

## *Submissions to the UN SRVAW thematic report on rape as a violation and gender-based violence against women grave and systematic human rights*

5/20/2020

The Barbra Schlifer Commemorative Clinic (the Clinic) is a multi-disciplinary, front-line service provider to women who have experienced intimate partner violence, family violence, and experience structural violence. It provides legal representation, professional counselling, and language interpretation services to women from a broad cross-section of racial, ethno-cultural, and socio-economic backgrounds. As such, the Clinic has a deep and integrated understanding of the intersecting and multiple inequalities that exist in women's lives and the impact that gender-based and sexual offences have on women. The Clinic also has a deep understanding of the barriers to accessing the justice system faced by women who have experienced sexual violence in the migrant context, and the financial, emotional, psychological, and other burdens that participating in legal proceedings imposes on individual survivors.

Since 1985, the Clinic has provided services to more than 80,000 women in the greater Toronto area. In 2018-2019, the Clinic's legal department assisted 3,300 clients, the counselling department assisted 2,697 clients, and assisted 2,556 women with language interpretation sessions. The Clinic has two special projects focused on sexual abuse: Independent Legal Advice for Sexual Assault Survivors and Project on Sexual Harassment in workplace for precarious status women.

The Clinic, and organizations like the Clinic, focus on access to justice for sexual violence survivors who have an ongoing struggle for sustainable funding and resources in Canada. While we do raise charitable donations to support our work, we primarily rely on public funding to provide our services free of charge.

### **Definition and scope of criminal law provisions**

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing fully translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.
  - There is no rape classification in Canada. The law of sexual assault is used analogously to the crime of rape.
  - Sexual assault in Canada as defined in the Canadian Criminal Code is fundamentally different than equivalent offences as defined in many other developed nations. The factors that determine what level of sexual assault charge (or the equivalent in other nations) is given also differ, as per Martin's Annual Criminal Code 2010.

- Greenspan and Rosenberg 2009 states in the annotations for s. 271 (p.572) that sexual assault is an assault, within any one of the definitions of that concept in s. 265(1), which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated.
- Sexual assault level 1 (s. 271): An assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. Level 1 involves minor physical injuries to the victim.
- Sexual assault level 2 (s. 272): Sexual assault with a weapon, threats, or causing bodily harm.
- Aggravated sexual assault level 3 (s. 273): Sexual assault that results in wounding, maiming, disfiguring, or endangering the life of the victim.
- By the definitions in the Canadian Criminal Code, what would be defined as rape in other countries (and what used to be defined as rape in Canada) could fall under the *Criminal Code's* sexual assault level 1, sexual assault level 2, or sexual assault level 3, depending on the severity of the assault.
- A man who commits forced penetration, formerly legally known as rape, can be charged and prosecuted under any of these sections, including 271 if it is determined that the attack did not involve a weapon, bodily harm, or multiple assailants.<sup>1</sup>

### Sections criminalizing sexual assault:

[Criminal Code, RSC 1985, c C-46, s 271, LRC 1985, ch C-46, art 271](#)

SECTION 271.

#### ***Sexual assault***

271. Everyone who commits a **sexual assault** is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[Criminal Code, RSC 1985, c C-46, s 272, LRC 1985, ch C-46, art 272](#)

SECTION 272.

#### ***Sexual assault with a weapon, threats to a third party or causing bodily harm***

272. (1) Every person commits an offence who, in committing a **sexual assault**,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

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<sup>1</sup> [https://www.justice.gc.ca/eng/rp-pr/cj-ip/victim/rr14\\_01/p10.html](https://www.justice.gc.ca/eng/rp-pr/cj-ip/victim/rr14_01/p10.html)

(c) causes bodily harm to the complainant; or

(c.1) chokes, suffocates or strangles the complainant; or

(d) is a party to the offence with any other person.

### *Punishment*

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years;

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

### *Subsequent offences*

(3) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under subsection 85(1) or (2) or section 244 or 244.2; or

(c) an offence under section 220, 236, 239 or 273, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

### *Sequence of convictions only*

(4) For the purposes of subsection (3), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[Criminal Code, RSC 1985, c C-46, s 273, LRC 1985, ch C-46, art 273](#)

SECTION 273.

*Aggravated sexual assault*

273. (1) Every one commits an aggravated **sexual assault** who, in committing a **sexual assault**, wounds, maims, disfigures or endangers the life of the complainant.

*Aggravated sexual assault*

(2) Every person who commits an aggravated **sexual assault** is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for life.

*Subsequent offences*

(3) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

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(c) an offence under section 220, 236, 239 or 272, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence.

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*Sequence of convictions only*

(4) For the purposes of subsection (3), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[Criminal Code, RSC 1985, c C-46, s 273.1, LRC 1985, ch C-46, art 273.1](#)

SECTION 273.1

***Meaning of "consent"***

273.1 (1) Subject to subsection (2) and subsection 265(3), "**consent**" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

***Consent***

**Consent** must be present at the time the sexual activity in question takes place.

*Question of law*

The question of whether no **consent** is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

*No consent obtained*

(2) For the purpose of subsection (1), no **consent** is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of **consenting** to the activity for any reason other than the one referred to in paragraph (a.1);

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;  
or

(e) the complainant, having **consented** to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

*Subsection (2) not limiting*

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no **consent** is obtained.

SECTION 273.2

*Where belief in **consent** not a defence*

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant **consented** to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from
  - (i) the accused's self-induced intoxication,
  - (ii) the accused's recklessness or wilful blindness, or
  - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no **consent** is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was **consenting**; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct

**The law of assault & consent:**

SECTION 265.

***Assault***

265. (1) A person commits an **assault** when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

*Application*

(2) This section applies to all forms of **assault**, including sexual **assault**, sexual **assault** with a weapon, threats to a third party or causing bodily harm and aggravated sexual **assault**.

### *Consent*

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

### *Accused's belief as to consent*

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

2. Based on the wording of those provisions, is the provided definition of rape:

- a. Gender specific, covering women only **NO**
- b. Gender neutral, covering all persons **YES**
- c. Based on the lack of consent of victim **YES**
- d. Based on the use of force or threat **YES**
- e. Some combination of the above. **YES**
- f. Does it cover only vaginal rape? **NO**
- g. Does it cover all forms of penetration? **NO**. If yes, please specify.
- h. Is marital rape in this provision explicitly included? **YES**
- i. Is the law silent on marital rape? **NO**
- j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? **YES**
- k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? **NO**

3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it. **NO**

4. What is the legal age for sexual consent?

- The legal age for consent in Canada is 16 years. In some cases, the age of consent is set higher at 18 years. The higher age will apply where there is a relationship of trust, authority, or dependency.<sup>2</sup>
5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.
- Yes, there are provisions that differentiate for sexual activity between peers.
  - These provisions are known as “close-in-age” exceptions.
  - A 14- or 15-year-old can consent to sexual activity as long as the partner is less than five years older than them and no relationship of trust, authority, dependency, or possibility of exploitation exists. If the partner is more than 5 years older than the 14- or 15-year-old all sexual activity is a criminal offence.
  - There is also a close-in-age exception for 12- and 13-year-olds. A 12- or 13-year-old can consent to sexual activity with a partner as long as that partner is less than 2 years older than them and no relationship of trust, authority, dependency, or possibility of exploitation exists. Any sexual activity with a partner more than 2 years older than the 12- or 13-year-old is a criminal offence.
  - When making a determination as to whether a relationship is exploitative of the young person, the following factors will be taken into account: the young person’s age, the age difference between the young person and the sexual partner, how the relationship developed, and if the partner may have controlled or influenced the young person.<sup>3</sup>
6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.<sup>4</sup>
- **Sexual assault** (s. 271 CCC) when tried as an indictable offence carries a codified maximum sentence of imprisonment for not more than 10 years, or if the complainant is under the age of 16, to imprisonment for a term of not more than 14 years and to a minimum sentence of imprisonment for one year.
  - If the offence is punishable on summary conviction, a person is liable to imprisonment for a term of not more than 18 months, or if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
  - **Sexual assault with a weapon, threats to a third party or causing bodily harm** (s. 272) every individual that commits an offence under this section is guilty of an indictable offence.
  - If a restricted/prohibited firearm is used in the commission of the offence, a person is liable to imprisonment for a term not exceeding 14 years and a minimum term of imprisonment a) for the first offence, five years b) in the case of a second offence, seven years.
  - If the complainant is under the age of 16 the maximum period of imprisonment is life, and the minimum is five years.
  - **Aggravated sexual assault** (s. 273 CCC) every person who commits an aggravated assault is guilty of an indictable offence.

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<sup>2</sup> <https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html>

<sup>3</sup> <https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html>

<sup>4</sup> <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-58.html#docCont>



- If a firearm is used in the commission of the offence, the minimum sentence is five years and the maximum sentence is life imprisonment. In the case of a subsequent or second offence the minimum sentence is raised to seven years.
- If the complainant is under the age of 16 the minimum sentence is five years imprisonment and the maximum sentence is life in prison.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?<sup>5</sup>

- The court sentencing the offender may order, in addition to any other sentence imposed, that the offender pay restitution to the victim of the offence. The court may impose the restitution order based on application by the prosecutor or on its own motion.
- Restitution, as an additional sentence, may be ordered for readily ascertainable loss of or damage to property suffered as a result of the commission of the offence and readily ascertainable pecuniary (monetary) damages, including loss of income or support, incurred as a result of bodily harm suffered as a result of the commission of the offence.
- In addition, in the case of an offence causing bodily harm to the offender's spouse or child (family violence), restitution may be ordered for readily ascertainable expenses incurred by the victim as a result of moving out of the offender's household for temporary housing, child care, food, and transportation.
- Where restitution is ordered as an additional sentence and the restitution is not paid within the time period specified by the court, the person to whom the restitution is to be paid (i.e. the victim/the beneficiary of the order) may file the order in any civil court in Canada.
- The restitution order made in the criminal proceedings will then have the same effect as a civil judgment for damages made by a civil court. The victim can enforce the order against the offender in the same manner as a civil judgment (e.g. direct the Sheriff to seize bank accounts, place liens on property etc.) (See sections 738-741.2 of the *Criminal Code*.)
- Restitution may also be a condition of an offender's probation order, where probation is the appropriate sentence.

**Aggravating and mitigating circumstances**

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

- The sentencing principles to be taken into account are outlined in s. 718.2 of the *Criminal Code*.
- The most relevant to sentencing a rape/sexual assault case are:
  - Evidence that the offender, in committing the offence, abused an intimate partner or member of the offender's family
  - Evidence that the offender abused a person under the age of 18
  - Evidence that the offender abused a position of trust or authority

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<sup>5</sup> <https://www.justice.gc.ca/eng/cj-jp/victims-victimes/code.html>

- Evidence that the offence had a significant impact on the victim, and consideration will also be given to age and other personal circumstances
  - a. Is rape by more than one perpetrator an aggravating circumstance? **NO**
  - b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) **YES**
  - c. Is rape by spouse or intimate partner an aggravating circumstance? **YES**
9. Does the law foresee mitigating circumstances for the purposes of punishment? **NO** If yes, please specify.
10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? **NO** If so, at what stage and what are the consequences?
- a. Regardless of the law, is reconciliation permitted in practice? **NO** and what is the practice in this regard?
11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? **NO** If yes, please specify.
- a. if the perpetrator marries the victim of rape? **NO**
  - b. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? **NO**

### Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)? **YES**
13. Is rape reported to the police prosecuted ex parte (private prosecution)? **NO**
14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? **NO**
15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? **NO**
16. Please provide information on the statute of limitations for prosecuting rape.
- There is currently no limitation period for prosecuting rape/sexual assault in Canada.

- This is codified in provincial Ontario statute in the following example:

[Limitations Act, 2002, SO 2002, c 24, Sched B, s 16](#)

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

NO LIMITATION PERIOD

***No limitation period***

**16** (1) There is no limitation period in respect of,

(h) a proceeding based on a sexual assault;

(h.1) a proceeding based on any other misconduct of a sexual nature if, at the time of the misconduct, the person with the claim was a minor or any of the following applied with respect to the relationship between the person with the claim and the person who committed the misconduct:

(i) the other person had charge of the person with the claim,

(ii) the other person was in a position of trust or authority in relation to the person with the claim,

(iii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person;

(h.2) a proceeding based on an assault if, at the time of the assault, the person with the claim was a minor or any of the following applied with respect to the relationship between the person with the claim and the person who committed the assault:

(i) they had an intimate relationship,

(ii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person;

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? **YES**

18. Are there mandatory requirements for proof of rape, such as medical evidence or the need for witnesses? **NO** If yes, please specify.

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial? **YES**

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES. If yes, please specify.<sup>6</sup>

- The *Criminal Code* requires the decision-maker to, at various points in the criminal justice process, ensure the safety and security of any victim of or witness to the offence.
- Examples include:
  - The responsible judicial officer will consider the safety and security of the victim in any decision about an accused's bail
  - Where an accused is released pending trial, the judge will consider including as a condition to bail that the accused abstain from any direct or indirect communication with the victim
  - The particular concerns of the victim will be considered and highlighted in decisions on the imposition of special bail conditions, including firearms prohibitions, and in criminal harassment offences

### War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity? YES

22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? NO

23. Are there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? NO

24. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

### Data<sup>7</sup>

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

- In 2017, there were 24,672 incidents of sexual assault (levels 1, 2 and 3), and police categorized 98% of these as level 1.
- This represents an increase from 22,246 incidents in 2006. From 2006-2016, the quantity of incidents reported by police fluctuated slightly.

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<sup>6</sup> <https://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/dig/vict.html>

<sup>7</sup> <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html>

- However, from 2016 to 2017 the number of police-reported level 1 sexual assaults increased 14% (from 21,072 to 24,094), the number of level 2 sexual assaults increased 6% (from 395 to 417), and the number of level 3 sexual assaults increased 44% (from 112 to 161).
- The proportion of the total number of all sexual assaults reported to police that were cleared by charge was mostly constant from 1998 to 2015, varying from 41% to 46%.
- In the past two years, the cleared-by-charge rate dropped considerably to 37% in 2016 and 34% in 2017.
- In 2017, a higher proportion of sexual assault incidents level 2 (55%) and level 3 (64%) were cleared by charge than level 1 incidents (34%).
- For the 2016/2017 fiscal year, 42% of all sexual assault case decisions (levels 1, 2, and 3) in adult criminal court resulted in a finding of guilt.
- The percentage of sexual assault cases that resulted in a guilty decision has remained stable over the past 10 years.
- For the 2016/2017 fiscal year, 59% of accused found guilty of sexual assault (levels 1, 2, and 3) in adult court were ordered a custodial sentence and 19% were ordered probation as the most serious sentence.

### Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

#### Under Reported Sexual Violence:<sup>8</sup>

- There is no specific designation of rape in Canada, therefore the statistics for reporting are for sexual assault.
- Sexual assault is one of the most under reported crimes in Canada.
- It is estimated that only one in 20 cases reach the attention of police or other authorities.
- The General Social Survey (GSS) on Canadians' Safety (Victimization) lists the following most common reasons women did not report sexual assault to the police:
  - Perception that the crime was minor and not worth taking the time to report (71%)
  - The feeling that the matter was of a personal/private nature and handling it privately would be better (67%)
  - Perception that no one was harmed during the incident (63%)
  - An apprehension or mistrust about the justice system procedure, including not wanting to communicate with law enforcement (45%)
  - Perception that the police would not consider the sexual assault of enough importance (43%)
  - A belief that the offender/perpetrator would not receive the adequate punishment (40%)
- Another reason victims do not report sexual assault is due to fear. They fear retaliation from the offender/perpetrator, the negative impact on their jobs, and/or facing the perpetrator and being subject to cross-examination during criminal proceedings.

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<sup>8</sup> <https://scics.ca/en/product-produit/reporting-investigating-and-prosecuting-sexual-assaults-committed-against-adults-challenges-and-promising-practices-in-enhancing-access-to-justice-for-victims/#a44>

- Some victims do not report because they are unaware that the context of their assault is a crime. For example, victims that are married and experience sexual assault within their marital relationship may not be aware that their spouse can face criminal sanctions.
- Further, when the assault comes from an intimate partner, victims may avoid reporting because they do not want the perpetrator to be arrested and sanctioned.
- This is further complicated as victims of sexual assault are sometimes financially dependent on their abusers.
- Estimates indicate that less than 1% of sexual assaults end in a conviction of the perpetrator. This estimate relies on data from a 2012 analysis of self-reported data and court statistics.<sup>9</sup>
- Survivors of sexual assault are also prevented from reporting because after an assault they may experience a large range of psychological responses that prevent them from reporting.<sup>10</sup>
- These can include anger, fear, denial, shock, embarrassment, shame, and guilt. The internalization of feelings like shame, stigma, guilt, and the belief by victims that they will receive blame, be revictimized, dismissed, or not believed and treated disrespectfully are key contributing factors in the underreporting of sexual assault to police.<sup>11</sup>
- A sexual assault is a traumatic experience and it can trigger Post-Traumatic Stress Disorder in women, where the process of reporting to authorities feels like they are being victimized again.<sup>12</sup>
- Movements such as #MeToo and Time's Up have triggered public discussions and responses to sexual violence in the last few years.<sup>13</sup>
- Police Data collected from the Uniform Crime Reporting (UCR) Survey indicates that there was a significant increase in the number of sexual assaults reported to police after the #MeToo movement first went viral. Despite this increase, sexual assault is still one of the most underreported crimes in Canada, a finding further confirmed by data collected for the Survey of Safety in Public and Private Spaces (SSPPS).
- The survey confirmed that the majority of women who were victims of sexual assault did not report the most serious incident to the police.
- Self-reported data has shown that two thirds of sexual assaults are not reported to police because the victim believed the assault was minor and not worth reporting, it was a private/personal matter, and better handled personally because no one was harmed.<sup>14</sup>
- Victims of sexual assault find their aversion to reporting to police is reinforced by the negative experiences that other victims have described when getting involved with the justice system.

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<sup>9</sup> <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

<sup>10</sup> <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

<sup>11</sup> <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

<sup>12</sup> <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

<sup>13</sup> <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

<sup>14</sup> <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

- When a sexual assault is reported to the police experiences of belief, validation, and no judgement can and do impact disclosure by victims positively. However, even when these positive experiences occur victims can still be unsatisfied and negatively affected by the other parts of the criminal justice system, such as long court processes and unmet expectations about the outcomes of reporting the crime.<sup>15</sup>
- Further, victims of sexual assault are most likely to delay in reporting the occurrence of a crime, which can occur for a few reasons, including the emotional trauma from the assault.<sup>16</sup>
- There are series of recommendations put forward by for the current government by Elaine Craig, (author of *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*) an associate professor in the Schulich School of Law at Dalhousie University. In the context of government efforts to address sexual violence she suggests, “Key to the success of any of these efforts will be the government’s willingness to consult and work with sexual assault experts – front-line workers, academics and practitioners. Initiatives like the Department of Justice’s 2017 Knowledge Exchange (in which sexual assault experts and law- and policy-makers were brought together to examine how sexual assaults are reported, charged and prosecuted in Canada) should be undertaken throughout the government’s term including in these early days in office, when mandates are developed and directions chosen.”<sup>17</sup>

#### Additional Barriers to Reporting Rape and Sexual Violence: Women with precarious status in Canada face additional barriers to reporting

- Women in Canada may have no legal status or precarious status.
- Women who have no immigration status are deemed to be non-status. This term encompasses women whose refugee claims have been rejected, whose immigration sponsorship has failed, victims of human trafficking, those whose visas or permits to stay in the country have expired, and undocumented entrants to Canada.<sup>18</sup>
- Precarious status refers to women with less than full immigration. This includes temporary workers, students, refugee applicants, as well as those holding other forms of authorized status, such as visas and permanent residency.<sup>19</sup>
- Many migrant women have lived here without status for many years and have no links to their country of origin to which they might be deported if found out by Canadian authorities. Countless women make refugee claims that are rejected or choose to remain without status rather than return to their

<sup>15</sup> <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

<sup>16</sup> <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

<sup>17</sup> <https://policyoptions.irpp.org/magazines/january-2020/how-the-minority-parliament-can-help-respond-to-sexualized-violence/>

<sup>18</sup> <https://policyoptions.irpp.org/magazines/february-2020/sexual-assault-policy-must-better-protect-migrant-women/>

<sup>19</sup> <https://policyoptions.irpp.org/magazines/february-2020/sexual-assault-policy-must-better-protect-migrant-women/>

countries of origin. Some women enter Canada legally through avenues such as sponsorship by an employer, spouse, or family member. But when these avenues fail, those women may become non-status.<sup>20</sup>

- There is no statistical evidence to suggest that immigrant and refugee women experience more violence than women in the general population of Canada. However, current research suggests that immigrant and refugee women who are victims of violence are faced with additional barriers to reporting the violence and accessing support and assistance.
- These barriers include but are not limited to social isolation, language issues, immigration and sponsorship barriers, and economic vulnerability.<sup>21</sup>
- Researchers in Canada and the United States agree in suggesting that women who are immigrants and refugees experience systematic racism and legal barriers that negatively affect their access to resources.<sup>22</sup>
- These same researchers highlight that even though intimate partner homicide rates are on the decline in Canada, the reported rates of violence against immigrant women may, in some cases, be lower than their non-immigrant counterparts.
- Yet it is possible that immigrant and refugee women experience a higher severity and prevalence of violence, but due to the barriers that make it more difficult to report the abuse, these crimes go undocumented.
- The statistics related to incidence of sexual assault in immigrant women is particularly problematic due to these factors.
- National statistics on violence against immigrants and refugees are unreliable for a plethora of reasons.
- Women with no status or whose status is precarious often work in situations that are also precarious, meaning nonstandard employment. This is usually temporary work without employee benefits or legal protection, and usually pays minimum wage or less.
- Women in these situations are especially at risk because they are the most likely to depend on third parties for residence and/or employment. They are also the least likely to seek police or medical assistance after a sexual assault for fear that their status will be discovered.
- These women are susceptible to workplace exploitation, including poor working conditions where they are at risk of workplace injuries.<sup>23</sup>

### Rape myths and stereotypes still persisting in the justice system:

Law Enforcement:

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<sup>20</sup> <https://policyoptions.irpp.org/magazines/february-2020/sexual-assault-policy-must-better-protect-migrant-women/>

<sup>21</sup> [https://endingviolence.org/files/uploads/Lit\\_Review\\_Binder\\_IWP\\_for\\_website\\_Apr2010.pdf](https://endingviolence.org/files/uploads/Lit_Review_Binder_IWP_for_website_Apr2010.pdf)

<sup>22</sup> [https://endingviolence.org/files/uploads/Lit\\_Review\\_Binder\\_IWP\\_for\\_website\\_Apr2010.pdf](https://endingviolence.org/files/uploads/Lit_Review_Binder_IWP_for_website_Apr2010.pdf)

<sup>23</sup> <https://policyoptions.irpp.org/magazines/february-2020/sexual-assault-policy-must-better-protect-migrant-women/>



- One of the main reasons women avoid reporting sexual violence to the police is a fear that they will receive poor treatment from law enforcement and the court system.
- These barriers continue to persist even in the face of police training, specialized sexual assault police units, and improved coordination between police and sexual assault support centers in many communities.<sup>24</sup>
- When sexual assault is reported, police have broad discretion to drop complaints that they believe are unfounded even when there are grounds for a criminal charge and a suspect is identified. An investigation by the Canadian newspaper the *Globe and Mail* demonstrated that depending on the jurisdiction in question, between 2% and 51% of sexual assault complaints are dismissed by police as unfounded.<sup>25</sup>
- In the cases that are considered legitimate, less than 50% result in charges against a suspect.
- Due to media attention generated by the *Globe and Mail* investigation, police were pressured to review how they handled cases of sexual assault that resulted in dismissal. Some police agencies that had higher-than-average rates of dismissals conducted case reviews. These were done behind closed doors and resulted in proclamations that there were no problems with the investigations. However, this process offered no transparency or accountability. This allows police to avoid scrutiny.<sup>26</sup>
- Further dismissals of sexual assault cases continue throughout the justice system, as only 50% of suspects face prosecution and only half of these prosecutions result in convictions.
- In reality, false reports of sexual assault are no higher than any other crime.
- Police decisions are influenced by preconceived notions about real rape or genuine victims and who deserves the protection of the police.<sup>27</sup>

#### The Court System:

- The first rape shield laws were enacted in Canada in 1982; they were designed to shield complainants of sexual assault from courtroom tactics that relied on the prevalence of rape myths.
- These laws say that the sexual history of sexual assault complainants could only be used as evidence in very limited circumstances, such as when the sexual history is central to the accused's right to a fair trial.
- Despite these laws, complainants are not always protected in the courtroom.
- Scholars from Dalhousie University and the University of Alberta describe this as the "justice gap."<sup>28</sup>

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<sup>24</sup> <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

<sup>25</sup> <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

<sup>26</sup> <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

<sup>27</sup> <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

<sup>28</sup> <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>

- This means that even though rape shield laws exist on paper, in practice criminal defence lawyers have managed to get permission to introduce sexual history of complainants for misleading purposes.
- The law does not address misogynistic views that are held by judges and counsel.
- In 2019, a Saskatchewan court permitted a defence lawyer to ask questions such as why she “did not fight back” and “why she did not report the assault right away.” He also asked questions about the woman’s “style of scream.”<sup>29</sup>
- Sexual assault is a largely gendered crime and female victim responses are shaped by gender socialization.
- Sexual assault is also a uniquely private crime that reflects societal values about gender roles and sexuality. These factors make it highly difficult to prosecute.
- The testimony of a victim is critically important, because in sexual assault cases the victim or witness’s testimony is usually the primary or only source of evidence.
- Therefore, how this testimony is heard in court, received by juries and judges, and understood can be crucial.
- Many of the prominent misunderstandings there are stem from rape myths, a systematic failure to understand trauma reactions, and assumptions about small and apparent inconsistencies in recall when describing and reliving traumatic events. This often leads to mistaken beliefs that a victim’s testimony is lacking in credibility and reliability.<sup>30</sup>
- The Supreme Court of Canada and federal law reform has formally rejected a number of rape myths about sexual violence against women, however these myths are still in existence.
- There are incorrect ideas that women who are “promiscuous” or of “unchaste” character are not trustworthy and more likely to have consented to the sexual acts they are reporting were assault. These are the twin myths that are addressed by the rape shield provisions in the *Criminal Code of Canada*.
- Another myth is that survivors of sexual violence who do not immediately report their sexual assault to the police are lying.
- There is also the mistaken idea that women who do not wish to engage in sex or sexual acts will always physically fight back, scream, or attempt to flee from the situation to show “proof” they did not provide consent.<sup>31</sup>
- Many still view women who use alcohol and/or drugs as responsible for the sexual violence against them.
- Further, there is the misconceived notion that consent in intimate partnerships is ongoing and that it does not need to be explicitly given between long-term partners.
- Research in this area indicates that women who experience sexual assault are still subject to social pressures to respond in particular ways to “prove” that they are real victims and possess credibility.<sup>32</sup>

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<sup>29</sup> <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>

<sup>30</sup> <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/p2.html>

<sup>31</sup> <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/p2.html>

<sup>32</sup> <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/p2.html>

- The justice system does explicitly confirm that there are no ideal victims of sexual assault, but societal attitudes are still reluctant to change.
- Women who do not provide the expected scripts of their assault are still subject to sceptical and suspicious treatment from police and court rooms. They are still questioned on whether they were actually sexual assaulted and if they are the ones to blame for their own victimization.<sup>33</sup>
- Some social expectations of victims of sexual assault include: that they offered physical and/or verbal resistance to unwanted sex, express clear and explicit non-consent to the sexual contact, discontinue all contact with the alleged perpetrator of the crime, and demonstrate perfect or almost perfect recall, including a consistent and linear account of their assault.
- This multitude of expectations are unrealistic and do not represent how most women respond to a sexual assault. These biases and assumptions interfere with how victim testimony is treated and understood during criminal trials and how legal decision-makers assess their credibility.<sup>34</sup>

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<sup>33</sup> <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/p2.html>

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