**Canada’s response to the**

**UN Special Rapporteur on violence against women’s questionnaire on the criminalization and prosecution of rape**

**June 9, 2020**

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 full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.**

An overview of Canada’s sexual assault provisions is provided below followed by a link to the *Criminal Code of Canada*, where the referenced provisions can be found. Throughout this document the terms “victim” and “complainant” are used interchangeably.

The *Criminal Code* prohibits three levels of sexual assault: sexual assault (section 271); sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272); and, aggravated sexual assault (section 273). Sexual offences address all non-consensual sexual activity ranging from sexual touching to sexual intercourse. The age of consent for sexual activity is 16 years, with "close in age" exceptions, below which consent is not a defence (section 150.1). Although the general sexual assault offences can be used where the victim is a child, the *Criminal Code* also contains child-specific sexual offences, including sexual interference (section 151), invitation to sexual touching (section 152) and sexual exploitation (section 153).

The *Criminal Code* also contains definitions, as well as special rules and procedures, designed to protect the complainant from assumptions and inferences based on myths and stereotypes about sexual assault victims and how they should behave. These include:

**Definition of Consent**: The *Criminal Code* sets out an “affirmative consent” regime, i.e., consent must be affirmatively communicated through words or conduct to avoid criminal liability; submission or passivity do not constitute consent. Section 273.1 defines consent specifically for the purposes of the sexual assault provisions as “the voluntary agreement of the complainant to engage in the sexual activity in question” (subsection 273.1(1)), requires that consent be ongoing and continuous throughout the sexual activity in question (subsection 273.1(1.1)), and provides a non-exhaustive list of circumstances in which no consent is obtained, i.e., where the law declares that any consent that might have been obtained is legally invalid (subsection 273.1(2); see also subsection 265(3), which applies to both the assault and sexual assault offences).

**Defence of Mistaken Belief in Consent**: Section 273.2 limits the accused’s ability to advance a mistake of fact defence with respect to the complainant’s consent, i.e., that the accused honestly but mistakenly believed the complainant consented even though the complainant did not in fact consent. For example, the defence is not available: unless the accused can point to some evidence indicating that the complainant affirmatively communicated consent by words or conduct; if the accused did not take reasonable steps to verify consent; or, if the mistake was based on the accused’s voluntary intoxication or recklessness.

**Admissibility of Evidence of Complainant’s Prior Sexual Activity**: Sections 276 and 278.93 to 278.97 create evidentiary and procedural rules specific to sexual assault trials that must be followed when the accused seeks to adduce evidence of a complainant’s sexual history (i.e., sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the accused or another person). Admissibility of such evidence is determined through a *voir dire* at which complainants can make submissions and be represented by counsel (subsections 278.94(2) and (3)). Evidence adduced to support either one of two general inferences, i.e., that the complainant is more likely to have consented or is less worthy of belief (referred to as the “twin myths”), is categorically excluded and never admissible (subsection 276(1)). Evidence adduced to support other inferences must meet the requirements of subsection 276(2) to be admissible (i.e., it must be relevant, specific, and must have significant probative value that is not substantially outweighed by its potential prejudice to the administration of justice). This regime also applies to communications by the complainant made for a sexual purpose, or whose content is of a sexual nature (subsection 276(4)). The regime’s objectives include removing myths and stereotypes about sexual assault complainants from the trial process, which is intended to protect complainants’ privacy and equality rights.

**Production of Complainants’ Private Records to Accused**:Sections 278.1 to 278.91 create a regime to be followed in cases where the accused seeks access to the complainant’s private records that are in the possession of third parties (such as therapeutic, counselling or medical records). Production is determined through a *voir dire* at which complainants can make submissions and be represented by counsel (subsection 278.4(2) and (2.1)). The regime’s objectives include preventing the defence from engaging in “fishing expeditions” designed to discredit the complainant and protecting the complainant’s right to privacy, equality and psychological integrity.

**Admissibility of Complainants’ Private Records by Accused**: Sections 278.92 to 278.97 create a regime to be followed in cases where the accused seeks to introduce into evidence the complainant’s private records that are in the accused’s possession (such as a diary, or therapeutic, counselling or medical records). Admissibility is determined through a *voir dire* at which complainants can make submissions and be represented by counsel (subsections 278.94(2) and (3)). The regime’s objectives are similar to those of the third party records and admissibility of sexual history evidence regimes.

**Sentencing** (aggravating circumstances): The *Criminal Code* requires courts to treat offences more seriously for sentencing purposes, including where there is evidence that the crimes were motivated by bias, prejudice or hate based on age or sex (paragraph 718.2(a)(i)) or where the offence involved abuse of a spouse, a common-law partner, a child or a position of trust or authority (paragraphs 718.2(a)(ii) & (iii)). Victims of sexual offences can also choose to present a **victim impact statement** at the time of sentencing to describe the impact the crime has had on them (section 722). Where a community is impacted by a sexual offence, a **community impact statement** may also be submitted (section 722.2).

Source: <https://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html>.

**2. Based on the wording of those provisions, is the provided definition of rape:
a) Gender specific, covering women only. YES/NO**

Canada’s sexual offences prohibit all non-consensual sexual activity ranging from sexual touching to sexual intercourse and protect all persons regardless of gender.

**b) Gender neutral, covering all persons. YES/NO**

Canada’s sexual offences protect all persons regardless of gender.

**c) Based on the lack of consent of victim. YES/ NO**

Canada’s sexual assault provisions create an “affirmative consent” regime, i.e., consent must be affirmatively communicated through words or conduct to avoid criminal liability; submission or passivity do not constitute consent.

**d) Based on the use of force or threat. YES/ NO**

Canada’s sexual assault provisions do not require proof of the use of force or threat of force; sexual activity that does not involve the free, active and ongoing consent of the parties to that activity constitutes sexual assault. Moreover, consent extracted through force or threat of force is not valid in law (see paragraphs 265(3)(a) and (b) referenced in the response to question 1).

**e) Some combination of the above. YES / NO**

Canada’s sexual assault provisions are gender neutral, based on the lack of consent of the victim and do not require proof of use of force or threat of force.

**f) Does it cover only vaginal rape? YES /NO**

As noted above, Canada’s sexual offences prohibit all non-consensual sexual activity ranging from sexual touching to sexual intercourse.

**g) Does it cover all forms of penetration? YES/NO. If yes, please specify.**

See response to question 2f.

**h) Is marital rape in this provision explicitly included? YES / NO**

Canada’s sexual assault provisions apply to a person who sexually assaults their spouse. Section 278 of the *Criminal Code* specifies that a spouse may be charged with sexual assault in respect of their spouse.

**i) Is the law silent on marital rape? YES/NO**

See response to question 2h.

**j) Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/NO**

See section 278 of the *Criminal Code*, referenced in the response to question 2h.

**k) Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /NO**

See response to 2h.

**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. Canada’s sexual assault provisions apply regardless of the relationship between the victim and the accused.

**4) What is the legal age for sexual consent?**

The general age of consent to sexual activity in Canada is 16 years (section 150.1). If there is a relationship of trust, authority or dependency between the older person and the young person or if the relationship is otherwise exploitative of the young person, the age of consent is 18 years (section 153).

**5) Are there provisions that differentiate for sexual activity between peers? If so, please provide them.**

The *Criminal Code* contains a “close in age” exception that allows a 14 or 15 year old to consent to sexual activity as long as the partner is **less than five years older** and there is no relationship of trust, authority or dependency or any other exploitation of the young person (subsection 150.1(2.1)). This means that if the partner is 5 years or older than the 14 or 15 year old, any sexual activity is a criminal offence.

The *Criminal Code* also contains a “close in age” exception that allows 12 and 13 year olds to consent to sexual activity with a partner as long as the partner is **less than two years older** and there is no relationship of trust, authority or dependency or any other exploitation of the young person (subsection 150.1(2)). This means that if the partner is 2 years or older than the 12 or 13 year old, any sexual activity is a criminal offence.

**6) Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.**

The maximum penalty for sexual assault (section 271) is 14 years if the victim is under 16 years and 10 years in all other cases.

The maximum penalty for sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272) is life imprisonment if the victim is under 16 years and 14 years in all other cases.

The maximum penalty for aggravated sexual assault (section 273) is life imprisonment.

The maximum penalty for the child-specific contact sexual offences (sections 151 to 153) is 14 years.

**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?**

The federal *Victims Bill of Rights Act*, enacted in 2015, enshrines the rights of all victims of crime, including victims of sexual violence, in four areas: information, protection, participation and restitution.

Under this Act, every victim has the right to have the court consider making a restitution order under s. 737.1 of the *Criminal Code of Canada.* A restitution order can be issued for certain losses: (a) to cover the cost of damage to, the loss of or destruction of the property of any person as a result of the commission of an offence; (b) to cover all pecuniary damages, including loss of income or support, to any person who has suffered bodily or psychological harm as the result of the commission of an offence; (c) to cover the cost of all actual and reasonable expenses incurred by a member of the offender’s household associated with a person having to move out of that household to cover temporary housing, food, childcare and transportation. Restitution may be ordered regardless if the offender received a custodial sentence.

Civil redress by victims against the perpetrators of crime is a matter of provincial/territorial responsibility in Canada. Additionally, some provinces have enacted legislation which establishes compensation or financial benefits programs for victims of a crime that occurred in that province.  Such programs vary widely in terms of eligibility and compensable expenses and are not available in all jurisdictions.

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

The *Criminal Code* requires that sentencing courts consider certain circumstances as aggravating factors for sentencing purposes (see section 718.2, described in the response to question 1) and that they give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for an offence that involved the abuse of a person under the age of 18 years (section 718.01) or when imposing a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances (section 718.04).

The *Criminal Code* also establishes three levels of sexual assault, depending on the violence used by the assailant: sexual assault (section 271); sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272); and, aggravated sexual assault (section 273). See response to question 1 and response to question 6 for the applicable penalties.

**a) Is rape by more than one perpetrator an aggravating circumstance? YES/NO**

A sexual assault that involves more than one assailant is a more serious form of sexual assault (section 272(1)(d)).

**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/NO**

See section 718.2, described in the response to question 1, and section 718.04, described in the response to question 8.

**c) Is rape by spouse or intimate partner an aggravating circumstance? YES/NO**

See subparagraph 718.2(a)(ii), described in the response to question 1.

**10) Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/NO If so, at what stage and what are the consequences?**

**a) Regardless of the law, is reconciliation permitted in practice? YES/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? YES/NO If yes, please specify.**

**a) if the perpetrator marries the victim of rape? YES/NO**

**b) if the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO**

**12) Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO**

**13) Is rape reported to the police prosecuted ex parte (private prosecution)? YES/NO**

**14) Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? YES/NO**

In Canada, prosecutors decide whether to proceed with a prosecution, based on whether there is a reasonable prospect of conviction and the prosecution is in the public interest. This includes accepting pleas to lesser charges, for example where the evidence is insufficient to support a more serious charge.

The concept of “friendly settlement” does not exist in Canadian law.

**15) Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/NO**

See the response to question 14.

**16) Please provide information on the statute of limitations for prosecuting rape.**

There are no limitation periods on prosecuting sexual offences in Canada.

**17) Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES/NO**

See response to question 16. Canada prosecutes historical sexual abuse cases.

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

The *Criminal Code* specifies that corroboration is not required in sexual offending cases (section 274).

**19) Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES/NO**

See description of the provisions that govern the admissibility of evidence of the complainant’s prior sexual activity (sections 276 and 278.93 to 278.97) in the response to question 1.

**20) Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.**

In the response to question 1, see description of the provisions that govern: the admissibility of evidence of the complainant’s prior sexual activity (sections 276 and 278.93 to 278.97); the production of the complainant’s private records to the accused (sections 278.1 to 278.91); and, the admissibility of the complainant’s private records by the accused (sections 278.92 to 278.97).

**21) Is rape criminalized as a war crime or crime against humanity? YES/NO**

Rape is criminalized as both a crime against humanity and a war crime.

The definition of crimes against humanity, outlined in subsections 4(3) (offences inside Canada) and 6(3) (offences outside Canada) of the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24) (CAHWCA), includes “sexual violence… according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” Rape is included in the terms “sexual violence” and is an enumerated act in the *Rome Statute* as a crime against humanity. Rape is also a crime against humanity in customary international law. Therefore, the CAHWCA criminalizes rape as a crime against humanity.

Subsections 4(3) (offences inside Canada) and 6(3) (offences outside Canada) of the CAHWCA define a war crime as “an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” Rape is a war crime in conventional international law (*Rome Statute* and *Geneva Conventions*) as well as in customary international law; therefore, rape is included in the definition of war crimes in Canada. (The CAHWCA is available at: <https://laws-lois.justice.gc.ca/eng/acts/c-45.9/>).

**22) Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/NO**

**23) Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/NO**

There is no statute of limitations (see response to question 22).

**24) Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES/NO**

See the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24).

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

Between 2014 and 2018, there were increases in the number of police-reported incidents of sexual violence against adults and children. Over the 5-year period, there was a 39% increase in the total number of police-reported sexual assault violations (sections 271 to 273 of the *Criminal Code*; 20,631 incidents in 2014 compared to 28,741 incidents in 2018). There was a larger increase (+115%) in the number of police-reported sexual offences against children (sections 151 to 153 of the *Criminal Code*; 3,240 incidents in 2014 compared to 6,981 incidents in 2018). Increases in police-report incidents may be reflective of an increase in victim reporting rather than (or in addition to) an increase in actual incidents. Greater public awareness of sexual violence through social movements such as #MeToo and subsequent media attention during this time period may have led to more victims reporting to police.  There was a 24% increase in the average rate of police-reported victimization from the 9 months prior to the #MeToo movement going viral, to the three months post #MeToo peak (15.0 victims per 100,000 to 18.6 victims per 100,000).1  Also, maximum penalties for certain sexual violations against children were increased in 2012 and 2015, which may have changed the most serious violation reported  by police, given that police-reported data reflect the most serious violation in a case.

In general, there was a slight increase in the number of completed cases between 2014 and 2018 (i.e., cases with a decision and sentence). For adult offenders, the proportion of cases with a guilty verdict decreased slightly for sexual assault violations (46% to 40%), but remained stable for sexual offences against children (52% to 50%). The proportion of cases with a guilty verdict that received a custody sentence did not change; just over half of sexual assault cases and slightly more than four-fifths of cases of sexual offences against children. There were also increases in ‘other’ sanctions for offences against adults and children (e.g., conditional discharges, suspended sentences, community service orders and prohibition order among others). Approximately 50% of cases with a guilty verdict received “other” sanctions in 2014, and that increased to 85% by 2018.  A case may have more than one type of sanction (i.e., custody and an ‘other’ sanction). This may represent a move towards more meaningful and/or reparative sentencing.

For youth offenders, there was a slight decrease in guilty verdicts for sexual assault cases (61% to 56%), though guilty verdicts for sexual offences against children remained stable (approximately 61%).  Custody is ordered infrequently for youth offenders, and the percentage of guilty cases that received custody decreased between 2014 and 2018, from 8% to 5% for sexual offences against children, and from 14% to 8% for sexual assault violations. There were increases in community service orders and ‘other’ sanctions.  For youth, ‘other’ sanctions may include restitution, apologies, counseling programs, and intensive support and supervision among others.  Canada’s *Youth Criminal Justice Act* (YCJA) supports diversion, reparation and rehabilitation for young offenders while reducing reliance on incarceration. (The YCJA is available at: <https://www.laws-lois.justice.gc.ca/eng/acts/y-1.5/index.html>).

 1 Rates as published in *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017, Statistics Canada.* (<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54979-eng.htm>)

**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.**

Please see the federal, provincial and territorial report entitled, *Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults – Challenges and Promising Practices in Enhancing Access to Justice for Victims* (2018), available at: <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/> (please note that sexual assault law reform proposed by former Bill C-51 and referenced in this report became law in December 2018, just after the report was publicly released). This report identifies challenges faced by the criminal justice system in addressing sexual assault and makes related recommendations.