

Victims of Sexual Assault: Who Represents Them in Criminal Proceedings?

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Introduction

Very few victims of sexual assault report the offence to police. Those who do lay a complaint report a very high level of dissatisfaction with their participation in our criminal justice system.¹ At the same time it is virtually unheard of for victims of any crime, including sexual assault, to seek independent legal advice. Why don't victims of sexual assault retain counsel? Would access to independent legal advice and representation encourage more survivors of sexual assault to come forward? Would the provision of legal services create a more positive experience for those individuals who do choose to initiate criminal legal proceedings? This paper will examine those questions. The paper will also identify the specific types of legal services which could be provided to victims of sexual assault, as well as propose a few options for the delivery of such services.

Reporting Sexual Assault

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¹ This dissatisfaction with the criminal justice system has undoubtedly contributed to the steady increase in civil actions for sexual wrongdoing. For a list of articles, cases and a discussion of the advantages and disadvantages of tort actions in this context, see Grace, E. and Vella, S., Civil Liability for Sexual Abuse and Violence in Canada (Toronto: Butterworths, 2000). See also British Columbia Law Institute, Civil Remedies for Sexual Assault (Report No. 14) (Vancouver, 2001), pp.19-36; Klar, L., Tort Law, 3rd edition (Toronto, Carswell 2003), pp. 49 – 52; Linden, A., Canadian Tort Law, 7th Edition (Toronto: Butterworths, 2001), pp. 44-45 and Paciocco, D., "Competeting Constitutional Rights in an Age of Deference: A Bad Time To Be An Accused" (2001), 14 S.C.L.R. (2d) 111, at pp. 118-119.

Numerous studies suggest that sexual assault in Canada is a highly unreported crime compared to other crimes, including other crimes of violence.² As noted in a recent update³, the most detailed information on sexual assault in Canada is available from the 1993 Violence Against Women Survey.⁴ That study involved a national sample of more than 12,000 female adults. Although 39% of the respondents indicated that they had experienced a sexual assault, only 6% of sexual assaults were actually reported to the police. By way of comparison, 28% of non-sexual assaults were reported.⁵ In other words, at the time of this report, non-sexual assaults were reported at almost five times the rate of sexual assaults.

Since 1993 there has been a gradual decline in the total number of reported instances of sexual assault in Canada, which now hovers around 30,000 per year.⁶ However, there has been no significant change in the reporting rate. According to the 2004 General Social Survey, just 8% of sexual assault victims reported the crime to police.⁷

In surveys conducted by the federal Department of Justice, survivors of sexual assault have identified the reasons why they did or did not report incidents of sexual assault to the police. The most frequently mentioned reason for reporting was to ensure the safety and protection of other women and children, as well as to protect themselves.⁸ The list of reasons behind women's decisions

² Department of Justice Canada, Sexual Assault Legislation in Canada: An Evaluation (Overview, Report No. 5) (Ottawa, Statistics Canada, 1990); Statistics Canada, The Violence Against Women Survey (Ottawa, Statistics Canada, 1993); Statistics Canada, Sex Offenders (Ottawa, Statistics Canada, 1999); H. Johnson & V. Sacco, "Researching Violence Against Women: Statistics Canada National Survey" (1995) 37 Can J. Crim. 281; Julian V. Roberts, "Sexual Assault in Canada: Recent Statistical Trends" (1996) 21 Queen's L.J. 395; Statistics Canada, Measuring Violence Against Women: Statistical Trends 2006 (Ottawa, Statistics Canada, 2006).

³ Measuring Violence Against Women: Statistical Trends, *ibid.*, p. 24.

⁴ The Violence Against Women Survey, *supra*, note 2.

⁵ Roberts, *supra*, note 2, p. 401.

⁶ Sara Beattie, Andrea Cardillo, Holly Johnson & Rebecca Kong, Juristat (July 2003). At pp. 2-3 the authors note that in 2002 there were 27,094 sexual offences reported to police, a rate of 86 incidents for every 100,000 population. In 2004 the rate was 82 per 100,000. See "Measuring Violence Against Women", *supra*, note 2, p. 71. These large numbers caused the Metropolitan Action Committee on Violence Against Women and Children (METRAC) to note: "Given that this figure represents only approximately 6% of the sexual assaults that occur each year sexual assault is not uncommon in this country." See "Frequently Asked Questions About Sexual Assault", online at www.metrac.org/new/faq_sex.htm.

⁷ Measuring Violence Against Women, *supra*, note 2, p. 26.

⁸ Tina Hatten, Survey of Sexual Assault Survivors: Report to Participants (Ottawa: Department of Justice Canada, 1999), pp. 8-9. See also Beattie et al., *supra*, note 6, p. 6.

not to disclose sexual assaults is quite lengthy: believing that the police could not do anything to help them; wanting to keep the incident private; feeling ashamed or embarrassed; being reluctant to become involved with the police and courts; fearing that they would not be believed; not being sure the incident was a crime; not having sufficient proof; fearing the perpetrator; and, not wanting the perpetrator arrested or jailed.⁹ Many women specifically identified their concern that medical and psychiatric records could be disclosed during court proceedings.¹⁰ In essence, when women who chose not to report instances of sexual assault were asked to identify the reasons for the decision the primary reason was fear of the criminal justice system itself.

For victims of sexual assault, fear of the criminal justice system is well founded. Most members of the public are familiar with the horror stories of brutal and humiliating cross-examination conducted by heartless and insensitive defence counsel. Obviously, one's view of defence tactics depends very much upon where one is seated in the courtroom. Regardless, and whatever one's view of defence counsel conduct, it is clear that even those who initially felt well prepared to face the onslaught are sometimes left shocked and shaken.¹¹

A very good example is provided by what has in effect become a rallying cry for victims of sexual assault in Canada. In 1988, Ottawa lawyer Michael Edelson, speaking at a seminar for area lawyers, suggested that defence counsel should "whack the complainant hard" at the preliminary inquiry in order to get the client discharged before trial. He continued:

"Generally, if you destroy the complainant in a prosecution...you destroy the head. You cut off the head of the Crown's case and the case is dead. My own experience is the preliminary inquiry is the ideal place in a sexual assault trial to try and win it all. You can do things...with a complainant at a preliminary inquiry in front of a judge, which you

⁹ Measuring Violence Against Women, supra, note 2, pp. 57-58.

¹⁰ Hatten, supra, note 8, pp. 10-11.

¹¹ Some commentators argue that that despite their ability to do so, Canadian judges have failed to protect the complainant from cross-examination designed primarily to embarrass and humiliate. See Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence – Achieving Equality (Ottawa, Minister of Supply and Services Canada, 1993), p. 222.

would never do for tactical, strategic reasons – sympathy for the witness, et cetera – in front of a jury... you've got to attack the complainant with all you've got so that he or she will say I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge."¹²

Whether at the preliminary inquiry or at trial, victims of sexual assault will almost certainly undergo a rigorous examination, generally far beyond and far different from anything experienced by complainants involved in other offences. In anticipation, many victims will understandably hesitate to come forward.

Other factors which impact reporting rates include a lack of confidence in the system and a general sense of frustration experienced by many individuals caught up in the criminal justice process. The prevalent view among victims is that the likelihood of a conviction is remote, and in the event of a conviction, the sentence imposed will be inadequate.¹³ Headlines such as "House Arrest for Abhorrent Sex Crime" do tend to promote cynicism.¹⁴ For some, participation in Canada's criminal justice system is seen as nothing more than an exercise in futility – again, leading many to leave serious crimes unreported.¹⁵ This sense of frustration is not limited to victims:

¹² Schmitz, C., "Whack Sex Assault Complainant at Preliminary Inquiry" Lawyer's Weekly (Vol. 22, May 1988).

¹³ The statistics and the reports accompanying them are somewhat inconsistent. There is research suggesting that with respect to conviction rates, comparisons between sexual assault and other forms of assault reveal few differences. There is also research suggesting that sentences for sexual assault have been increasing in recent years. See Department of Justice Canada, Policy, Programs and Research Sector, Sexual Assault Legislation in Canada – An Evaluation – Sentencing Patterns in Cases of Sexual Assault (Ottawa: Department of Justice, 1991). However, in a recent study by the Canadian Centre for Justice Statistics it was stated that individuals charged with sexual offences are less likely to be found guilty than those charged with other violent offences. However, it was also stated that once convicted, sexual offenders in adult court are more likely than other violent offenders to receive a prison sentence. See Beattie et al., *supra*, note 6, p. 9.

¹⁴ Windsor Star (July 5, 2003).

¹⁵ "Recent studies suggest that sexual assault is the most under-reported of all violent crimes. One of the reasons why sexual assault is so under-reported is that sexual assault victims assume that they will not be successful in court. Often their assumption is correct. Although there is no evidence that sexual assault victims lie about their experience any more than victims of other crimes, there is a deep-rooted and widespread scepticism about a woman's testimony that she was sexually assaulted. In light of this scepticism, it is not surprising that the likelihood of a sexual assault complaint actually ending in a conviction is generally estimated at 2 to 5 per cent." Castel, J.R., "Prosecutorial Uses of Rape Trauma Syndrome Evidence: A Critical Analysis" (1991), 7 J.L. & Soc. Pol'y, 175 at p. 175. The Canadian Panel on Violence Against Women, *supra*, note 11 at p. 223 concluded that "sentencing practices reveal a high level of tolerance for crimes of violence against women." See also Kaukinen, K.

“In my 16 years as a criminal prosecutor, one thing has become increasingly disturbing: many crime victims seem to remain significantly dissatisfied long after their cases have been ‘completed’ by the criminal justice system. Some of that dissatisfaction is easily traced. We all can do a better job keeping victims informed about investigative timelines, court appearances, release on bail, and the court process in general. We can do more to help victims prepare to give evidence. When it comes to sentencing, we can do better in explaining the sentencing process, the wide range of factors the sentencing judge must consider and the general range of sentence a court will likely find appropriate in the particular case. As well, we can assist victims to assist in the sentencing process, either in person or through victim impact statements. Even when we have done our best in all those respects, however, substantial dissatisfaction seems to remain. Many victims still feel that the system has not really ‘heard’ them and that offenders have not been made to ‘take responsibility’ for their crimes. It is as if there is a disconnect somewhere between victims’ perceptions of justice and what the courts ultimately accomplish.”¹⁶

Victims in the Criminal Justice System

Until well into the 19th century, victims played a very active role in the criminal justice system, including initiating and actually taking responsibility for conducting the prosecution. This ended with the creation of public police forces and public prosecutor offices.¹⁷ In today’s criminal justice system the victim is generally viewed as a potential witness, and nothing more. Only the accused and the Crown are parties to a criminal proceeding. There is no general right of

& Colavecchia, S., “Public Perceptions of the Courts: An Examination of Attitudes Toward the Treatment of Victims and Accused” (1991), 41 Can. J. Corr. 364 where the authors comment on recent research which demonstrates that Canadians feel sentences are too lenient.

¹⁶ Ross, R., “Victims and Criminal Justice: Exploring the Disconnect” (2002), 46 Crim. L. Q. 483, at p. 483.

¹⁷ The Honourable Mr. Justice Brian Dickson, “The Forgotten Party – The Victim of Crime” (1984), 18 U.B.C. L. Rev. 319 at p. 320.; Young, Alan N., The Role of the Victim in the Criminal Justice Process: a Literature Review – 1989 to 1999 (Ottawa: Department of Justice, 2001), p. 6.

participation for any third party, including the victim.¹⁸ As noted in the Bernardo case, in modern times, direct participation by victims in criminal proceedings has become extremely rare:

“I am of the view that in general victims and parents of victims do not have a right to intervenor status in a criminal trial...There is no foundation, in statute or in common law, for the proposition that a victim must be granted intervenor status in a criminal trial...I am granting the Mahaffy and French families intervenor status for this publication ban application, as an indulgence, because I am of the opinion that these families have a unique and different perspective to offer on the issue being put forward by the Crown, which would not otherwise be presented...I emphasize that intervenor status for victims and or their families will be rare. I find the circumstances of this case to be so strikingly unusual that they necessitate the families be given intervenor status.”¹⁹

Federal legislation and the Supreme Court of Canada have given some limited opportunity for participation by victims of sexual assault in the criminal trial process. Victims may file and, upon request, read a victim impact statement during the sentencing hearing.²⁰ The Criminal Code also provides some limited rights of standing on applications for publication bans.²¹ In O'Connor,²² which dealt with the disclosure of the victim’s medical and therapeutic records to the accused, the Supreme Court held that in order to initiate the production procedure, the accused must bring a formal written application that is served on both the custodians of the records and persons having a privacy interest in the records.²³ Thus, the Court indirectly

¹⁸ Barrett, J., Balancing Charter Interests, Victims’ Rights and Third Part Remedies (Toronto: Carswell, 2000), p. 3-48.

¹⁹ R. v. Bernardo (1995), 38 C.R. (4th) 229, 236-237 (Ont. Gen. Div.) per Lesage, A.C.J.O.C.

²⁰ Criminal Code, R.S.C. 1985, C-46, s. 722.

²¹ Criminal Code, R.S.C. 1985, C-46, s. 486.4.

²² R. v. O’Connor [1995] 4 S.C.R. 411.

²³ The Court held that the privacy interests of the complainant were protected by sections 7 and 8 of the Charter. The equality provision of the Charter, s. 15, was not considered. However, in a subsequent case, R. v. Mills [1999] 3 S.C.R. 668 the Supreme Court did recognize equality rights for sexual assault complainants. Professor Stuart notes that the implications of an enforceable section 15 claim for complainants in sexual assault cases has been largely

conferred standing to complainants in these matters in holding that there must be a procedure before the trial to balance the accused's right to full answer and defence against the privacy interests of the complainant.²⁴

Despite a barrage of criticism and the very legitimate concern about eroding the fundamental rights of an accused,²⁵ it appears inevitable that victims of crime, led by victims of sexual assault, will play an increasingly active role in the Canadian criminal trial process. "Victims Rights" has become an important political issue as evidenced by the appointment of Canada's first Federal Ombudsman for Victims of Crime on April 23, 2007.²⁶ This trend is also suggested by a number of legislative initiatives designed to make the judicial process more responsive to the concerns of victims of sexual assault. In some instances, for example, sections 278.1 – 278.8 of the Criminal Code, legislation has been enacted to support the direction of a judicial decision, in this case, O'Connor. In other instances, the federal government found it necessary to enact legislation to counteract judicial decisions seen as contrary to the interests of victims. For example, in response to the Pappajohn²⁷ decision, which held that the defence of mistake of fact was to be evaluated subjectively, the Criminal Code now provides that the defence of mistake of fact will not be available unless the accused took "reasonable steps" to ascertain that the complainant was in fact consenting.²⁸ In

unexplored: "Can complainants now seek status to be represented throughout a sexual assault trial? How about rights to cross-examine the accused, to challenge the similar fact rule or to reverse the presumption of innocence?...While criminal law should be sensitive to issues of gender and race, this foray into the web of uncertain s. 15 jurisprudence seems unprincipled and unfortunate. It will likely bring a new range of complexity, subtlety and diminishment to the fundamental rights of accused the Court has been at pains to develop since the Charter was proclaimed." See Stuart, D., Charter Justice in Canadian Criminal Law, 3rd Edition (Carswell, 2000), pp. 39-40.

²⁴ Barrett, supra, note 18, pp. 3-51, 3-52. In subsequent decisions the Supreme Court has ruled that third parties, such as complainants, who are affected by an interlocutory order may challenge the order by launching an appeal. Such an appeal may be launched by a third party prior to a final judgment being rendered in a criminal proceeding. See Barrett, at p. 3-52. See A.(L.L.) v. B. (A.), [1995] 4 S.C.R. 536 and R. v. Mills, [1999] 3 S.C.R. 668.

²⁵ See Greenspan, E., "The New Truth: Victims Never Lie" (2001), 124 S.C.L.R. 89; Paciocco, D., "Why the Constitutionalization of Victims' Rights Should Not Occur" (2005), 49 Crim. L. Q. 393; Young, A., "Crime Victims and Constitutional Rights" (2005), 49 Crim. L.Q. 432; Roach, K., "Victims' Rights and the Charter" (2005), 49 Crim. L.Q. 474.

²⁶ "Ministers of Justice and Public Safety Name First Federal Ombudsman for Victims of Crime" online at www.victimfirst.gc.ca/news-nouv/nr-cp/doc.

²⁷ Pappajohn v. R., [1980] 2 S.C.R. 120.

²⁸ Criminal Code, R.S.C. 1985, c. C-46, s. 273.2.

another example, Daviault²⁹, the Supreme Court held that where an accused was intoxicated to the point where he was incapable of performing a voluntary act, that person could not be convicted of an offence. In other words, although intoxication was not a defence to a charge of sexual assault, “extreme intoxication” could result in an acquittal. The federal government responded with section 33.1 of the Criminal Code which provides that the defence of extreme intoxication is no longer available to a person charged with a crime of violence, including sexual assault.

In the last thirty years there have been a number of other amendments and additions to the federal legislation favourably received by victims and their supporters. Some of the best known, and most significant include replacing the offence of rape with the new offence of sexual assault,³⁰ banning the publication of the identity or name of complainants and witnesses,³¹ prohibiting the use of evidence of sexual reputation³² and limiting evidence of the complainant’s sexual activity – the “rape shield” provision.³³ In recognition of the fact that over 60% of the victims of sexual assault are children³⁴ special provisions have been developed which allow young persons to testify behind a screen, by closed circuit television or through the use of video recorded evidence.³⁵

²⁹ R. v. Daviault, [1994] 3 S.C.R. 63.

³⁰ Criminal Code, R.S.C. 1985, c. C-46, ss. 271-273.

³¹ Criminal Code, R.S.C. 1985, c. C-46, ss. 486.4, 486.5

³² Criminal Code, R.S.C. 1985, c. C-46, s. 277.

³³ Criminal Code, R.S.C. 1985, c. c-46, s. 276.

³⁴ In a recent report, Beattie et al., supra, note 6, at p. 7, the authors found that 61% of sexual offences reported to police in 2002 were children and youth under eighteen years of age. This report, at p. 8, also found that children aged eleven and under were most often victimized by family members, especially in the case of girls. Parents were identified as suspects in 20% of cases, while in 29% of cases other relatives were identified as suspects. While 9% of cases involved children falling prey to strangers, in 42% of cases, friends and acquaintances were suspects. In comparison, 58% of youth aged twelve to seventeen were victimized by friends and acquaintances, as were 52% of adults.

³⁵ Criminal Code, R.S.C. 1985, c. C-46, ss. 484(2.1), 715.1. Other Criminal Code provisions designed to assist victims of sexual assault include giving consideration to the safety of the victim in making any determination about judicial interim release (s. 515 (10)(b)); identifying those circumstances where no consent is obtained ((ss. 273.1, 265(4)); identifying those circumstances in which belief in consent is not a defence (s. 273.2); removing the requirement for corroboration of the evidence of a complainant (s. 274); abrogating the defence of recent complaint (s. 275); providing that a spouse may be charged with sexual assault (s.278); excluding the jury and public at a s. 276 hearing (s. 276.2); creating a publication ban with respect to a s. 276 hearing (s. 276.3); restriction on publication of O'Connor applications (s. 278.9); discretionary power to exclude members of the public, particularly where the victim is under the age of eighteen (ss. 486(1)(1.1)); allowing a complainant under the age of fourteen, or who has a

All of the provinces have also indicated that the rights of victims are a very high governmental priority. For example, in Ontario the government enacted a Victims' Bill of Rights³⁶ in 1995, established an Office for Victims of Crime in 1998 and in 2001, established an integrated Victim Services Division in the Ministry of the Attorney General.³⁷ In a recent news release announcing the Report on Financial Assistance for Victims of Violent Crime in Ontario by the Honourable R. Roy McMurtry, the province indicated that since 2003/04 over \$546.3 million dollars has been spent on victim services. The press release also highlighted several newer programs, the Early Victim Contact program which provides outreach to victims of domestic violence within 24 hours, the Ontario Victim Crisis Assistance Referral Service which, in 2008 alone, provided assistance to approximately 48,000 victims, and the Victim Quick Response Program which covers emergency expenses in the immediate aftermath of violent crime.³⁸

The Ontario Victims' Bill of Rights³⁹ identifies a number of principles which are to govern the treatment of victims of crime, including victims of sexual

mental or physical disability, to testify with the assistance of a support person (s. 486 (1.2); restricting the cross examination of a complainant under the age of eighteen by an unrepresented accused (s. 486.3); providing for victim impact statements at sentencing (s. 722). Victims are also allowed to make victim impact statements at faint-hope hearings (s. 745.63(1)), hearings before the Review Board in respect of offenders who are found not criminally responsible on account of mental disorder (s. 672.5 (14)) and hearings before the National Parole Board (Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 23(1)(e), 25.) See Barrett, J., "Expanding Victims' Rights in the Charter Era and Beyond" in The Charter and Criminal Justice, Twenty-Five Years Later (LexisNexis 2008), pp. 640-642. With regard to hearings before the Review Board, the author notes, at p. 641, note 58, that as a result of the proclamation of Bill C-10 (S.C. 2005, c.22), duties have been imposed to notify victims in certain circumstances and to inquire as to whether or not the victim is aware of the right to prepare a statement prior to the making of a disposition. See also Department of Justice Canada, A Crime Victims Guide to the Criminal Justice System (Ottawa, 2003), p. 2. Victims are also provided an increased amount of information about the perpetrator once they enter the federal penitentiary system, for example, transfers between institutions, passes and release dates. See Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 26. See also Canadian Resource Centre for Victims of Crime, A Victim's Guide to the Canadian Justice System: Questions and Answers (Ottawa, 2002) at pp. 42, 47.

³⁶ Victims' Bill of Rights, S.O. 1995, c. 6, as amended by 1999, c. 6, s. 11, 2000, c. 26, Sched. A, s. 4, 2005, c. 5, s. 11.

³⁷ See Ministry of the Attorney General, online at www.attorneygeneral.jus.gov.on.ca/english/about. See Office for Victims of Crime, Report on Victims Services in Ontario, A Voice for Victims (Toronto, 2000). This report contains a detailed history and description of victim services in Ontario.

³⁸ Government of Ontario, "Ontario Releases McMurtry Victims Services Report", News Release, August 21, 2008 online at www.attorneygeneral.jus.gov.on.ca/english/news/2008/20080821-mcmurtry-nr.asp. The report itself (The Honourable R. Roy McMurtry Report on Financial Assistance for Victims of Violent Crime in Ontario) provides a summary and overview of both financial assistance programs and non-financial victims services and programs currently operating in the province of Ontario.

³⁹ Victims' Bill of Rights, S.O. 1995, c.6.

assault. The legislation provides that justice system officials should treat victims with courtesy, compassion and respect for their personal dignity and privacy.⁴⁰ More specifically the Victims' Bill of Rights provides that victims should have access to information about virtually all processes and procedures as they make their way through the criminal justice system. Victims should be informed of services and remedies available to victims of crime, the protections available to prevent intimidation, the progress of their case, all significant dates, any decisions such as bail or release and instances of escape.⁴¹ The legislation also provides for a justice fund to assist victims through support for community agencies and program development.⁴² All other provinces and territories have similar legislation.⁴³

To this point, the Ontario Victims' Bill of Rights has not expanded the role of victims in the trial process or related proceedings. Section 2(5) of the legislation itself specifically states that no new cause of action, claim or other remedy has been created by its enactment.⁴⁴ In Vanscoy v. Ontario⁴⁵ two victims of crime were not notified of pending court dates nor were they consulted with respect to plea bargaining arrangements. The applicants sought a declaration that their statutory rights under section 2(1) of the Victims' Bill of Rights had been violated and that section 2(5) of the legislation violated section 7 of the Charter which provides that

⁴⁰ Victims' Bill of Rights, S.O. 1995, c. 6, s. 2(1) (1.).

⁴¹ Victims Bill of Rights, S.O. 1995, c. 6, s.2. The Ministry of Correctional Services Act, R.R.O. 1990, Reg. 778, s. 62 allows victims to request and receive information about the offender, including his current status, the date of the parole hearing, the parole decision, reasons for the decision and special conditions attached to a parole grant decision. The Ministry of Correctional Services Act, R.S.O. 1990, c. M22, s. 36.1 permits victims to participate in proceedings of the Ontario Parole and Earned Release Board. Victims are allowed to view the proceedings, make a submission and be present when the inmate is advised of the Board's decision. Ministry of Safety and Security, Correctional Services, Victims at Parole Hearings (Toronto, April 22, 2003).

⁴² Victims' Bill of Rights, R.S.O. 1995, c. 6, s. 5.

⁴³ Alberta: Victims of Crime Act, R.S.A. 2000, c. V-3; British Columbia: Victims of Crime Act, S.B.C. 1996, c. 48; Manitoba: The Victims' Bill of Rights, S.M. 1998, c. 44; New Brunswick: Victims' Services Act 1987, S.N.B. 1987, c. V-2.1 as amended by S.N.B. 1996, c. 36; Newfoundland and Labrador: Victims of Crime Services Act, R.S.N.L. 1990, c. V-5; Northwest Territories: Victims of Crime Act, R.S.N.W.T. 1988, c. 9; Nova Scotia: Victims Rights and Services Act, S.N.S. 1989, c. 14 as amended by 1992, c.36, 2000, c.4, ss. 86-92; Nunavut: Victims of Crime Act (Nunavet), R.S.N.W.T. 1988, c. 9 as amended by statutes enacted under s. 76.05 of the Nunavet Act, R.S.N.W.T. 1998, c. 34; Prince Edward Island: Victims of Crime Act, S.P.E.I. 1988, c. V-3.1; Quebec: Crime Victims Compensation Act, 1994 S.Q., c. 1-6; Saskatchewan: Victims of Crime Act, S.S. 1995, c. V-6.011 as amended by 1997, c.24, 2000, c. 51 and 2001, c. 34; Yukon: Crime Prevention and Victim Services Act, R.S.Y. 2002, c. 84.

⁴⁴ Victims' Bill of Rights, S.O. 1995, c.6, s. 2(5).

⁴⁵ Vanscoy v. Ontario, [1999] O.J. No. 1661 (Ont. Sup. Ct. J.)

everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. They argued that it was a principle of fundamental justice that there should be no right without a remedy. They also argued that the right to be kept informed had crystallized into a principle of fundamental justice. The Ontario Superior Court of Justice dismissed the application and held that the Ontario Victims' Bill of Rights was not intended to, and did not, provide rights to victims of crime. Rather, "...the Act is a statement of principle and social policy, beguilingly clothed in the language of legislation....even if there were an indefensible breach of these principles, the legislation expressly precludes any remedy for the alleged wrong."⁴⁶ Thus, since there were no rights provided by the legislation, it could not be argued that the applicants had been denied a remedy to a violated right: "To put it simply, there are no rights to be breached, so no remedy is required."⁴⁷ Finally, the Court concluded that the right to be informed was not a principle of fundamental justice.⁴⁸

The victims' rights legislation enacted across the country has not provided enforceable legal rights for victims of sexual assault, nor has the legislation provided access to broad, general legal representation. However, in British Columbia and Manitoba the legislation does specifically provide that victims will

⁴⁶ Vanscoy v. Ontario [1999] O.J. No. 1661 (Ont. Sup. Ct. J.) per Day J. at paras. 22 and 41.

⁴⁷ Vanscoy v. Ontario, [1999] O.J.No. 1661 (Ont. Sup. Ct. J.) per Day, J. at para. 32. Professor Young notes "The B.C. legislation does provide some relief by having violations come within the mandate of the Ombudsman, and recently, Manitoba amended its legislation to allow for a grievance procedure with complaints being directed to the Director of Victim Support Services for investigation." See Young, A., The Role of the Victim in the Criminal Justice Process: A Literature Review – 1989 to 1999 (Ottawa, Department of Justice, 2001), p. 29. The Alberta legislation provides that a "Director" may provide information to victims on how to resolve their concerns where a victim feels they have not been treated in accordance with the principles of the Act. See Victims of Crime Act, R.S.A. 2000, c. V-3, s. 3(2)(b). In Ontario an amendment to the legislation was proposed which would allow the Office of Victims of Crime to receive and review complaints. A report with recommendations would then be made to the Attorney General. See Bill 89, An Act to Provide for the Respectful Treatment of Victims of Crime, 2d. Session, 37th Leg., Ontario, 2001, s. 10. This private member's bill did not proceed past First Reading which occurred on June 25, 2001.

⁴⁸ "It is a laudable idea, but it is not vital or fundamental in the manner of a principle such as the presumption of innocence" Vanscoy v. Ontario, [1999] O.J.No. 1661 (Ont. Sup. Ct. J.) per Day, J. at para 37. In Barrett, J, supra, note 35, p. 644, the author notes that "...while victims now have statutory rights to provide evidence of victim impact, attempts to expand this into a right to speak to or challenge the actual sentence imposed have failed." The decision of R. v. Tkachuk (2001), 159 C.C.C. (3d) 434 (Alta. C.A.) is cited. The Court held that Alberta's Victims of Crime Act did not provide any rights of participation in prosecutorial discretionary decision-making nor did it provide a right to speak to the length of the sentence.

receive legal representation on O'Connor applications for production or disclosure of the victim's personal or private information.⁴⁹ In those provinces representation is provided regardless of income, despite a qualification in the B.C. legislation which requires that "the victim would not otherwise receive this representation because of a lack of financial resources."⁵⁰ In other provinces, such as Alberta and Ontario, representation will be provided to persons who meet the financial requirements of the provincial Legal Aid Plans.⁵¹ In Newfoundland/Labrador and Prince Edward Island the legislation simply states that victims "should" have access to legal services⁵² and in Nova Scotia, under the heading "Victim's Absolute Rights", the Victim's Rights and Services Act boldly declares that a victim has the "right" to access social, legal (emphasis added), medical and mental health services."⁵³ These declarations have not resulted in any actual programs.⁵⁴ In reality, victims of sexual assault (with the very limited exception of O'Connor applications in some provinces) do not have effective access to independent legal advice and representation. Access to legal representation, absent arbitrary restrictions based on income, is a crucial step in the advancement of victims' rights. Professor Young has precisely identified the issue: "Legal representation is an integral component of the effective implementation of rights. Victims are now provided a wide range of legal rights

⁴⁹ See Victims of Crime Act, R.S.B.C. 1996, c. 478, s. 3(a) and The Victims' Bill of Rights, S.M. 1998, c. 44, s. 25. See R. v. Monkman (2007), 211 Man. R. (2d) 104 (Man. Q.B.).

⁵⁰ See Victims of Crime Act, R.S.B.C. 1996, c. 478, s. 3(b). See Younie, S., "Overview of Crown Counsel's Initial Involvement in Sexual Abuse Cases" in Sexual Assault/Abuse: Cross Disciplinary Approach (Vancouver, The Continuing Legal Education Society of British Columbia, 2000) at 1.1.08. See also "Legal Advice and Representation on Bill C-46 Applications", BC Association of Specialized Victim Assistance and Counselling Programs Newsletter (Fall 1997) online at www.harbour.sfu.ca/freda/c46.

⁵¹ See Legal Aid Ontario, Guide to Legal Aid Certificate Coverage (Toronto, 2003) at p. 2 and O'Connor/Mills Applications, Area Office Policy Manual (November 25, 2003). Barrett, supra, note 35, p.652 states: "Even though legal assistance may be available, research shows that in the majority of cases complainants do not have independent legal representation." The author cites Koshan, J., "Disclosure and Production in Sexual Violence Cases: Situating Stichcombe" (2002), 40 *alta. L. Rev.* 655, at pp. 684-685.

⁵² See Victims of Crime Services Act, R.S.N.L. 1990, c. V-5, s. 3(3), s. 5 and Victims of Crime Act, S.P.E.I. 1988, c. V-3.1, s. 2(c).

⁵³ Victims' Rights and Services Act, S.N.S. 1989, c. 14, s. 3(1)(b).

⁵⁴ In G.M. v. Director of Victims' Services (2003), 211 N.S.R. (2d) 147, 154 (N.S.C.A.) the Court did note s. 3(1)(b) of the Victims' Rights and Services Act, S.N.S. 1989, c. 14 in ordering that a victim be compensated for the reasonable future cost of massage therapy together with the reasonable cost of travel expenses necessary to give her access to such treatment.

but are never provided with the benefit of independent legal advice to assist in the exercise of the rights.”⁵⁵

Although the victims’ rights legislation may have fallen short of initial expectations it is important to emphasize the fact that over the past thirty years we have witnessed a significant number of advances in the services provided for victims of crime. In addition to funding sexual assault centres and shelters for battered women the provinces and territories have developed programs which provide general information, updates on the progress of the case, counselling, court preparation and accompaniment, victim impact statement preparation, information about the current status of offenders and liaison with police, courts, the Crown and corrections.⁵⁶ It will be suggested below that many of these services could be replaced, or at least augmented, by the addition of independent legal counsel acting on behalf of the victim.

It should also be noted that apart from Newfoundland/Labrador and the Territories, all Canadian provinces have some form of criminal injuries compensation scheme. Although there are variations from province to province Ontario’s legislation is fairly typical. Victims of sexual assault may receive compensation to cover medical expenses, counselling, loss of wages, and pain and suffering. However, legal fees are excluded.⁵⁷

⁵⁵ Young, A., *supra*, note 47, p. 29.

⁵⁶ The Canadian Centre for Justice Statistics reports that in 2005-2006 over 400,000 victims of crime sought assistance from victim services across Canada. The Centre estimates that there are a total of 830 victim service agencies in the country. The cost of providing formal services to victims, based on responses from 628 victim service agencies (excluding compensation programs) totaled \$152.2 million. See Brzozowski, Jodi-Anne, Victim Services in Canada, 2005 – 2006 (Statistics Canada, Canadian Centre for Justice Statistics). See also Victim Services in Canada: National, Provincial and Territorial Fact Sheets, 2005/2006 (Statistics Canada, Canadian Centre for Justice Statistics). For an excellent summary of all the provincial and territorial programs see An Overview of Victim Services in Canada online at www.victimsfirst.gc.ca/serv and National Victims of Crime Awareness Week online at www.victimsworld.ca/archive2007/resource_guide/16.

⁵⁷ See Compensation for Victims of Crime Act R.S.O. 1990, c. C.24, s. 7(1). “Compensation is not awarded for property damage or theft, an incident involving a motor vehicle, legal fees incurred for criminal and/or civil proceedings” The Criminal Injuries Compensation Board, “Eligibility” online at www.cicb.gov.on.ca/en/fact1. For an excellent summary of the provincial compensation programs see The Honourable R. Roy McMurtry, Report on Financial Assistance for Victims of Violent Crime in Ontario (Toronto, 2008), Appendix G, pp. 95-106.

Legal Representation for Victims – Current Status

For many victims of sexual assault there is a lack of trust and a basic misunderstanding of the roles of various actors in the system. The first contact point for many victims of sexual assault will be the police. Few, if any, victims view the police as acting directly on their behalf or under their direction. On the other hand many women have expressed a general lack of trust and a concern that "...police officers know little about the dynamics of violence against women or take violence against women seriously."⁵⁸

The next contact point for most victims will be Victims Services and the Victim/Witness Program. While these programs do provide invaluable physical, emotional and courtroom preparation support, one of the first points made during the initial interview process is that workers can not discuss the details of the victim's actual case. These programs do not provide legal advice or act as legal advocates for the victim.⁵⁹

On the other hand, many victims of crime are under the impression that the Crown Attorney is "their lawyer" and is obligated to act on their behalf. This notion has been reinforced by some provincial authorities. For example, the Manitoba Department of Justice, in response to the question: "Do I Need a Lawyer?" advises: "A Crown attorney is assigned to present your case in court, at no cost to you. You do not need a lawyer."⁶⁰In fact, when engaged as a prosecutor, a lawyer's prime function is not to seek conviction or advocate on behalf of the victim but rather to act "for the public" and "see that justice is done

⁵⁸ Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence – Achieving Equality (Ottawa, Minister of Supply and Services Canada, 1993), pp. 214. In a recent study conducted by the Canadian Centre for Justice Statistics, 47% of victims of sexual assault surveyed stated they did not report the offence because they did not want the police involved and 18% felt that the police would not help them. Beattie et.al., *supra*, note 6, p. 6.

⁵⁹ In Services for Victims of Crime (Public Legal Education and Information Service of New Brunswick, 2004), p.8, this caution is provided: "Victim Services Coordinators and/or volunteers are not lawyers or legal advisors for victims. If you want to talk about your specific evidence, they will arrange for you to meet with the Crown Prosecutor assigned to your case." See also Ministry of the Attorney General, "Victim/Witness Assistance Program, We Help You Feel More Comfortable with the Court Process" (Toronto: Ministry of the Attorney General, 2003).

⁶⁰ Manitoba Department of Justice, "Victim Rights Support Service (VRSS)" online at www.gov.mb.ca/justice/victims/services/vrss at p. 2.

through a fair trial on the merits.”⁶¹ The Crown acts on behalf of all members of society, including both the victim and the accused:

“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty...”⁶²

In Canadian studies one of the biggest complaints registered by victims of sexual assault is the lack of information about the progress of their case and the fact that the search for such information often requires them to deal with a number of different individuals in the system, forcing them to repeat their story over and over again.⁶³ Police officers and Crown Attorneys carry unmanageable caseloads in the best of circumstances. It is simply not realistic to expect individual cases to receive the amount of attention which would be thought appropriate by the victim. The introduction of an independent, legally trained advocate would represent a very positive development for all concerned. A victim’s lawyer could track the progress of the case, facilitate the flow of information, provide a single contact point for the victim, and significantly reduce time pressures currently imposed on police and the Crown.

The idea of independent legal representation for victims of crime is not new. In many of the European legal systems victims not only retain independent legal representation they actively participate in the trial, in effect as a co-prosecutor.⁶⁴ While this approach would clearly be attractive to

⁶¹ Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01(3) and Commentary.

⁶² R. v. Boucher, [1955] S.C.R. 16, 23-24 per Rand J.

⁶³ City of Toronto, “Review of the Investigation of Sexual Assaults, Toronto Police Service” by Jeffrey Griffiths (City Auditor) (Toronto Audit Services, October 1999), pp. 58-59.

⁶⁴ Several jurisdictions, notably France, allow the victim to attach their civil claim to the criminal prosecution and thus participate as an equal with legal representation and the right to cross-examine. Professor Young notes that in

many Canadians, several cautions have been offered. First, while the potential to participate appears to lead to greater satisfaction with the process, very few victims of sexual assault in Europe actually take advantage of the opportunity. They are content to leave carriage of the prosecution to public officials.⁶⁵ Also, the addition of a represented victim “...could serve to lengthen a trial process which already appears bloated and inefficient”.⁶⁶ Finally, like most people, current participants in the criminal justice system - judges, Crown and defence counsel, are, quite simply, comfortable with what they know. American scholar George Fletcher uses a baseball analogy:

“With the prosecution and the defence in control of the adversary system, it is not easy to crack their bipolar power. Introducing the victim as another prosecutor would seem like having two pitchers throwing strikes at the batter. It would disrupt a game that everyone is now comfortable with – everyone, that is, except the victims who are excluded.”⁶⁷

The provincial governments in Canada have developed a number of important programs to deal with violence against women and children. In Ontario, the Office of the Children’s Lawyer and the Domestic Violence Court Program are two well-known examples. In child protection proceedings, when children may be in need of protection for many reasons, including physical abuse and sexual assault, the court can request the appointment of an independent legal representative from the Office of the Children’s Lawyer. The Children’s Aid

Canada the constitutional division between the federal jurisdiction over criminal law and the provincial jurisdiction over civil law would not readily permit what he describes as a “parasitic” civil claim onto an existing criminal prosecution. In Germany, the “nebenklage” procedure allows victims of serious violent crime to participate at the trial with a state-funded lawyer. See Young, *supra*, note 47, p. 37. For a brief summary of some of the legislation and programs operating in the United States, Europe, Australia and New Zealand see Barrett, J., “Expanding Victims’ Rights in the Charter Era and Beyond” in The Charter and Criminal Justice, Twenty-Five Years Later (LexisNexis, 2008), p. 663 and Wilson, L., “Independent Legal Representation for Victims of Sexual Assault: a Model for Delivery of Legal Services” (2005), 23 *The Windsor Y.B. Access Just.* 249, at pp. 280 -283.

⁶⁵ Young, *supra*, note 47, p. 37.

⁶⁶ Young, *supra*, note 47, p. 37.

⁶⁷ Fletcher, G., With Justice for Some: Victims’ Rights in Criminal Trials (Reading, Mass.: Addison-Wesley, 1995), pp. 195 – 196.

Society (or Family and Children's Services) and the child's parents or other caregivers are likely to have their own lawyers to represent them in court. Counsel from the Office of the Children's Lawyer will represent the child's best interest in those proceedings.⁶⁸

Ontario's Domestic Violence Court Program facilitates the prosecution of domestic assault cases, which may involve instances of sexual abuse. In this program teams of specialized personnel, including police, Crown Attorneys, Victim/Witness Assistance Program staff and other community agencies work closely together to provide a more supportive environment for assaulted women.⁶⁹ There is no specific authorization, either in legislation or in Program practices and procedures, for the provision of independent legal counsel. However, victims may be eligible for Legal Aid and staff at Legal Aid offices can provide emergency authorization for a free two-hour appointment with a lawyer.⁷⁰ In addition, Family Law Information Centres are located in many Ontario courts and can provide a variety of information and services, including simple legal advice.⁷¹

While legal service delivery models for victims of child abuse and domestic assault can provide some guidance for all victims of sexual abuse, caution is advised. First, in instances of child abuse the Office of the Children's Lawyer does not get involved in criminal prosecutions. Second, unlike cases of domestic violence and many cases of child abuse, victims of sexual assault often do not display any signs of physical violence. Third, domestic violence prosecutions are

⁶⁸ See Office of the Children's Lawyer, Ministry of the Attorney General for Ontario online at www.attorneygeneral.jus.gov.on.ca/english/family/ocl.

⁶⁹ See Domestic Violence Court Program, Ministry for the Attorney General of Ontario, online at www.attorneygeneral.jus.gov.on.ca/english/about/vw/dvc.asp. See also Ministry of the Attorney General, Province of Ontario, Policing Standards Manual 2000, Domestic Violence Occurrences and Do You Know a Woman Who is Being Abused? A Legal Rights Handbook (Toronto: Community Legal Education Ontario, 2002).

⁷⁰ Community Legal Education Ontario, *ibid*, p. 45. The following statement appeared in a Government of Ontario press release titled "Fact Sheet – Assisting Victims of Domestic Violence", issued by the Ontario Ministry of the Attorney General on November 1, 2002: "Domestic violence is the highest priority of Legal Aid Ontario for family legal aid certificates. Women's eligibility for legal aid is not based on the spouse's income if they have left an abusive relationship. The hours of legal representation available to victims seeking restraining orders has been doubled."

⁷¹ Community Legal Education Ontario, *supra*, note 69, p. 46. Similar programs operate across the country. An excellent example is Calgary's Court Preparation and Restraining Order Program. See Calgary Legal Guidance, online at www.clg.ab.ca and Sheriff King Family Violence Prevention Centre, online at www.ywcaofcalgary.com.

unlikely to involve crucial issues which are often central to cases of sexual assault – identity of the accused, credibility of the complainant, the existence of consent and/or the mistaken belief in consent. Finally, the detailed statement given to police by victims of sexual assault plays a significantly more important role in subsequent criminal proceedings than a statement given in cases of domestic violence, perhaps less so in cases of child abuse depending upon the circumstances of the case and the time lag between event and complaint.

Apart from cases involving child abuse and domestic violence Canadian programs which provide independent legal counsel to victims of sexual assault are markedly underdeveloped. A number of Legal Assistance clinics provide legal representation for low-income clients in limited areas such as Criminal Injuries Compensation claims and applications for restraining orders and peace bonds.⁷² However, the Barbara Schlifer Commemorative Clinic in Toronto appears to be the only Canadian program which offers dedicated and comprehensive legal services to victims of sexual assault.⁷³ The clinic is named after Barbara Schlifer, a young woman who was murdered on April 11, 1980, the day of her call to the Bar of Ontario. As part of its program, which also involves working with victims of domestic violence, the Schlifer Clinic provides extensive information to clients about the criminal justice system, assists in applications for protection orders, represents clients on O'Connor applications, liaises with the Office of the Crown Attorney and other service providers, and provides court support and accompaniment. The Clinic is also available to provide legal representation in virtually all related areas such as Criminal Injuries Compensation and representation before various administrative tribunals, such as the health professions disciplinary tribunals. The Barbara Schlifer Commemorative Clinic provides an exceptional model for the future development of programs to provide legal representation for victims of sexual assault.

⁷² See Community Legal Education Ontario, Community Legal Clinics in Southwestern Ontario, online at www.cleo.on.ca/english/index. As noted earlier, supra, note 51, in Ontario, legal representation on O'Connor applications will be provided to persons who meet the financial requirements of the provincial Legal Aid Plan.

⁷³ Barbara Schlifer Commemorative Clinic, online at www.schliferclinic.com.

Legal Representation for Victims – Creating a New Model

Any program which seeks to provide victims of sexual assault access to legal services must recognize and respect the fundamental legal rights of the accused; recognize and respect the current Canadian adversarial model of criminal justice, in particular, that while victims have a limited right of participation, they are not a party to criminal proceedings, and; recognize and respect the experience of current service providers including medical personnel, police, prosecutors and counsellors. In essence, emerging delivery systems should augment, rather than interfere or collide with, existing services and judicial processes. Legal services should be provided to victims of sexual assault as part of an integrated and comprehensive array of services.

A broad spectrum of legal services (discussed below) could be provided through existing Legal Assistance Clinics, newly emerging specialized clinics such as the Barbara Schlifer Clinic in Toronto, the Legal Aid certificate program, or a combination of the three. The obvious drawback to the clinic system is the lack of effective access for many people who do not live in areas which provide such services. Lawyers offering to participate through provincial Legal Aid plans are almost certain to come from the practising defence bar. While lawyers understand that it is very easy to change hats as they change clients the perception of prospective clients is likely to be somewhat different. Some clients may have difficulty with the fact that their lawyer routinely defends persons accused of sexual assault. There is another potential problem with the use of Legal Aid Certificates and the clinical programs as well. As noted earlier,⁷⁴ a common complaint from victims of sexual assault stems from the fact that there is no central point of contact. The legal process can take several years and over that time victims see a number of different service personnel and often are required to initiate their own inquiries as to the progress of their case. A system which provided for a series of different lawyers for different legal issues would only add to the problem. There is also a concern that both clinics and the private

⁷⁴ See the text which accompanies note 63.

bar may not be able to provide or attract more experienced counsel.⁷⁵ Finally, in the case of Legal Aid, there would have to be a detailed discussion about the types of services which could be provided and the number of hours which could be billed to the program. Provincial governments will not fund a program where the nature of the services and the time required to provide those services is left to the particular needs and requests of the client. All of these difficulties can be overcome and effective programs can be developed, providing victims of sexual assault with access to legal services and representation by a lawyer – their lawyer.

Financial eligibility will be a major issue. The majority of our citizens, including victims of sexual assault are not eligible for general legal aid services in Canada.⁷⁶ As noted earlier, in providing representation on O'Connor applications, two provinces, British Columbia and Manitoba have not imposed any restrictions on access to counsel based on financial criteria established by their respective Legal Aid plans. It is important to remember that one of the functions of counsel to victims of sexual assault will be to advise clients of various legal options which in many, if not most cases, will be unknown to them – for example, insurance coverages, compensation claims, dealing with professional disciplinary bodies, civil actions, enforcement of restitution orders, and so on. Very, very few victims of sexual assault retain counsel, not so much because they make a conscious decision not to seek legal advice, but rather because they are completely unaware of the wide range of services which could be provided. Restricting access to counsel on the basis of income will effectively deny access to justice for most victims of sexual assault. Removing the financial means test would also allow us to research the question of whether or not access to legal services actually encourages more victims to come forward – something which is in the best

⁷⁵ Most senior criminal lawyers in Ontario do not participate in the Legal Aid Plan. See “LAO Staff Lawyers Part of a Plan”, Law Times, May 5, 2003, p. 1. The Honourable Sidney B. Linden, Chief Justice of the Ontario Court of Justice from 1990 to 1999 and, at the time, Chair of the Board of Directors, Legal Aid Ontario wrote (Globe and Mail, February 26, 2002, p. A21): “In the past five years....the number of lawyers accepting legal-aid cases has dropped by 23 per cent while our caseload has grown by more than 50 per cent....Committed lawyers are walking away from legal aid, despite their strong personal convictions about helping the poor. The reason is clear: low legal-aid rates make it impractical for lawyers to do the legal-aid work they once did.”

⁷⁶ See Canadian Bar Association's Position on Legal Aid (2001) online at www.cba.org/CBA/Advocacy/LegalAidAdvocacyResourcekit. See also Buckley, M., The Legal Aid Crisis: Time for Action (Canadian Bar Association, 2000) and Manitoba Association of Women and the Law, Women's Rights to Public Legal Representation in Canada and Manitoba (2002) online at www.nawl.ca.

interests of all Canadians. The unique circumstances of victims of sexual assault, in particular the markedly lower rate of reporting and extreme trauma of giving evidence, should support the exception and justify the distinction vis-à-vis other victims of crime.

When we are discussing the concept of independent legal representation for victims of sexual assault it is important to remember that many of these victims are children. Children who have experienced physical or sexual abuse are at a greater risk than their peers of developing emotional and behavioural problems, posttraumatic stress disorder symptoms, anxiety disorders, depression and substance abuse problems.⁷⁷ The stress of testifying in court, especially against someone who has been in a position of trust (such as a parent), can create further trauma for these children.⁷⁸ A legally trained advocate would certainly assist in protecting the best interests of the child.⁷⁹

When new or expanded programs are proposed, the first question always relates to funding. In Ontario, the most likely existing source of funding is the Victims Justice Fund. Section 737 of the Criminal Code, which came into force in 1989, created a victim surcharge provision which was designed to collect revenue for provincial victim assistance programs. The amount of the victim surcharge is

⁷⁷ Cohen, J., Berliner L. & Mannarino, A., "Psychosocial and Pharmacological Interventions for Child Crime Victims" (2003), 16 *Journal of Traumatic Stress* 175; Dubner, A., Motta, R., "Sexually and Physically Abused Foster Care Children and Posttraumatic Stress Disorder" (1999), 67 *Journal of Consulting and Clinical Psychology* 367; Wolfe, D., Crooks, C., See, V., McIntyre – Smith, A. & Jaffe, P., "The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique" (2003), 6 *Clinical Child and Family Psychology Review* 171; Quas, J., "Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court" (2005), 70 *Monographs of the Society for Research in Child Development* 1.

⁷⁸ Brannon, C., "The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation" (1994), 18 *Law and Psychology Review* 439.

⁷⁹ Acting on behalf of young clients can be especially challenging. When a client's ability to make decisions is impaired because of minority, mental disability, or some other reason, a lawyer is required, as far as reasonably possible, to maintain a normal lawyer-client relationship. See Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.02(6). While parental involvement should be encouraged in most cases, parents should be advised that counsel is required to seek instruction from the client and to respect the confidential nature of that relationship. See Law Society of Upper Canada, Rules of Professional Conduct, Rules 2.03(1) and 4.01(1). Many people are skeptical about counsel's ability to receive meaningful instruction from a young client. Studies suggest that young people twelve years of age or older have a general capacity to instruct counsel. See Maczko, F., "Some Problems With Acting for Children" (1979), 2 *Can. J. Fam. L.* 267 at pp. 272 – 274; Federal – Provincial – Territorial Task Force on Youth Justice, A Review of the Young Offenders Act and the Youth Justice System in Canada (Toronto: Canadian Department of Justice, 1996), at p. 535 and Bala, N., Youth Criminal Justice Law (Toronto: Irwin Law, 2003), at p. 341.

15% of any fine imposed on an offender, or if no fine is imposed, \$50 in the case of an offence punishable by summary conviction and \$100 in the case of an offence punishable by indictment.⁸⁰ In 1995, Ontario added a provincial victim fine surcharge which applies to all fines (except parking violations) under the Provincial Offences Act.⁸¹ The federal and provincial surcharges together constitute the Victims Justice Fund.⁸²

The surcharge program has generated considerable controversy. A recent federal Department of Justice study⁸³ found that although the fine is to be imposed unless an offender can establish undue hardship⁸⁴, judges across the country are routinely waiving imposition of the surcharge. Although the study focused on the situation in New Brunswick it was noted that in Ontario, in 2001-2002 the province took in only \$1.2 million out of a possible \$6.6 million, a difference between actual and potential revenues of \$5.4 million⁸⁵. The report cited an earlier study which suggested that the major reason for the low rate of imposition of the surcharge in Ontario was judicial concern that the revenue was not being used to provide services for crime victims. Rather, revenue was being deposited in the province's Consolidated Revenue Fund. Judges indicated that if the revenue were actually directed toward victim services, they would be more likely to impose the surcharge.⁸⁶ Justice McMurtry offers this comment:

“Many people have expressed great concern and confusion with the status of the Victims' Justice Fund. There is a widely held belief that the Ministry has allowed the Victims' Justice Fund to carry a significant surplus year-to-year. It is difficult to verify this belief because the

⁸⁰ Criminal Code, R.S.C. 1985, c. C-46, s. 737(2).

⁸¹ Provincial Offences Act, R.S.O. 1990, c. P33, s. 60.1(4).

⁸² Victims Bill of Rights, S.O. 1995, c. 6, s. 5.

⁸³ Department of Justice Canada, Federal Victim Surcharge in New Brunswick: An Operational Review (Ottawa, 2008) online at www.section15.gc.ca/eng/pi/rs/rep-rap/2007/rr07_vic2/toc-tdm. The lead author on the study was Professor Moira Law, Centre for Criminal Justice Studies, University of New Brunswick.

⁸⁴ Criminal Code, R.S.C. 1985, c. C-46, s. 737(5). Section 737(6) of the Code states that where there is a waiver “the court shall state its reasons in the record of the proceedings.” Professor Law, *ibid*, p. 1, states this did not occur in 99% of the cases reviewed.

⁸⁵ Department of Justice Canada, *supra*, note 83, p. 1.1.3.

⁸⁶ Department of Justice Canada, *supra*, note 83, p. 1.2. The report cited was Helping Victims Through Fine Surcharges by Lee Axon and Bob Hann (1994).

Ministry does not provide easily accessible public accounting of its spending from the Victims' Justice Fund...The information that the OVSS (Ontario Victims Services Secretariat) provided shows that the Victims' Justice fund has carried forward a surplus of over \$50 million each year since 2001. While the OVSS advised me that these surpluses were 'fully committed' each year, this does not address the issue that the expenditures out of the Fund each year were less than the Fund balance at the start of each year. On this subject the Ombudsman concluded: '[The Victims' Justice Fund] is posing as money expended on victims' rights, when in fact it sits, with its large surplus, as a little-used line item on the Government books.'...I am troubled by the fact that the Victims' Justice Fund has apparently sat in a surplus position for so long without any real accountability to the constituency it is meant to serve."⁸⁷

It would appear that a more determined enforcement of the fine surcharge program and use of the existing surplus would allow the immediate introduction of expanded clinical and certificate programs to provide legal representation to all victims of sexual abuse, not just those who can survive a financial means test.

If we do move to a system which provides legal services for victims of sexual assault one of the important questions will be the appropriate entry point for counsel. Counsel could be contacted immediately following the event and asked to attend either at the scene of the alleged offence or at the hospital. There are several arguments against this early involvement. First, the presence of counsel injects one more person into what is often a very confused and traumatic situation. Counsel could interfere with the work of medical personnel and disrupt the police investigation. Second, there is a legitimate concern that a meeting with counsel prior to an initial report to police will be misrepresented and provide a significant advantage to defence counsel on the issue of credibility, with no apparent corresponding benefit accruing to the complainant. Defence counsel

⁸⁷ The Honourable R. Roy McMurtry, Report on Financial Assistance for Victims of Violent Crime in Ontario (Toronto, 2008), pp. 61-62. One writer recently suggested that monies in the Victims' Justice Fund be used by victims to retain lawyers enabling them to sue offenders for bodily harm and emotional distress. The author also suggested that uncollectable judgments could be paid out of the Fund. See Shanoff, A., "Suing Offenders" Law Times, March 31, 2008, p. 6.

could be expected to assert that victims met with counsel to “try and get their stories straight”. An early meeting could also prompt defence counsel to suggest that the complainant was getting everything in order in preparation for a civil suit. Finally, attendance at the scene of the alleged offence could result in counsel being called as a witness. This would be counterproductive in that a lawyer should not act as counsel and be a witness in the same proceeding.⁸⁸

Ideally, the first meeting between counsel and complainant would take place during the interval between the initial interview with the police and the taking of a detailed statement.⁸⁹ Counsel could explain the significance of the detailed statement to the client and the need to be truthful, clear and comprehensive. Counsel would not attend the interview – their presence could be disruptive and is really unnecessary.

Similarly, there is an opportunity for legal counsel to work with the Crown Attorney without interfering with the work of that office or the rights of the accused. Although Crown counsel across the country do generally consult with victims of sexual assault on issues such as plea bargains and decisions not to prosecute,⁹⁰ victims of crime do not have any enforceable right to be consulted about, or even informed of, these decisions. The failure of the Crown to consult with a victim of the offence does not violate the victim’s Charter rights and a victim’s dissatisfaction with a plea arrangement or a decision not to prosecute will not affect the validity of the proceedings. The Crown has complete discretion in these matters.⁹¹

It is often very difficult for Crown counsel to explain, to the satisfaction of the victim, a decision to negotiate a plea or not to proceed with a prosecution. Victims of sexual assault are not likely to be sympathetic to the legal hurdles

⁸⁸ MacKenzie, G., Lawyers and Ethics: Professional Responsibility and Discipline, 2nd Edition, (Toronto : Carswell, 2000) at 4-50. See Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.02.

⁸⁹ It has been suggested that the common police practice of taking lengthy and detailed statements immediately after the initial interview from a woman who had been sexually assaulted be discontinued. See City of Toronto, Review of the Investigation of Sexual Assaults, Toronto Police Service (Toronto Audit Services, 1999), p. 51.

⁹⁰ See Law Commission of Canada, Restoring Dignity: Responding to Child Abuse in Canadian Institutions (Ottawa: Minister of Public Works and Government Services, 2000), p. 23.

⁹¹ Barrett, *supra*, note 18, p. 3-55. See also Vanscoy v. Ontario [1999]O.J.N. 1661 (Ont. Sup. Ct. Jus.) per Day J. at para.38.

faced by prosecutors. Legal counsel, acting for the victim, can serve an important role in this process, both in discussing these issues with the Crown and providing an explanation to the victim.⁹²

There are other instances where counsel could assist the Crown. For example, in bail applications, one of the grounds on which the Crown may seek detention of the accused is where the detention is necessary for the protection or safety of the public, including the victim.⁹³ Victims of sexual assault may be more comfortable disclosing intimate details to their own lawyer as opposed to the Crown Attorney. Accordingly, there may be situations where counsel is privy to information initially unknown to the Crown. In those circumstances it would be appropriate for counsel to forward that information to the Crown Attorney. Similarly, many offenders are in a position of trust in relation to their victim. Section 718.2(a)(iii) of the Criminal Code provides that where a court imposes a sentence they shall take into consideration evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.⁹⁴ Again, counsel may be able to bring important and relevant information to the attention of the Crown Attorney.

What follows is a list and discussion of several specific legal services which could be provided by a lawyer acting on behalf of a victim of sexual assault:

1. Legal Advice and Information

The provision of general and case-specific information may well be the most important service which could be provided by a lawyer acting on behalf of a victim of sexual assault. Currently, most of the information victims receive about the criminal justice process comes from the Crown Attorney and service providers

⁹² Where there was a fundamental disagreement on the question of whether or not a prosecution should proceed it would be possible for the complainant to initiate a private prosecution. The complainant's lawyer could assume the role of prosecutor. However, the Crown does have the power to intervene and take over a private prosecution or stay the proceedings. See the Criminal Code, R.S.C. 1985, c. C-46, ss. 2, 579(1), 785 and Crown Attorneys Act, R.S.O. 1990, c. C.49, s. 11(d). See also Law Commission of Canada, *supra*, note 90, p. 116; Quigley, T., Procedure in Canadian Criminal Law, (Scarborough: Carswell 1997), pp. 341, 346; Atrens, J. et al., Criminal Procedure: Canadian Law and Practice (Toronto: Butterworths, 2002) vol. 1 at V-13 to V-26.

⁹³ Criminal Code, R.S.C. 1985, c. C-46, s. 515(10)(b).

⁹⁴ Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(a)(iii).

such as Victim/Witness Assistance Programs and sexual assault crisis centres. Crown Attorneys have a very limited amount of time for pre-trial interviews⁹⁵ and service providers are generally careful to avoid offering legal advice or opinion. A primary function of legal counsel will be to explain the various and often mysterious processes and procedures involved in a criminal prosecution for sexual assault. They will provide an explanation of the role of the various parties, the legal protections accorded an accused and the limited role of the victim in the process. A discussion of the legal consequences of a false allegation with one's own lawyer will lack the accusatory nature of an interview with the police or the Crown Attorney and may prevent the tendency of some people caught in a falsehood to compound the problem with further misrepresentations and untruths.⁹⁶ Counsel can also try to explain a number of concepts which have been the subject of much comment and criticism by victims' groups – the burden of proof, the right to remain silent, the concept of consent, access to records and sentencing parameters. Victims want to know why an accused is not required to take the stand, why the Crown is not able to ask certain questions and why a sentence of six months is considered appropriate. While these discussions are unlikely to affect the frustration and anger experienced by many victims they will provide a better basis for the start of the healing process:

“[W]hile a conviction may provide closure, an acquittal may make closure more difficult to achieve. An acquittal means only that, in law, the guilt of the accused was not established beyond a reasonable doubt. This legal conclusion may not reflect reality and many victims perceive an acquittal as a rejection of their story by the legal system. Survivors who expect the criminal justice system to uncover all the facts

⁹⁵ Canadian Panel on Violence Against Women, *supra*, note 11, p. 219.

⁹⁶ In Beattie et al., *supra*, note 6, at p. 9, the authors reported: “Approximately one in six sexual offences reported to the police in 2002 were declared ‘unfounded’ by the authorities meaning that after an initial investigation took place, police concluded that no violation of the law took place nor was attempted....Other types of violent crime were unfounded by police in 7% of reported incidents between 1991 and 2002.” The authors do not suggest that these statistics demonstrate a higher rate of false reports for sexual assault than for other offences.

and to validate their testimony will be disappointed unless they have a solid grasp of its nature and purposes."⁹⁷

With the introduction of legal representation for victims it is inevitable there will be allegations that counsel has crossed the line in witness preparation. Gavin MacKenzie, a leading authority on legal ethics, notes that "...the great grey area in which the fine and fuzzy distinction between jealous advocacy and the improper tailoring of a witness's evidence tests the honour of even the most noble advocate."⁹⁸The Rules of Professional Conduct of the Law Society of Upper Canada require counsel to "represent the client resolutely and honourably within the limits of the law."⁹⁹The Rules also recognize that "the lawyer's function as advocate is openly and necessarily partisan."¹⁰⁰However, the Rules also provide that a lawyer must discharge this duty of resolute partisanship "with candour".¹⁰¹The lawyer must not "knowingly attempt to deceive a tribunal or influence the course of justice by ...suppressing what ought to be disclosed."¹⁰²In his analysis of the attempt to find the right balance Gavin MacKenzie offers a number of insights which are directly relevant to the interaction between counsel and the victim of a sexual assault:

"In interviewing witnesses, the lawyer is not required to play a merely passive role, or to be a mere scribe. The rule of thumb that a lawyer may advise a witness how to testify, but must refrain from advising the witness what to say, over-simplifies the problem, but at least recognizes that the lawyer may honourably play an active role in preparing witnesses to give evidence...It is also proper for lawyers to direct the witnesses' attention to relevant issues, to probe in an attempt to refresh their memories by suggesting and referring to known facts or other evidence, even if an effect of so doing is to prompt answers that witnesses might not have volunteered without such prodding. Lawyers

⁹⁷ Law Commission of Canada, *supra*, note 90, p. 126.

⁹⁸ MacKenzie, *supra*, note 88, p. 4-24.2. See also Levy, E., *Examination of Witnesses in Criminal Cases* (Toronto: Carswell, 1999), at pp. 15-24.

⁹⁹ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01(1).

¹⁰⁰ *Ibid*, Rule 4.01(1), Commentary.

¹⁰¹ *Ibid*, Rule 4.10 (1).

¹⁰² *Ibid*, Rule 4.01(2)(e).

may prepare witnesses to meet a hostile cross-examination...In cases in which techniques such as these do not have the effect of inducing witnesses to misrepresent material facts, either explicitly through actual testimony or implicitly through demeanour, both of the lawyer's duties – resolute partisanship and candour to the court – are discharged. The effective preparation of witnesses serves not only the client's interest, but also the effective and efficient administration of justice...To summarize: Lawyers may provide legal advice to their client for the purpose of directing the client's mind to facts about which the client may testify...Lawyers must not coach or assist witnesses so as to distort the evidence which they would give if unaided."¹⁰³

It should be noted that in order to avoid any suggestion of impropriety, legal counsel at the Barbara Schlifer Commemorative Clinic in Toronto will not discuss the evidence of the client.¹⁰⁴

The need to provide information does not end with the completion of the trial. Victims of sexual assault want information with regard to appeals, parole hearings, transfers, escapes, scheduled release dates, conditions on release and the offender's destination upon release. There are a number of different programs run by the provinces and the federal government which provide this information but in most cases the obligation to initiate the search rests with the victim.¹⁰⁵ This is a role which could be suitably handled by a lawyer acting on behalf of a victim. Counsel could undertake to track the offender and forward any information about actual or forthcoming change of status to the victim.

¹⁰³ MacKenzie, supra, note 88, pp. 4-24.3, 4-25 and 4.29 – 4.30.

¹⁰⁴ Supra, note 73.

¹⁰⁵ See Victims Services, Ministry of the Attorney General, online at www.attorneygeneral.jus.gov.on.ca and Office for Victims of Crime, Report on Victim Services in Ontario, A Voice for Victims (Toronto, 2000), pp. 54-56. Under the federal Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 26 victims can receive information about offenders serving two years or more, including when the offender's sentence began, dates for any review considering conditional release, location of the offender, release dates, conditions imposed on release, and the offender's destination upon release. However, this type of information is not provided automatically and requires a written request to obtain certain information or to receive information regularly. Also, some information will only be provided after the National Parole Board or the Correctional Service of Canada balances the victim's interest against the offender's right to privacy. See Department of Justice Canada, Policy Centre for Victim Issues, "After Sentencing", online at www.canada.justice.gc.ca and Canadian Resource Centre for Victims of Crime, A Victim's Guide to the Canadian Justice System, Questions and Answers (Ottawa, 2002).

2. Threats From the Accused

Where threats of personal injury from an accused or his associates occur counsel can take an active role by either referring matters to the police or seeking sureties to keep the peace. Where the complainant has been threatened a number of possible charges including obstructing justice, intimidation, intimidation of a justice system participant, uttering threats, making harassing phone calls and criminal harassment or stalking could result.¹⁰⁶ Section 810 of the Criminal Code provides a statutory procedure to obtain an order which requires a person to keep the peace and be of good behaviour, notwithstanding the absence of a formal criminal prosecution. The information will be laid before a justice “by or on behalf of” a person who fears on reasonable grounds that another person will cause injury to her.¹⁰⁷ While the Crown Attorney will normally lay the information there could be circumstances where counsel for the victim would initiate the process, for example, in a situation where the Crown did not feel there was a sufficient basis for an order.

3. Threats From Counsel for the Accused

Occasionally, defence counsel has responded to charges against their client with threats of criminal prosecution for an offence such as mischief contending that the complainant has made a false allegation.¹⁰⁸ Defence counsel have also been known to threaten a civil action such as defamation alleging that the complainant has damaged the reputation of their client. There could also be a civil action for malicious prosecution. These threats are often meant to intimidate and convince a victim to abandon her complaint.¹⁰⁹ Legal counsel for a victim of sexual assault could respond to the questions and concerns of the client and in many

¹⁰⁶ See Criminal Code, R.S.C. 1985, c. C-46, ss. 139, 423 (1), 423.1910, 264.1(10), 372(3) and 264(1).

¹⁰⁷ Criminal Code, R.S.C. 1985, c. C-46, s. 810. See Canadian Resource Centre for Victims of Crime, supra, note 105, p. 7. For a comment on both peace bonds and restraining orders, see Community Legal Education Ontario, Do You Know a Woman Who is Being Abused? A Legal Rights Handbook (Toronto, 2002), pp. 34-36. For a detailed discussion of the process of securing a peace bond see Younie, S., “Overview of Crown Counsel’s initial involvement in Sexual Abuse Cases” in Sexual Assault/Abuse: Cross Disciplinary Approach (Vancouver: The Continuing Legal Education Society of British Columbia, 2000) at p. 1.1.12.

¹⁰⁸ Criminal Code, R.S.C. 1985, c. C-46, s. 140(1).

¹⁰⁹ DesRosiers, N. and Langevin, L., Representing Victims of Sexual and Spousal Abuse (Toronto: Irwin Law, 2002), p. 317. See also Metropolitan Action Committee on Violence Against Women and Children, Sexual Assault: A Guide to the Criminal System: Guidebook Two (Toronto, 2002), p. 6.

cases discourage such tactics. In extreme cases such threats could constitute extortion, a criminal offence.¹¹⁰ The Rules of Professional Conduct of the Law Society of Upper Canada also prohibit threats of criminal proceedings and advise that a lawyer shall not dissuade a witness from giving evidence or needlessly abuse, hector or harass a witness.¹¹¹ Inappropriate conduct could be reported to the Law Society and disciplinary hearings could be initiated.¹¹²

4. Publication Bans

The Criminal Code contains a number of provisions which provide for publication bans. Of particular interest to victims of sexual assault are the provisions which ban information on the sexual activity and identity of the complainant.¹¹³ There are also provisions in the Code which allow the judge to exclude members of the public.¹¹⁴ Although the power to ban publication or close the courtroom is a discretionary power granted the judge, in the case of an order prohibiting disclosure of the identity of the complainant, the order is mandatory on an application made by the prosecutor or the complainant.¹¹⁵ While the Crown will undoubtedly continue to request these orders in all cases it is important to note that the legislation specifically provides an opportunity to hear from the complainant, presumably through counsel.

5. Record Disclosure

Victims of sexual assault “may” be represented by legal counsel where an accused seeks disclosure of personal records. The Code contains a list of the type of records which may be sought. They include medical, psychiatric, therapeutic and counselling records, as well as personal journals and diaries.¹¹⁶ The legislation also identifies the various factors which the Court should consider in deciding

¹¹⁰ Criminal Code, R.S.C. 1985, c. c-46, s. 346(1).

¹¹¹ Law Society of Upper Canada, Rules of Professional Conduct, Rules 2.02(4) and 4.01(2)(l)(k).

¹¹² *Ibid*, Rule 6.

¹¹³ Criminal Code, R.S.C. 1985, c. C-46, ss. 276.3(1), 486(3). Section 278.9(10) of the Code bans publication of any material in relation to an application for record disclosure.

¹¹⁴ Criminal Code, R.S.C. 1985, c. C-46, s. 486(1). Section 537(1)(h) of the Code allows the court to exclude members of the public during a preliminary inquiry.

¹¹⁵ Criminal Code, R.S.C. 1985, c. C-46, s. 486(4). For a discussion of publication bans to protect the complainant see Fuerst, M., Defending Sexual Offence Cases, 2nd. Edition (Toronto: Carswell, 2000), p. 4.2.

¹¹⁶ Criminal Code, R.S.C. 1985, c. C-46, s. 278.1.

whether or not to review the records and ultimately whether or not to disclose the records to the accused. Two of the important considerations are “the accused’s right to make full answer and defence and ... the right of privacy and equality of the complainant.”¹¹⁷ The legislation also requires the Court to consider, among other things, “the potential prejudice to the personal dignity” of the complainant and “society’s interest in encouraging the reporting of sexual offences.”¹¹⁸ As noted above, many provinces provide legal representation on disclosure applications if, and only if, the complainant qualifies for Legal Aid.¹¹⁹ If we are truly serious about encouraging victims of sexual assault to come forward, representation should be available to all victims, regardless of income.

6. Victim Impact Statements

In 1988, the Criminal Code was amended to allow for the introduction of written victim impact statements at the trial of an accused.¹²⁰ In 1999, the legislation was further amended to permit a victim to deliver the statement orally in open court.¹²¹ Although we do not have any comprehensive studies, available information suggests that victims of crime, including victims of sexual assault, infrequently avail themselves of the opportunity to provide a victim impact statement.¹²²

Victim impact statements provide victims of sexual assault an opportunity to participate in the sentencing process. The statements are a means for the victim to describe not just the actions of the offender but also the physical, financial and psychological impacts of those actions. Although the judge is directed by the Criminal Code to consider victim impact statements when

¹¹⁷ Criminal Code, R.S.C. 1985, c. C-46, s. 278.7(2).

¹¹⁸ Criminal Code, R.S.C. 1985, c. C-46, ss. 278.5(2)(e) and (f).

¹¹⁹ See the text which accompanies notes 49-51.

¹²⁰ Criminal Code, R.S.C. 1985, c. C-46, s. 722. Victim impact statements may also be submitted in Youth Court. See Youth Criminal Justice Act, S.C. 2002, c. 1, s. 50.

¹²¹ Criminal Code, R.S.C. 1985, c. C-46, s. 722(2.1).

¹²² See Young, *supra*, note 17, pp. 24-25.

sentencing offenders, the judge alone decides what weight will be given to the statement in each individual case.¹²³

Since their introduction there has been an ongoing debate as to the value and actual effect of victim impact statements.¹²⁴ While far from unanimous, many observers subscribe to the conclusions offered by Professor Alan Young: first, neither the empirical evidence nor judicial decisions conclusively show that victim impact statements result in longer sentences; and, second, for some individuals participation is inherently valuable because of the due process value of fostering dignity through participation in a decision-making process that has direct relevance to one's welfare interests.¹²⁵

A lawyer can play a very important role in assisting a client who wishes to make a victim impact statement. Again, the primary role will be that of providing information. Counsel can explain both the process and appropriate content for a victim impact statement. For example, the client should be reminded that while the victim impact statement provides a voice for victims in the criminal process, a criminal trial, including the sentencing phase, is not a tripartite proceeding. It is the public interest, not a private interest, which is to be served in sentencing. Counsel can explain that the civil justice system, and not the criminal justice system, is available to address actionable wrongs between individual citizens.¹²⁶ Counsel can also explain that the victim impact statement should not be structured so as to foster or encourage any element of personal revenge. Rather, victim impact statements can only contain relevant information about harm and loss. They should not include criticisms of the offender, statements about the facts of the case or recommendations as to the severity of punishment.¹²⁷ Thus, victims who wish to make a victim impact statement must be

¹²³ Law Commission of Canada, *supra*, note 90, p. 121. The authors note that it is only as a result of amendments to the Criminal Code, S.C. 1995, c. 22, s. 6, that judges are required to take these statements into account.

¹²⁴ See Skurka, S., "Two Scales of Justice: The Victim as Adversary" (1993), 35 *Crim. L.Q.* 334 and Young, A., "Two Scales of Justice: a Reply" (1993), 35 *Crim. L.Q.* 355. See also Roberts, J., "Time to Take another Look at Victim Impact Statements" (2001), 16 *Justice Report*, No. 3, p. 9 and Manson, A., "Victims and Victim Impact Statements" in The Law of Sentencing (Toronto: Irwin Law, 2001), pp. 194-198.

¹²⁵ Young, *ibid*, pp. 371-373.

¹²⁶ R. v. Gabriel (1999), 26 C.R. (5th) 364, 373-374 (Ont. S.C.) per Hill J..

¹²⁷ R. v. Gabriel (1999), 26 C.R. (5th) 364, 375-377 (Ont. S.C.) per Hill J..

advised that while they can submit the statement in writing or orally there are limits on the scope and manner of the presentation.¹²⁸ This will be a difficult and complex conversation and is best left to be handled by one's own lawyer rather than the Crown Attorney or staff from the Victim/Witness Program.

A lawyer can provide other important information to a victim as they prepare to write their statement. Victims should know that the accused and his lawyer will see the victim impact statement and that, although rarely done, defence counsel has the right to question victims about their statement. Victims should also know that once a victim impact statement has been entered into court it becomes public record and the media will have access to it. Finally, victims should be aware that if their circumstances change as a result of the offence their victim impact statement could be updated. This is very important because the victim impact statement will be placed in the offender's prison file and the National Parole Board and Corrections Canada may refer to the statement when considering the offender for temporary passes or parole.¹²⁹

7. Restitution Orders

Section 738 of the Criminal Code provides that where an offender is convicted of an offence the court may order the offender to make restitution for the cost of property damage and in the case of bodily harm, ascertainable pecuniary damages including loss of income.¹³⁰ Unlike a fine, restitution is paid to the victim rather than the State.

Canadian studies have shown that approximately one third of restitution orders are not paid by the offender.¹³¹ Section 741 of the Criminal Code provides that where an offender has been ordered to pay restitution to a victim and has

¹²⁸ Professor Manson states that in exceptional circumstances the Court could refuse to allow an oral presentation. See Manson, A., *supra*, note 124, p. 197.

¹²⁹ Canadian Resource Centre for Victims of Crime, *supra*, note 35, pp. 39-40.

¹³⁰ Criminal Code, R.S.C. 1985, c. C-46, s. 738(1). Professor Manson notes that the language of the legislation precludes restitution for pain and suffering. Recovery of these damages would require a civil suit. See Manson, *supra*, note 124, pp. 251-252. Section 741.2 of the Code provides that a restitution order does not limit the victim's right to sue for civil damages.

¹³¹ Burns, P., Criminal Injuries Compensation, 2nd Edition (Toronto: Butterworths, 1991), pp. 26-27. See also Canadian Resource Centre for Victims of Crime, *supra*, note 35, p. 18.

not done so, the victim can enter as a judgment the amount ordered to be paid in a civil court. That judgment is then enforceable against the offender.¹³² A victim's lawyer could undertake the legal work involved in the enforcement procedure.

Consideration of restitution as a sentencing option is based on the Court's own initiative or on application from the Crown.¹³³ Although the absence of restitution has been identified as a contributor to victim dissatisfaction its use has been extremely limited, and in the view of some, this option has been under utilized.¹³⁴ The presence of independent counsel acting on behalf of the victim may alter that pattern.

8. Parole Hearings

Since 1992 victims have been allowed to attend National Parole Board hearings as observers. As of July 1, 2001 they have also been allowed to read their victim impact statements at those hearings. In order to attend a hearing and/or read a statement an application must be forwarded to the Board.¹³⁵ Victims can also attend and participate at provincial parole board hearings.¹³⁶ A lawyer would be able to assist in the application to appear, explain the process, assist in any amendments or updates to the victim impact statement and attend the hearing with the victim.

9. Criminal Injuries Compensation

Although there is general support for the concept of criminal injuries compensation there are constant complaints about funding levels and the

¹³² Criminal Code, R.S.C. 1985, c. c-46, s. 741(1).

¹³³ Criminal Code, R.S.C. 1985, c. C-46, s. 738(1).

¹³⁴ See Young, *supra*, note 17, p. 23; Burns, *supra*, note 131, pp. 27-28; Law Commission of Canada, *supra*, note 90, p. 132; and Roach, K., Due Process and Victims' Rights, *The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), pp. 296-298.

¹³⁵ Canadian Resource Center for Victims of Crime, *supra*, note 35, pp. 50-51; Department of Justice Canada, Policy Centre for Victim Issues, *supra*, note 105. There have been both positive and negative comments about victim participation in parole hearings. See Roberts, J., "Should Victims Have a Say in Parole Hearings?" (2001), 16 *Jus. R.*, No. 2, pp. 10-11 and Gaudreault, A., "Oral Statements by Victims at Parole Hearings: Restoring the Balance?" (2001) 16 *Jus. R.*, No. 3, p. 8.

¹³⁶ See Victim Empowerment Act, 2002, S.O. 2002, c.12; Ministry of Correctional Services Act, R.R.O. 1990, Reg. 778, s. 62, amended by O.Reg. 254/03. See also Directive, Ministry of Public Safety and Security, Province of Ontario, Victims at Parole Hearings (Toronto, April 22, 2003).

cumbersome nature of the administrative process.¹³⁷ Unlike an order for restitution under the Criminal Code, compensation boards across the country can, and do make awards for pain and suffering.¹³⁸ We have also seen some recent increases to the award caps – for example, in Ontario the maximum award in the case of an injury compensated by periodic payments has risen from \$250,000 to \$365,000.¹³⁹ Unlike some other legal regimes, such as no-fault automobile and worker’s compensation legislation, recovery under the criminal injuries compensation scheme does not preclude a subsequent civil suit for damages. However, in some provinces, such as Ontario, the Compensation Board is entitled to be reimbursed for the amount of compensation awarded where the victim subsequently recovers damages from the offender in a civil suit.¹⁴⁰

Very few victims of crime bother trying to navigate their way through the compensation process.¹⁴¹ Some studies indicate that less than 15% of victims have even been informed of their right to seek compensation.¹⁴² It is important to note that of the victims who do apply the largest percentage by a considerable margin are victims of sexual assault.¹⁴³ The addition of legal counsel acting on behalf of victims can be expected to have some impact on current low utilization rates.¹⁴⁴ Lawyers will make victims of sexual assault aware of the process, they will deal with the paperwork and represent the victim before the Board.

¹³⁷ See The Honourable R. Roy McMurtry, *supra*, note 57, Burns, *supra*, note 131, pp. 367-368; Roach, *supra*, note 134, p.p. 300-301; British Columbia Law Institute, Civil Remedies for Sexual Assault (Report No. 14), (Vancouver, 2001), p. 95; Law Commission of Canada, *supra*, note 90, pp. 193-206.

¹³⁸ Compensation for Victims of Crime Act, S.O. 1990, c. C.24, s. 7(1)(d).

¹³⁹ See S.O. 2000, c. 26, Sch. A, s. 4(5).

¹⁴⁰ See S.O. 2000, c. 26, Sch. A, s. 4(6). Prior to this amendment the Board maintained a subrogated action against the offender.

¹⁴¹ See Roach, *supra*, note 134, p. 300 and Young, *supra*, note 17, p. 33.

¹⁴² Young, *supra*, note 17, p. 33. The Ontario Ombudsman stated that the Board in that province “..creates hyper-technical hurdles that discourage applicants and stockpiles the claims made by those who are uncommonly persistent. This is a shocking state of affairs. The Criminal Injuries Compensation Board is not an institution to be celebrated. It is an embarrassment.” Marin, A., Adding Insult to Injury, Investigation Into the Treatment of Victims by the Criminal Injuries Compensation Board (Toronto, 2007), para. 13.

¹⁴³ Dobson, I. Criminal Injuries Compensation Board online at www.cbupub.com/pao/issue7/board. Using statistics from 1995 the author found that 42.2% of the applications to the Board that year involved the offence of sexual assault. The next highest rates of applications were for assault causing bodily harm at 16.6% and common assault at 16%.

¹⁴⁴ In his recent report, *supra*, note 57, pp. 51-53, Justice McMurtry recommended the appointment of a Victim Advocate. The Victim Advocate would advocate for program and policy reforms but would not act for individual victims.

10. Related Proceedings

In addition to the criminal trial process itself there may be a number of related legal proceedings. Civil suits, disciplinary hearings, and workplace issues are examples.

Lawyers dealing with the criminal aspects of the client's case could, quite appropriately, provide general information about the option of a civil action against the offender or the possibility of an action against a third party or an institution responsible for the supervision of the offender. Several studies have found that victims are not currently receiving such information.¹⁴⁵ Counsel could also provide a referral to an experienced civil litigator. Because clients will almost certainly be concerned about the cost of litigation, counsel could discuss the issue of fees generally including the availability of contingency fee arrangements.¹⁴⁶

In some cases the offender will be a member of a professional organization which has the power to discipline, fine or force resignation for violation of the profession's code of professional conduct. In Ontario, the best known examples are the College of Physicians and Surgeons for doctors, the Ontario College of Teachers for teachers, and the Law Society of Upper Canada for lawyers. That list is far from exhaustive. In a study sponsored by the Metro Action Committee on Violence against Women and Children, organizations representing sixteen different professions were studied with regard to this issue. The list included chiropractors, dentists, nurses, pharmacists, psychologists, police and social workers.¹⁴⁷ Although the lawyer involved in the criminal matter would be able to offer some general observations about participation by victims in disciplinary hearings, a referral would be appropriate.

There are also a number of potential issues related to the workplace. A sexual assault committed at work may amount to discrimination on the basis of

¹⁴⁵ See British Columbia Law Institute, *supra*, note 137, p. 76 and Law Commission of Canada, *supra*, note 90, p. 176.

¹⁴⁶ See Cross, P., Ontario Adopts Contingency Fees: An Option for Women Suing Abusers in Civil Court (Ontario Women's Justice Network) online at www.owjn.org. See The Solicitors Act, S.O. 1999, c. S15, s. 28.

¹⁴⁷ Symons, M. and Marshall, P., Breach of Trust in Sexual Assault: Statement of the Problem, Part Two, Review of Social Issues (METRAC, 1992), p. 14.

sex in violation of the Ontario Human Rights Code.¹⁴⁸ Similarly, an employer has an obligation under the Occupational Health and Safety Act to provide a safe workplace for employees.¹⁴⁹ For a variety of reasons, including physical and emotional trauma, some victims of sexual assault encounter difficulty returning to work. This would certainly be the case if an accused, found not guilty, was a co-worker of the complainant. A lawyer could play an important role in discussions with employers and union officials in trying to facilitate reasonable accommodation for victims of sexual assault as they return to work. The victim's lawyer may have some insight into these matters but again, because of the complex nature of the legal issues involved, it would be wise to refer the client to someone with expertise in human rights and/or employment law.

The preceding list of functions which could be performed by a lawyer acting on behalf of a victim of sexual assault is not suggested to be exhaustive – a variety of additional roles will quickly emerge if and when independent advocacy programs develop. On the other hand, this discussion should demonstrate a clear need for such services.

Conclusion

Canadians have become increasingly cynical about the ability of the criminal justice system to deal effectively and appropriately with crime and criminals. The treatment of victims has also sparked outrage. A recent example is provided by a case from Toronto where a young, pregnant woman spent a week in jail, not because she committed a crime, but because she refused to testify against her boyfriend in a domestic abuse case.¹⁵⁰ For victims of sexual assault, their family and friends, distain and suspicions about the criminal justice system

¹⁴⁸ Human Rights Code, R.S.O. 1990, c. H.19, ss. 7(2). While the legislation does not refer specifically to sexual assault, sexual harassment is prohibited. The Ontario Human Rights Commission has defined sexual harassment as including sexual assault. See Porjes, M., "Sexual Harassment in the Workplace" in The Ontario Human Rights Code and Its Impact on the Workplace (Toronto: Insight Press, 1999), p. 19.

¹⁴⁹ Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 25(2)(h).

¹⁵⁰ "The plight of a pregnant teenager behind bars for refusing to testify against her boyfriend in a domestic-abuse case will set back the women's movement and deter other victims from seeking help, advocates say...Ms. Mowett has vowed to never again call police for help..Ms. Mowett also said yesterday that she does not understand how she ended up in jail. 'It's just so unfair, man, I never did anything,' she told The Canadian Press." "Pregnant teen jailed after refusing to testify on abuse", Globe and Mail, Thursday, April 10, 2008.

will almost certainly be reinforced by the excruciating experience of the trial process. Will access to legal representation help dispel these fears and encourage more victims of sexual assault to report the crime? Will more effective access to information and the provision of comprehensive legal services create a more positive experience for those victims who do choose to come forward with a complaint? The development of new and innovative programs will allow us to move toward those goals and begin to answer these important questions.

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