outside of the criminal legal system. An RJ practitioner from central Canada stated that,

> ***"Part of the problem I feel like we're up against is that we are socialized… to believe that the police and the criminal legal system [are] mechanisms for safety, and it's what creates safety. And so we're up against this mythos or mythology about what that system means. Not only do we have to work on building alternative responses, because we can't send people elsewhere if they don't exist, but we also have to work at changing our community's understanding of what creates a safe community. And it's such an uphill climb to help the community understand that police, courts, prisons are not making us safer."***

When people think about criminal offences, the general assumption is that they will be dealt with by the police and the legal system. If a person is unable to access justice in this manner—for example, those facing structural marginalization—then it often seems as if there is no other option. The legal system is hegemonic in the minds of people, and there must be a concerted effort to educate and prompt society to craft new systems and ways of understanding justice.

Part of this involves ensuring that the public better understands some of these new options. RJ/TJ are still new concepts for most people. In a system that links crime to punishment and incarceration, focusing on recovery and healing can seem idealistic. People have not yet had the chance to see these other options in action.

According to one lawyer in central Canada,

> ***It's hard to let go of [the criminal legal system] because people don't feel ready for the alternative. [...] I feel like with sexual violence, I don't know many folks who really can imagine or understand another way yet. And therefore are really afraid of letting go of this, not letting go completely, but even just in their imagination, being willing to consider other things.***

Sexual violence is seen as a horrifically violent offence—though admittedly, only in certain circumstances—and people are afraid that without a harsh penalty, this type of violence will continue. However, sexual violence is endemic and reflects a wide range of severity. Yet in response, the conventional legal system fails to provide survivors with what they need after being assaulted, or to prevent more sexual violence from occurring. RJ/TJ may help address these problems.

Finally, it is crucial to recognize that sexual assault is a physical assault that undermines a person's sense of self and safety. Thus, when seeking justice, the system should not participate in taking away a survivor's choices. According to a PSI sexual violence advocate in central Canada,

> ***...lots of times people's fear on this stuff comes from a place of not knowing and understanding RJ. Almost always they don't understand RJ. Ever. And also what I perceive [are] really patronizing perspectives on what survivors need and want... Fear response. I know [it] comes from a place of care and worry, [but] it just is really paternalistic. Often around like we have to protect survivors. And I'm like we wouldn't do a process that a survivor didn't ask for... And so how dare you?***

In an earlier part of this report, we highlighted the way survivors were told that their justice desires were inappropriate or impossible. They were told they had to commit to a trial or their case would be dropped. Instead, key informants stressed how important it was to listen to survivors and believe them when they talk about what they want and need from justice. Any conversation about RJ/TJ needs to focus on the importance of letting individuals make choices about how to proceed after experiencing sexual violence.

NEED FOR RELATIONSHIP BUILDING WITH MARGINALIZED COMMUNITIES

Structurally marginalized groups such as racialized and Indigenous individuals, sex workers, and 2SLGBTQQIA+ people have been subjected to extensive state violence leading to distrust of the legal system and other government bodies.[155] To reduce reliance on the state, structurally marginalized groups have relied on community based responses to harm within their communities such as RJ/TJ. If the legal system wishes to promote their own RJ/TJ processes, the state must directly contend with the historical and ongoing harms it has caused to these groups. Simply using the knowledge developed about these types of justice by marginalized communities without making amends for why these groups felt it necessary to find justice outside of the state undermines any effort to ethically introduce RJ/TJ to the Canadian legal system.

There are a growing number of lawyers and private therapists shifting their practices towards RJ/TJ practices. However, those that we spoke to admitted that their clientele tends to be comprised of wealthy, white individuals. One lawyer from central Canada stated,

> ***Outside the system is different. I've privately mediated cases. These have exclusively involved wealthy people where the complainant is very privileged. Gets a lawyer early in the system. You know, their mom or dad gets them access to a lawyer who gives them legal advice about what they can or can't expect.***

> ***And then they decide they don't want to charge, but they have problems with the accused; say they're at the same tennis club. I'll just give a theoretical example because that's the world that I'm talking about. They go to camp together. They go to the same private school. They have the same circles of friends. And so what we want to negotiate is the relationship between those two people in a very specific context.***

Even though marginalized communities have been responsible for much of the development of RJ/TJ, legal professionals are finding that more privileged groups are the ones taking advantage of these processes. It is important that RJ/TJ be considered legitimate by all people, but the reasoning behind the creation of these processes should not forgotten. RJ/TJ has historically been a way of pushing back against abusive uses of state power and offering a way of accessing justice to groups that are often excluded or discriminated against in the conventional legal system. These concerns and needs should be at the centre of any expansion of RJ/TJ.

Despite claims that RJ/TJ is more appealing to marginalized groups, this statement does not distinguish between community-based and state-integrated or affiliated processes. The closer an RJ/TJ process is to state involvement, the less likely marginalized groups see it as an option. Given that mainstreaming RJ/TJ in the conventional legal system is meant to create more choices for survivors, it is imperative that the state recognize and work towards earning the trust of marginalized groups by centering them in the creation and building of justice mechanisms by and for these communities.

KEY TAKEAWAYS

- The feminist movement has been critical of the availability of RJ/TJ to respond to sexual violence and has been responsible for much of the advocacy that allowed for moratoriums to be introduced.
- Several anti-violence advocates we interviewed noted that the moratoriums were never intended to be permanent but rather to allow time for more work to be done to ensure that the process was safe for survivors of sexual violence.
- A general lack of knowledge about RJ/TJ among the public likely contributes to incorrect assumptions about RJ/TJ and the types of cases that are appropriate for this avenue of justice.
- Historically, RJ/TJ has been used and developed by marginalized communities, and their perspectives, needs, and expertise must continue to be centered in any advancement of the use of these types of justice by the state.

A 2019 Statistics Canada study on students at PSIs across the Canadian provinces found:[158]

197,000

women respondents stated that they had been sexually assaulted during their post-secondary education, a rate that is 3 times higher than their male counterparts.

71%

of students have witnessed or experienced unwanted sexual behaviour.

11%

of women students report having experienced sexual assault, and 45% of these reported experiencing at least one unwanted sexualized behavior in the last twelve months.

Most of the survey respondents (80% women, 86% men) reported that the perpetrators of unwanted sexual behaviour were fellow students.

There were higher rates of victimization among students who identify as women, students who are bisexual, and students who report having a disability.

CAMPUS-BASED SEXUAL VIOLENCE INVESTIGATIONS AND LAW REFORM ADVOCACY

Sexual violence remains an important issue for Canadian post-secondary institutions (PSIs) to address.[156] Much like the legal responses to sexual violence, the response to campus sexual violence has been a highly debated topic and has received widespread attention within the last decade.[157]

We conducted interviews with key informants who were knowledgeable about campus sexual violence or had experience working in a campus sexual violence office. The intention of these interviews was to identify the availability and potential barriers for accessing RJ/TJ at PSIs in Canada. The focus of the interviews was on university responses to students who experience sexual violence.

The key informants we interviewed stressed that PSIs have a unique culture and therefore require responses to sexual violence that differ from the broader community. Most notably, as demonstrated by the statistics above, is that the perpetrators of sexual harm are most often fellow students. This dynamic can have unique consequences as survivors and the person who caused harm may have to share physical space in classes, their friend groups, or residences. One key informant expanded on the PSI context for sexual violence:

“The number one person who causes harm [...] that I see is a friend. And so what happens is that that friend is part of a study circle. So if that relationship has been injured in such a grave way, [..], so that usually the person who’s been harmed chooses to step out of that circle and now loses their friend circle. This is their study circle. Maybe they’re a number of these small cohorts, so maybe they belong to a specialized [academic program] and by year 2 it’s narrowed down to like 60 people, and so that person now follows them for the next 3 or 4 years of their academic career. They’re in some similar classes. They’re in similar social events [...] And so students will say to me like, even if I can get through the next 3 years, he’s going to be in my circle when we’re both in our careers. I can’t escape this person.”

— SEXUAL VIOLENCE OFFICE MANAGER, PRAIRIES

SEXUAL VIOLENCE POLICIES AT POSTSECONDARY INSTITUTIONS

Beginning in 2017, PSIs across Canada responded to provincial and territorial legislation by adopting stand-alone sexual violence policies.[159] According to a 2021 environmental scan, the provinces that have legislation include: British Columbia, Manitoba, Ontario, Québec, Prince Edward Island and Yukon.[160] An analysis of the new sexual violence policies found that they share some key attributes:

- A recognition that universities have an ethical and legal responsibility to provide a learning, living, and work environment free from sexual violence.
- An acknowledgement that intersections of systemic marginalization may also contribute to the prevalence of sexual violence and its consequences.
- Many of the policies also mention prevention and support, but much of the focus is on individual and institutional accountability.[161]

PSI sexual violence policies often distinguish between a disclosure of sexual violence—which is often associated with seeking support or academic accommodation—and a formal report or "complaint" which will trigger a formal disciplinary process.[162]

PSIs' sexual violence complaint processes are complex. The policies must comply with institutional policies (such as student codes of conduct and human resources), collective agreements with university staff, and must be in adherence with various legal frameworks (such as legislation governing gender-based violence at PSIs, privacy, human rights, and occupational health and safety).[163]

The complexity of sexual violence policies was reflected in our interviews as key informants shared that both students and sexual violence support staff find it challenging to identify how to make a report, or to understand what will happen once a formal report is made.

Most Canadian PSIs use an investigation model. The flowchart below illustrates the standard on-campus adjudication process. It may vary based on staff structures, and/or the size of the institution itself, but the highlighted procedure is the most followed.

Many key informants raised concerns about the options available to survivors. Additionally, several of those we interviewed drew parallels between PSI policies and the approach of the criminal legal system, specifically due to the primary focus on the rights of the respondent:

> ***All of the procedural fairness rights went to the respondent. The complainant was treated as a witness only. They had absolutely no rights to information, or to respond to anything. And so imagine already the damage that would do to the survivor.***
>
> — *SEXUAL VIOLENCE OFFICE MANAGER, PRAIRIES*

> ***The [sexual violence] policies are to try and help the people who have been harmed, and yet we still focus on the person who's [caused] harm, who's been doing the harm, because we're worried that there's more liability or institutional risk from him.***
>
> — SEXUAL VIOLENCE OFFICE MANAGER, PRAIRIES

The focus on fairness for the respondent often resulted in the survivor feeling as if their needs were of less importance. As a result, many of the key informants found PSI investigations were often harmful for complainants:

> ***Our investigations at our university are harmful. If you go through them, you will be re-harmed through them. Not only are the staff very short of an analysis to do the work, I literally have to dissuade people from going to that office because I'm like literally, you will be re-harmed. [...]***
>
> — FORMER SEXUAL ASSAULT CENTRE DIRECTOR, WESTERN CANADA

> ***I would call [the investigation] dehumanizing for the survivor. Just the notion that you would put out probably in writing a very, very detailed personal statement about one of the worst things that ever happened to you, in excruciating detail. And the response you get back is, "thank you very much, we appreciate this. Now we're going to take this away and determine whether or not it happened." Right out of the gate we're dehumanizing this person.***
>
> — *SEXUAL VIOLENCE OFFICE MANAGER, PRAIRIES*

There are several reasons that complainants may find the PSI investigation harmful:

- Depending on the provincial privacy legislation, some complainants are not provided with the outcome of the investigation or if the respondent faced any consequences.[164]
- Investigations often took a significant amount of time to come to a conclusion.
- Even when there is a finding that the behaviour was inappropriate, it may not necessarily be found to contravene the policy which means there are no consequences for the person who caused harm.
- Even when there is a finding that the policy was in violation, the consequences are often minimal.

Finding safety in formal responses to sexual violence that involve institutional adjudication or the potential involvement of campus security or the police is often disproportionately difficult for Black, Indigenous, racialized, 2SLGBTQQIA+, and other structurally marginalized campus community members as well.[165]

AVAILABILITY OF RESTORATIVE OPTIONS ON CAMPUS

Several of the key informants we spoke with worked at PSIs that had sexual violence policies that explicitly included the availability of alternative options to a formal investigation. These key informants, however, noted that the alternative options that were identified in policies did not necessarily translate into clear procedures or well-resourced options for survivors:

> ***If we had someone walk in the door right now and say, "I want a restorative justice option," we may or may not have the capacity to do it.***
>
> ***— SEXUAL VIOLENCE OFFICE MANAGER, WESTERN CANADA***

> ***There is an option for alternative dispute resolutions [in the sexual assault policy], including transformative justice. What does that actually look like? That's where I'm less clear..[…]And one thing we've been struggling with is that the policy mentions this is an option. But there are no formal actual processes in place if somebody chooses that option.***
>
> ***— CAMPUS SEXUAL VIOLENCE EDUCATOR, WESTERN CANADA***

In contrast, another sexual violence policy at a university in central Canada does not explicitly have alternative options embedded within the policy, but the sexual violence office was well equipped to offer RJ/TJ options to survivors.

These interviews revealed that official sexual violence policies provide little information about what is actually happening on campus and often lack robust explanation of what options are available for survivors.

Key informants shared that many of the students they worked with would likely prefer a restorative option. The interviews revealed that while students often did not use the language of RJ/TJ, they often expressed seeking outcomes that were more in alignment with the values found in RJ/TJ processes, such as recognition of the harm they experienced, or the ability to share how the responsible person's behaviour impacted them.

> ***I'd be willing to [estimate] at least 75% of the people I've worked with are looking for what I would label restorative justice. That might not be the language they use, but they're looking for a restorative process because we know that these things happen between people who know each other, between people who are in the same circles and on campus.***
>
> — *SEXUAL VIOLENCE OFFICE MANAGER, WESTERN CANADA*

> ***I think most survivors would choose an alternative dispute resolution if that was like—it technically is an option. But if it were a better-defined option, and if there was someone on campus who could do it and explain it to them, I think it would be really well taken up.***
>
> — *SEXUAL VIOLENCE EDUCATOR, WESTERN CANADA*

CASE STUDY: PROMISING PRACTICES

Two racialized and gender-diverse students made formal reports to the PSI against the other for varying forms of sexual harm. Neither student wanted to report to the police and did not want to engage in a formal investigation which would be done by an investigator that did not share the same lived experiences as them. With the consent of both students, the PSI hired an external RJ/TJ facilitator to work with the students to identify a mutually agreeable resolution.

This example demonstrates that there is not always a clear distinction between the person who has been harmed and the person who has caused harm.

Promising Practice: Hiring an external, community-based facilitator with shared identity.

ADDRESSING BARRIERS IN PSI

An area of concern identified by key informants which is relevant to both formal investigations and RJ/TJ options is the need to evaluate how information and evidence of sexual violence reports are shared between institutions such as PSIs and the criminal legal system. The problems PSI informants identified are generally in line with what was discussed in the Container Theory part of this report. Campus sexual assault advocates struggle over how to engage in a university-level process when criminal reports are made at the same time. Many of these concerns are detailed in a report from Possibility Seeds on campus gender-based violence complaints.[166] Among their expert panel, they were only aware of one case in which a PSI received a court order for its records related to a breach of policy. They concluded that information gathered in a PSI context may be of limited use in criminal proceedings.[167] Possibility Seeds advocates for changes to the *Canada Evidence Act* that would exclude or make inadmissible in criminal proceedings records, statements, and information gathered by universities during their investigations.[168] They argue that changes to the *Evidence Act* may be beneficial because it would be more effective than seeking change in each of the provinces and territories, and address inconsistencies across different jurisdictions. This would include an amendment to the *Evidence Act* to exclude or make inadmissible, records, statements and information gathered in administrative processes including any investigations, findings, and outcomes as well as collaborative non-adjudicative resolution processes such as RJ/TJ.

ADVANCING RJ ON CAMPUS FOR SEXUAL VIOLENCE

The University of Alberta Report from the Working Group on Restorative Initiatives for Sexual Violence has made several recommendations for RJ processes to respond to sexual violence:[169]

- A restorative approach must be initiated by the survivor.
- The responsible person must acknowledge their actions and give fully informed consent to participate in good faith.
- The process should be designed and customized to address the needs of the situation and participants.
- Protections should be in place to ensure that communication within the process is confidential.
- The environment must be supportive for all participants.

Much like in communities outside of PSIs, there may also be legal barriers to encouraging respondents to participate in RJ options because such processes are not immune from potential subpoenas or production orders from the courts.[170] Some respondents may be hesitant to participate or may receive legal advice not to participate to protect themselves. Possibility Seeds has recommended several legal safeguards to encourage respondent participation:[171]

- Eliminating the need to admit to a policy violation or crime but rather to focus on the acknowledgement of the harm that they caused and be willing to participate in good faith.
- Limiting the written agreement to the action list that resulted from the process.
- Confidentiality of the process for all parties involved.

Our interviewees also offered several systemic level recommendations that are necessary for a PSI to meaningfully offer RJ/TJ for sexual violence:

- RJ practitioners on campus need to have specialized training in gendered violence. If this is not available within the PSI, the PSI should hire community-based RJ facilitators with this expertise on a case-by-case basis.
- Respondents need access to specialized support and resources for people who have caused harm.
- Campus sexual assault centre staff and community experts in RJ/TJ need to be meaningfully included and engaged throughout the development and evaluation of these processes.
- There must be further development of partnerships with community organizations working in gendered violence and RJ/TJ.
- PSI legal counsel must be better informed about processes, procedures, and histories of RJ/TJ for sexual violence.
- PSI administrative culture, which often focuses on minimizing institutional liability, needs to be shifted towards creating a restorative culture in all aspects of their policies and procedures.
- There must be creation of spaces on campus for community members facing intersecting forms of marginalization to seek support for sexual violence.

KEY TAKEAWAYS

- RJ options (most often described as alternative or informal processes) are identified in several sexual violence policies at PSIs across Canada, but their existence in policy does not necessarily reflect their availability or where there is institutional capacity to meaningfully conduct RJ processes.
- There is growing interest among campus sexual violence staff for RJ/TJ options to be offered. While all expressed interest and optimism for more options for survivors, many also expressed concerns about university capacity and commitment to meaningfully engage in RJ/TJ, and the lack of resources already allocated to sexual violence offices.
- Ensuring student access to RJ also ensures that structurally marginalized students who may not want to make formal reports or rely on the criminal legal system are also able to access justice.
- Respondents may be discouraged from participating in RJ processes out of fear of legal consequences such as criminal charges or civil actions. Institutions must put safeguards in place to encourage respondents to participate.
- Respondents of sexual violence reports also require support and resources.

CONCLUSION

While there remains debate over whether RJ/TJ processes are acceptable methods of seeking justice for sexual violence, these justice processes are of growing interest to key stakeholders in a number of sectors across Canada. Most importantly, survivors are demanding access to justice outside of the conventional legal system. Even though RJ/TJ will not be a workable solution for all sexual assaults, it is crucial to ensure that survivors have a choice of a wide variety of redress to match their own needs and desires.

Many in the legal sector strongly recommended a re-evaluation of existing moratoriums on restorative processes in all provinces and territories across Canada, along with sustainable and long-term funding for Indigenous law revitalization for responding to sexual and gendered violence. Legal actors also spoke about the need for an accessible and frequently updated directory of service providers to help reduce information silos between practitioners in different fields. In non-profit sectors and within post-secondary institutions, many of the recommendations we heard were around the importance of public education, increased funding opportunities, and creating networks of community care. One of the most central was the need for long-term funding opportunities for programs with expertise in gendered violence response and prevention to adequately equip them to offer restorative or transformative justice options. However, the most common recommendation throughout this process emerged from various folks in all fields: that survivors of sexual and/or gender-based violence must first have their basic needs met—safe, accessible housing, relevant social supports, financial aid, and more—to ensure their participation in restorative or transformative processes is not yet another burden they must take on.

Through this project, it became clear that while there are plenty of individuals working on expanding access to RJ/TJ opportunities, these processes are not yet well-incorporated into societal understandings of justice. Feminists, anti-violence scholars, lawyers, and non-profit professionals alike, though eager to implement alternatives to existing criminal justice methods, continue to feel hesitant about the efficacy of RJ/TJ, particularly in response to sexual violence. Yet, survivors continue to ask for these services, though they may not always use the specific terminology of RJ/TJ. Though there are many situations not addressed that are out of the scope of this report, future questions in this field of work may include delving deeper into providing and creating culturally safe justice mechanisms for Black, Indigenous, racialized and other structurally marginalized individuals, as well as thinking more critically about what public education, judicial education, and training opportunities may look like for those eager to facilitate restorative and transformative justice processes. Above all else, future work in this field must continue to prioritize the dignity, autonomy, and humanity of both the survivor and the person who has caused harm, and, as such, act with the belief that both parties are deserving of fair, just, and holistic responses and outcomes.

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RECOMMENDATIONS

1 *Re-evaluation of Moratoriums*

The Office of the Attorney General in each province and territory should review and re-evaluate any moratoriums prohibiting or limiting RJ/TJ for sexual violence with the goal of ending the moratoriums in criminal proceedings. This review needs to be done in collaboration with diverse anti-violence advocates and activists and RJ/TJ experts with an aim towards expanding the justice options available for survivors.

2 *Increased and Committed Funding for RJ/TJ*

Provincial/territorial and federal governments must establish long-term and sustainable funding for RJ/TJ programs specific for sexual violence. Such funding needs to also include ongoing supports such as counselling services or other culturally appropriate modalities of healing for survivors and people who cause harm.

3 *Increased funding to enhance Independent Legal Advice programs for survivors and the launch of similar programs in all provinces and territories*

Provinces across Canada have launched Independent Legal Advice (ILA) programs that provide survivors of sexual violence to access legal advice free of cost and these must be expanded, better funded, and made permanent (if still only in pilot form). ILA is critical for survivors to make educated decisions on how they want to proceed following sexual violence or to provide guidance on their involvement in the formal legal system. Access to ILA should also provide survivors with information about engaging in RJ/TJ and making informed decisions about their involvement in an RJ/TJ process.

In Ontario, the province must update the approved list of ILA lawyers to ensure the list of lawyers provided to survivors is current and allows for new calls to be added.

We also recommend that provinces and territories that do not currently have ILA programs for survivors create them. ILA programs need to be developed in collaboration with anti-violence organizations that can oversee the program as well as provide guidance on the appointment of approved legal counsel.

4 *Protections for Participants and their Disclosures in RJ/TJ Processes*

Further research into law reform opportunities is needed to better understand the limitations of protections for participants and their disclosures in RJ/TJ processes.

For all parties to be able to meaningfully participate in RJ/TJ, there must be protections built into these processes. For the person who caused harm, this means ensuring that anything disclosed during RJ/TJ cannot be used in other legal proceedings. For the survivor, this could mean prevention of defamation lawsuits by the person who caused harm. Any admissions made by an accused who participates in an AM under section 717 of the *Criminal Code* are legally prohibited from being used in other civil or criminal proceedings. However, not all RJ/TJ processes are connected to the section 717 regime, leaving practitioners to engage in piecemeal and legally untested forms of confidentiality agreements to protect their participants.

5 *Creation of a Directory of Service Providers*

There is a great need for comprehensive and updated directories of RJ/TJ service providers in each province to help reduce information silos between practitioners in the field. The specifics of who should maintain such a directory should be at the discretion of the provinces, based on regional needs and capacity. However, Nova Scotia offers a workable model as they have a provincially run office that organizes and coordinates restorative justice resources across the province.

6 *Public and specialized education about RJ/TJ*

The creation of sustainable funding streams from all levels of government and funding bodies for RJ/TJ and anti-violence organizations to provide public and targeted education on RJ/TJ. Provinces should also provide funding for public education campaigns aimed at survivors and other victims of crime to ensure that they are aware of RJ/TJ opportunities as is guaranteed by the *Canadian Victims Bill of Rights*.[172] Such funding should also be extended to fund sector specific education and training including provincial corrections, police services, and others who may work with survivors such as social workers, post-secondary administrators and medical professionals.

Specialized education is also needed for legal professionals. Provincial law societies should ensure their members have access to continuing legal education about RJ/TJ for sexual violence. RJ/TJ could also be embedded into law school curriculums. Ensuring that the legal community has numerous opportunities to learn more about RJ/TJ can help to develop their comfort instructing clients and enhance knowledge of local resources.

7 *Access to Basic Social Supports for Survivors of Sexual Violence*

All levels of government must ensure that survivors of sexual violence have access to safe and affordable housing, counselling, and social supports. This is an urgent basic need for many survivors, especially for those facing intersecting forms of marginalization and those in northern and rural communities. While justice is an important need, survival needs will generally take precedence and prevent survivors from being able to engage in any attempt to access redress.

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APPENDIX A

INTERVIEW GUIDE 1: LAWYERS

1. Can you tell me about your experience with alternative justice mechanisms in your work as a lawyer?

a. Are you familiar with section 717 of the *Criminal Code*?

b. Have you been involved in a criminal proceeding where this provision was used for your client or another party involved in the criminal dispute? Is this a common occurrence in your line of work?

c. What types of alternative justice mechanisms have you seen used in conjunction with s.717?

2. Have you seen section 717 used in cases involving sexual assault?

a. Does your jurisdiction allow for the use of section 717 in cases involving sexual violence?

b. Probe for reasoning

3. Do you support the use of alternative mechanisms for justice in the cases of sexual violence?

a. Do you believe there are differences between cases of sexual assault when compared to other types of violence that influences your thoughts on this matter?

4. Have you experienced complainants or accused individuals seeking out access to section 717 in the context of their cases?

5. Can you talk about what a typical alternative justice mechanism looks like in the course of your work?

a. Is there a difference between alternative justice mechanisms used in sexual assault cases compared to other criminal offences?

6. Is there anything about this topic that we have not asked about, but you feel is important to add to the conversation?

INTERVIEW GUIDE 2: PRACTITIONERS AND SEXUAL ASSAULT SUPPORT SERVICES

1. Begin by telling me about your role in alternative justice.

2. Do you also support alternative justice processes where sexual violence has occurred?

a. Is there a reason why you / your organization has decided not to provide alternatives to address sexual violence?

3. From your experience, why do people seek out alternative justice processes for sexual violence?

4. Are there any differences in these types of cases in comparison to other types of harm?

5. Can you walk me through an alternative justice process?

6. a. If the organization/individual works within the legal system, what is your relationship to the formal legal system? Are there any legal barriers you identify from doing this work? What are they?

b. If the organization works outside the legal system: While your work is outside of the formal legal system, do you face any lega barriers to doing this work effectively? If so, can you explain these to me?

7. As we prepare this report to provide guidance on necessary legal reform to better support alternative justice processes, is there anything we should take into consideration?

8. Is there anything else you would like to add to this conversation that we have not asked about?

ENDNOTES

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32 Due Justice 2, *supra* note 29; Office of the Federal Ombudsman for Victims of Crime, "Restorative Justice: Getting Fair Outcomes for Victims in Canada's Criminal Justice System" (November 2017), online: *Government of Canada* <https://www.victimsfirst.gc.ca/res/pub/gfo-ore/pdf/RestorativeJustice.pdf>.

33 There is a lack of data about how Indigenous adult survivors of sexual violence and gendered violence feel about sentencing circles. See: Patricia Barkaskas & Sarah Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault" (October 2017), online: *Department of Justice* <https://publications.gc.ca/collections/collection_2018/jus/J2-484-2017-eng.pdf>. Also see: "Access to Justice for Family Violence in Nunavut: Final Report on Research and Awareness Campaign" (October 2021), online: *Law Society of Nunavut* <https://www.lawsociety.nu.ca/sites/default/files/News/Public%20Notices/LSN_FAIA%20Final%20Public%20Report_Dec%2015%202021.pdf>.

34 Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 CJWL 1; Toby Susan Goldbach, "Sentencing Circles, Clashing Worldviews, and the Case of Christopher Pauchay" (2011) 10:1 Illumine: Journal of the Center for Studies in Religion and Society 53; Toby S Goldbach, "Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial" (2016) 25:61 Transnational Law & Contemporary Problems 61.

35 The justice committee has limited capacity in regard to how many files they can take on. Typically, they focus on cases involving first time offenders and less serious offences, and do not intervene in gender-based violence cases. Elizabeth Comack, "Meeting Survivors' Needs: Gender-Based Violence Against Inuit Women and the Criminal Justice Response: Phase II – Final Report" (September 2022), online: *Pauktuutit* <https://pauktuutit.ca/wp-content/uploads/Meeting-Survivors-Needs-Gender-Base-d-Violence-against-Inuit-Women-and-the-Criminal-Justice-System-Response_Phase-II-Final-Report-Sept2022.pdf>.

36 Jean Stevenson, "The Circle of Healing" (1999) 2:1 Native Social Work Journal 8.

37 Mia Mingus, "Pods and Pod-Mapping Worksheet" in Ejeris Dixon & Leah Lakshimi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, California: AK Press, 2020) 119.

38 To the best of our knowledge, surrogate restorative justice is relatively new in Canada. Community Justice Initiatives (CJI) based in Kitchener-Waterloo just began a pilot project. See: *Community Justice Initiatives*, online: <https://cjiwr.com/>; K Sackett Kerrigan & Eric S. Mankowski, "How Surrogate Impact Panels Function in the Context of Intimate Partner Violence: A Mixed Methods Study" (2021) 16:1 Victims & Offenders 50; Anne Hobbs, Ana Cienfuegos-Silvera & Lindsey E Wylie, "Variations in Victim Presence in Restorative Youth Conferencing Programs: The Use of Surrogate Victims Increases Reparation Completion" (2022) 17:7 Victims & Offenders 994.

39 Kim/Dixon et al, *supra* note 30.

40 Restorative Research Innovation and Education Lab, "2023 Fellows and Associates Public Lecture Series | Donna Coker" (27 March 2022), online: *YouTube* <https://www.youtube.com/watch?v=vCeKduPJ0jg>.

41 Correctional Service Canada, "Restorative Justice Services at Correctional Service Canada" (13 November 2019), online: *Correctional Service Canada* <https://www.csc-scc.gc.ca/restorative-justice/003005-0001-eng.shtml>.

42 It is important to note that this perspective is not shared by all RJ/TJ practitioners. In particular, there are RJ practitioners working in Corrections in programs that allow offenders to reach out to the people they have hurt to see if there is interest in a RJ/TJ process. However, these are fairly unique situations as there is no tangible benefit to the offender to engaging in such a process other than his personal healing and need to make amends. RJ practitioners told us that participation in these types of processes is not taken into consideration for parole opportunities.

43 John Braithwaite, "Principles of Restorative Justice" in Andrew Von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) 1.

44 Kim/Dixon et al, *supra* note 30.

45 One of the authors of this report was affiliated with the University of Calgary at the time of the research.

46 This research was undertaken with the promise that the identities of the participants would remain confidential. This is particularly important for some categories of interviewees which is why we do not always include an occupation/region of Canada attribution with all quotes in this report.

47 Not represented were New Brunswick, Prince Edward Island, Newfoundland and Labrador, and Saskatchewan.

48 *Code*, *supra* note 1, s 717.

49 PPSC, *supra* note 2.

50 *Ibid.*

51 Department of Justice, "A Review of the Principles and Purposes of the Sentencing in Sections 718-718.21 of the Criminal Code: The Genesis and Content of the Current Statement" (20 January 2023), online: *Government of Canada* <https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/p4.html>.

52 See: Scott Clark, "Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses" (2019), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>; *Code*, *supra* note 1, s 718.2e.

53 *Ibid*, s 717(3).

54 *Ibid*, s 717(4)(a).

55 *Ibid*, s 717(4)(b).

56 *Ibid*, s 717(4).

57 2019 CanLII 67534 (BC LA).

58 An AM can be requested before a charge is laid though most of the time a file has already been sent to a Crown who will be the one to officially request use of an AM.

59 Code, supra note 1, s 717(1).

60 *Ibid* at para 9.

61 Quote tanslated from French: On comprend aisément qu'il rebute à l'esprit que des aveux faits dans un contexte de déjudiciarisation soient tenus en compte pour des conséquences autres que celles que le législateur a voulu éviter. Il faut garder à l'esprit que ces aveux sont faits à l'intérieur d'un programme qui vise la responsabilisation du suspect et la pénalité adaptée à la victime ou à la société. En somme, permettre que ces aveux faits pour régler un dossier - entrainant le rejet des accusations - puissent servir à d'autres fins judiciaires qui pénaliseraient le suspect irait à l'encontre de l'objectif des mesures de rechange. Permettre cela pourrait également laisser un goût amer au suspect qui se qualifie pour le programme et qui en réalise les conditions et c'est pourquoi cette disposition a été adoptée par le législateur.

62 2021 QCCQ 13581.

63 2019 BCSC 142.

64 *Ibid* at para 45.

65 2018 BCSC 850.

66 Though the judge did mention that because this was a case involving a jury, different considerations about how they may utilise this type of information needed to be taken when compared to cases presided on by a judge alone. *Ibid* at para 24.

67 2007 CanLII 30751 (ON SC).

68 *Ibid* at para 36.

69 2008 ABPC 302.

70 *Ibid* at para 23.

71 *Ibid* at para 31.

72 *Ibid* at para 32.

73 This reasoning was later used in R v PCM, 2020 SKQB 118 which emphasized that prior participation in an AM is to be given little weight in a sentencing decision (at para 45).

74 2021 BCSC 745. This decision was appealed by the media organizations seeking records (see: The Canadian Broadcasting Corporation v British Columbia (Attorney General), 2022 BCCA 170), but the court denied their arguments and quashed the appeal.

75 *Ibid* at para 70.

76 *Ibid* at para 72.

77 2002 NSSC 236.

78 *Ibid* at para 14.

79 *Ibid* at para 22.

80 *Ibid* at para 25.

81 2000 SKQB 311.

82 *Ibid* at para 20.

83 *Ibid* at para 23.

84 2017 ABPC 166 [Henwood].
85 This is how most provinces operate as well.
86 Assessing remorse is a complex and contentious topic in criminal law. See: Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion* (New York: Routledge, 2016).
87 *Henwood*, *supra* note 84 at para 95.
88 Researching moratoriums can be quite difficult as Crown counsel policy manuals are not always online, nor are the written policies necessarily followed in practice. Part of why we profiled these specific provinces was because we were able to speak with more than one person with information on how moratoriums worked in their provinces.
89 "Nova Scotia Restorative Justice Program", online: *Government of Nova Scotia* <https://novascotia.ca/just/RJ/>.
90 "Changes to Restorative Justice will Improve Province's Criminal Justice System" (16 July 2019), online: *Government of Nova Scotia* <https://novascotia.ca/news/release/?id=20190716003>.
91 Ministry of the Attorney General, "Crown Prosecution Manual: Community Justice Programs for Adults" (27 May 2019), online: *Government of Ontario* <https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>.
92 Elizabeth Payne, "'We Just Can't Keep Up With Demand': New Funding Addresses Growing Need for Sexual Violence Support" (16 March 2018), online: *Ottawa Citizen* <https://ottawacitizen.com/news/local-news/we-just-cant-keep-up-with-demand-new-funding-addresses-growing-need-for-sexual-violence-support>.
93 Jacques Gallant, "This Sexual Assault Survivor Took Part in a 'Restorative Justice' Process in 2019. She's Pushing for Others to Have the Same Chance" (2 April 2023), online: *Toronto Star* <https://www.thestar.com/news/gta/2023/04/02/this-sexual-assault-survivor-took-part-in-a-restorative-justice-process-in-2019-shes-pushing-for-others-to-have-the-same-chance.html> [Gallant]; Viviane Fairbank, "How One Woman Reimagined Justice for her Rapist" (March 2020), online: *The Walrus* <https://thewalrus.ca/how-one-woman-reimagined-justice-for-her-rapist/>; Kim Zarzour, "How a Markham Sex Assault Survivor Found Justice —and Peace" (2 November 2019), online: *Toronto Star* <https://www.thestar.com/news/gta/how-a-markham-sex-assault-survivor-found-justice-and-peace/article_6005c3fc-c2e4-5584-a9a9-b5ca4d302cb8.html>.
94 Gallant, *ibid.*
95 *Ibid.*
96 Jacques Gallant, "This Toronto Lawyer Fought to Take Her Own Sex Assault Outside Court. She Wants Other Women to Have the Same Path to Justice" (8 April 2023), online: *Toronto Star* <https://www.thestar.com/news/gta/2023/04/08/this-toronto-lawyer-fought-to-take-her-own-sex-assault-outside-court-she-wants-other-women-to-have-the-same-path-to-justice.html>.
97 *Ibid.*
98 *Ibid.*
99 Jacques Gallant, "Infantilized. Re-traumatized. Silenced: Why Ontario Won't Give These Sex Assault Survivors What They Want" (2 April 2023), online: Toronto Star <https://www.thestar.com/news/gta/2023/04/02/infantilized-re-traumatized-silenced-why-ontario-wont-give-these-sex-assault-survivors-what-they-want.html>.
100 *Ibid.*
101 Cotter, *supra* note 10.
102 Jane Evans, "Restorative Justice and Gender-Based Violence: A Look at the Literature" (2021), online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd14-rr14/p2.html#c>; Ending Violence Association of BC & Just Outcomes, "Restorative Justice and Gender-Based Violence: Revisiting the Conversation in British Columbia" (2021), online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd14-rr14/p3.html#c> [EVA BC].
103 Wendy Stewart, Audrey Huntley & Fay Blaney, "The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia" (July 2001), online: *Government of Canada* <https://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-53-2001E.pdf> [Stewart et al].
104 BC Prosecution Service, "Crown Counsel Policy Manual: Alternatives to Prosecutions – Adults" (1 February 2023), online: *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/alt-1.pdf> [BC Policy Manual].
105 Aggravated sexual assault falls under section 273 of the *Criminal Code* which deals with the most serious of sexual assaults involving extensive violence, severe injury, and/or life endangerment.
106 Section 272 includes sexual assaults that involve harms such as use of a weapon, bodily harm, and threats of violence.
107 Section 271 includes all other incidents of non-consensual sexual touching not covered under the other two provisions.
108 BC Policy Manual, *supra* note 104.
109 EVA BC, *supra* note 102.
110 Crown Prosecution Service, "Alternative Measures Program" (7 May 2020), online: *Government of Alberta* <https://open.alberta.ca/dataset/8fa0bd3b-2bbe-400d-85d2-3ba8101d83e2/resource/c6c1a088-ef47-4812-ac78-38cef0c62556/download/jsg-cps-alternative-measures-program-2020.pdf>.
111 Justice Québec, "Programme de Mesures de Rechange Général Suivant Les Articles 716 á 717.4 du Code Criminel" (8 May 2023), online: *Government of Québec* <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/fr/programmes/pmrg/programme_pmrg_fr.pdf>.
112 Justice and Public Safety, "New Program Offers Alternative Measures to Court Process" (11 March 2019), online: *Government of Newfoundland & Labrador* <https://www.gov.nl.ca/releases/2019/jps/0311n03/>.
113 Ministry of Justice, "The Alternative Measures and Extrajudicial Sanctions Policies" (January 2013), online: *Government of Saskatchewan* <https://publications.saskatchewan.ca/api/v1/products/73150/formats/81682/download>.
114 Justice and Public Safety, "New Brunswick Adult Diversion Model" (2023), online: *Government of New Brunswick* <https://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/diversion-program/new-brunswick-adult-diversion-model.pdf>.
115 "Alternative Measures: Information for Victims of Adult and Youth Crime" (2015), online: *Community Legal Information Association of PEI* <https://legalinfopei.ca/wp-content/uploads/2020/12/CLI-Criminal-Alternative-Measures.pdf>.
116 Dave Baxter, "Restorative Justice Programs Showing Positive Results in Manitoba" (30 March 2023), online: *Winnipeg Sun* <https://winnipegsun.com/news/news-news/restorative-justice-programs-showing-positive-results-in-manitoba>; "Restorative Justice" (2023), online: *Government of Manitoba* <https://www.gov.mb.ca/justice/corrserv/restorjus.html>. Manitoba also has The Restorative Justice Act, CCSM, c R119.6, a piece of legislation that is unique in Canada.
117 Caroline Barghout & Joanne Levasseur, "'They Just Want the Violence to End': Restorative Justice Program Aims to Stop Intimate Partner Abuse" (6 March 2020), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/winnipeg-police-restorative-justice-partner-violence-1.5478990>.
118 For example, the Community Justice Committees in Inuit Nunangat regions mentioned earlier in this report.
119 Federal-Provincial-Territorial Group on Restorative Justice, "Increasing Use of Restorative Justice in Criminal Matters in Canada: Baseline Report" (2020), online: Government of Canada <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2020-resjus-jusrep/index-en.aspx>.
120 Mandi Gray, *Suing for Silence: Sexual Violence and Defamation Law* (Vancouver: UBC Press, 2024) [forthcoming] [Gray]; LEAF, "Factum of the Intervener Barbra Schlifer Commemorative Clinic: Rule 42 of the *Rules of the Supreme Court of Canada*" (2020), online: *Supreme Court of Canada* <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38374/FM120_Intervener_Barbra-Schlifer-Commemorative-Clinic.pdf> [Factum].
121 The privilege being talked about here is not solicitor-client privilege which protects confidential conversations and documents produced between a lawyer and client in the process of seeking legal advice. Neither is it litigation privilege which protects documents and communications produced between a lawyer, client, and/or third party in preparation for litigation. Both of these are well-respected concepts in the courts, but would not apply in the context of an RJ/TJ process. Mediation and settlement privilege attach to the discussions and documents prepared during mediation or for a settlement. However, these protections are not nearly as fulsome as those for solicitor-client or litigation privilege and can be breached for other legal proceedings in certain circumstances (see: *Association de Médiation Familiale du Québec v. Bouvier,* 2021 SCC 54). For example, it is likely that these types of privilege could be challenged in later criminal proceedings due to the high stakes involved such as the loss of someone's liberty.
122 For example, see: Fernanda Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (London: Routledge, 2016).
123 EVA BC, *supra* note 102.
124 *Kennedy v Swientach,* 2022 ABCA 161 is a decision dealing with an

application for records from an AM process. While the court did not disclose the records, this was due to an improperly drafted application. The court identified that there remain many questions about disclosure of records from AMs, particularly when these records are in the control of an agency such as the police service or Attorney General.

125 For example, see: *Apology Act, 2009*, SO 2009, c 3. Almost all Canadian provinces and territories have passed a similar act save for the Yukon.

126 Though many, if not most, survivors have no contact with the legal system at all, and limited access to anyone capable of discussing their options with them.

127 Burnett, *supra* note 23.

128 In fact, the Canadian Victim Bill of Rights gives any victim the right to information on request about a variety of options available to them, including restorative programs. See: *Canadian Victims Bill of Rights*, SC 2015, c 13, s 6(b) [CVBR].

129 "Nova Scotia Restorative Justice Program" (2021), online: *Government of Nova Scotia* <https://novascotia.ca/just/rj/>.

130 EVA BC, *supra* note 102.

131 "Truth and Reconciliation Commission of Canada: Calls to Action" (2015), online: *Truth and Reconciliation Commission of Canada* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

132 "Calls for Justice" (2 June 2019), online: *National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf> [MMIWG2S Report].

133 For more nuanced discussion about the conflation of restorative justice and Indigenous legal tradition, refer to: Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016); Hadley Friedland, "Indigenous Bar Association Accessing Justice and Reconciliation Project: Final Report" (4 February 2014), online: *University of Victoria Indigenous Law Research Unit* <https://ilru.ca/wp-content/uploads/2020/08/iba_ajr_final_report.pdf>.

134 Basil Johnston, *Ojibway Heritage* (Toronto: McClelland and Stewart, 1976).

135 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

136 For a distinctions-based approach to Indigenous legal traditions, see: Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Margot Hurlbert, ed, *Pursuing Justice: An Introduction to Justice Studies* (Nova Scotia: Fernwood Publishing, 2018).

137 Richard Missens, "Sovereignty, Good Governance and First Nations Human Resources: Capacity Challenges" (May 2008), online: *National Centre for First Nations Governance* <https://fngovernance.org/wp-content/uploads/2020/09/richard_missens.pdf>.

138 Stewart et al, *supra* note 103; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: University of British Columbia Press, 2014).

139 "What We Heard: Community Forums in Yellowknife: March 11 & 12, 2020" (2020), online: *Office of the Federal Ombudsman for Victims of Crime* <https://www.victimsfirst.gc.ca/res/pub/CFY-CFY/index.html#_Restorative_Justice>. This report notes that, in the Northwest Territories, referrals to domestic violence courts are counted as "restorative justice."

140 MMIWG2S Report, *supra note* 132.

141 For example, see: "Independent Legal Advice for Sexual Assault Victims", online: *Ontario Government* <https://www.ontario.ca/page/independent-legal-advice-sexual-assault-victims>. Similar programs are also offered (or are being piloted) in Alberta, Nova Scotia, Quebec, Newfoundland and Labrador, Prince Edward Island, and the Yukon.

142 Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 Windsor YB Access Just 1.

143 For example, the Barbra Schlifer Commemorative Clinic offers wraparound services designed to address the complexities of consequences experienced by women who have survived violence, including legal advice, counselling, and interpretation services. See: *Barbra Schlifer Commemorative Clinic*, online: <https://www.schliferclinic.com/>.

144 Gray, *supra* note 120.

145 Philip H Osborne, *The Law of Torts* (Toronto: Irwin Law, 2015) at 427.

146 Gray/Factum, *supra* note 120.

147 Though this finding is also likely due to the sampling bias of the work which focused on interviewing practitioners and lawyers with knowledge and experience in using RJ/TJ for sexual violence.

148 Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18 CJWL 479; Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004); James Ptacek, "Resisting Co-optation: Three Feminist Challenges to Anti-Violence Work" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 5. For a review on the debates over "carceral feminism" see: Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) 209; Elizabeth Bernstein, "Carceral Politics as Gender Justice? The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights" (2012) 41 Theoretical Sociology 233; Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2021).

149 Robyn Doolittle, "Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless" (3 February 2017), online: *The Globe and Mail* <https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>; WomenatthecentrE, *Declarations of Truth: Documenting Insights from Survivors of Sexual Violence* (July 2020), online: <https://www.womenatthecentre.com/declarations-of-truth/>; Due Justice 1, *supra* note 28; Murphy-Oikonen, supra note 12; Burnett *supra* note 23.

150 Kim/Dixon et al, *supra* note 30; Richie, *supra* note 25; Spade, *supra* note 25.

151 Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) 6:43 Stanford Law Review 1241; Natalie Clark, "Red Intersectionality and Violence-Informed Witnessing Praxis with Indigenous Girls" (2016) 9:2 Girlhood Studies 46.

152 For example: Women & Gender Equality Canada, "Introduction to GBA Plus" (2022), online: *Government of Canada* <https://women-gender-equality.canada.ca/gbaplus-course-cours-acsplus/eng/mod02/mod02_03_01a.html>. While beyond the scope of this report, it is critical to note that the adoption of intersectionality by government, not-for-profit organizations, and university administrators has been extensively critiqued for depoliticizing the original intent of intersectionality, see: Grace Ajele & Jena McGill, "Intersectionality in Law and Legal Contexts" (2020), online: *LEAF*<https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf>; Emily M Colpitts, "'Not Even Close Enough': Sexual Violence, Intersectionality and the Neoliberal University" (2021) 34:2 Gender and Education 151; Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).

153 Department of Justice, "Restorative Justice" (2018), online: *Government of Canada* <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar08.pdf>.

154 *Ibid.*

155 Kim/Dixon et al, *supra* note 30; Murphy-Oikonen, *supra* note 12; Jeanne L Alhusen, Marguerite B Lucea & Nancy Glass, "Perceptions of and Experiences with Systems Responses to Female Same-Sex Intimate Partner Violence" (2010) 1:4 Partner Abuse 443.

156 Post-secondary institutions include public universities and colleges. We were not able to interview anyone working at a Canadian college and were limited to interviews with university staff.

157 For nuanced discussion on the debates surrounding campus sexual violence responses and the availability of RJ/TJ, see: Daniel Del Gobbo, "Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence" (2022) 45:1 Dalhousie LJ 1; Daniel Del Gobbo, "Feminism in Conversation: Campus Sexual Violence and the Negotiation Within" (2021) 53:3 UBC L Rev 591.

158 Marta Burczycka, "Students' Experiences of Unwanted Sexualized Behaviours and Sexual Assault at Postsecondary Schools in the Canadian Provinces, 2019" (14 September 2020), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00005-eng.htm>.

159 Karen Busby, "Accountability Mechanisms in University Sexual Violence Policies" (2016-2018) 2 Canadian Yearbook of Human Rights 49 [Busby].

160 Stéfanie Tougas, Anoodth.Naushan, & Darshana Patel, "Environmental Scan of Relevant GBV Policies for Canadian Post-Secondary Institutions" (October 2021), online: *Courage to Act* <https://www.couragetoact.ca/blog/environmental-scan>.

161 Busby *supra* note 159.

162 *Ibid.*

163 Deborah Eerkes, Britney De Costa & Zanab Jafry, "A Comprehensive Guide to Campus Gender-Based Violence Complaints: Strategies for Procedurally Fair, Trauma-Informed Processes to Reduce Harm" (2021), online: *Possibility Seeds' Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada* <https://static1.squarespace.com/static/5d482d9fd8b74f0001c02192/t/61a920e3d91af21c9168555a/1638473959266/FINAL+-+RIA+-Section+3+%283%29.pdf> [Eerkes].

164 This concern was also raised by Karen Busby. Her research found that more than half of PSI sexual violence policies did not include any information about whether a complainant will be provided with any information about the investigator's report or administrator response to the report. Five of the institutions she surveyed allowed for administrators to provide complainants with a summary of the investigator's findings or a redacted copy of the report. Under almost all the policies reviewed in the study, complainants are not entitled to be advised of the remedies or sanctions, or the policy is silent on this point. Busby, *supra* note 159.

165 Marcus Sibley & Dawn Moore, "The Silos of Sexual Violence: Understanding the Limits and Barriers to Survivor-Centrism on University Campuses" in Diane Crocker, Joanne Minaker & Amanda Nelund, eds, *Violence Interrupted: Confronting Sexual Violence on University Campuses* (Montreal: McGill-Queen's University Press, 2020) 280.

166 Eerkes, *supra* note 163.

167 *Ibid* at 320. In most circumstances, the PSI should wait until any criminal legal proceedings have concluded, but there are some circumstances where it may be appropriate for simultaneous processes. However, these circumstances are limited. See: Karen Busby & Joanna Birenbaum *Achieving Fairness: A Guide to Campus Sexual Violence Complaints* (Toronto: Carswell, 2020).

168 Eerkes, *supra* note 163 at 321.

169 Deborah Eerkes & Chris Hackett, "Report from the Working Group on Restorative Initiatives for Sexual Violence" (1 August 2018), online: *University of Alberta* <https://era.library.ualberta.ca/items/fd463cea-cff4-4891-bace-36d62286fe81/view/0265f70d-2f94-49dc-9f26-04cf0a7b3d2c/RISV%20Report_2018-08-15.pdf>.

170 Eerkes, *supra* note 163.

171 *Ibid.*

172 CVBR, *supra* note 128.

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