

## **Submission to the Victorian Law Reform Commission: Improving the Responses of the Justice System to Sexual Offences**

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To whom it may concern,

Thank you for the opportunity to respond to the **Victorian Law Reform Commission's (VLRC) inquiry: *Improving the Responses of the Justice System to Sexual Offences***. This inquiry refers to the current and systemic challenges experienced by victim-survivors of sexual violence who engage the law for protection from further harm and seek to access justice, or who choose not to report due to fear of the justice process and its consequences. This submission makes a number of recommendations to enhance justice system responses to victim-survivors of sexual offences. In particular, it advocates for the need to reconceptualise victim-survivors as participants (rather than mere witnesses to proceedings) and recommends the introduction of separate legal representation (SLR) to promote the protection of empowerment of victims.

### **Issues Paper B – Sexual Offences: Key Issues in the Criminal Justice System**

#### **1. Is there a need to improve attitudes towards victim-survivors or the understanding of sexual harm within the criminal justice system? If so, how?**

In 2020, The Right Honorable Sir John Gillen wrote:

*Victims of sexual violence experience the most severe violations, suffering the depths of degradation and humiliation. These are crimes of alarming prevalence, largely ... perpetrated against women, striking at their bodily integrity and autonomy. ... More often than not, victims ... fail to report these crimes ... and if they do report, they may resile midway through the legal process. This happens because of the ... adversarial criminal justice process, and the humiliating and frightening culture that it fosters. (cited in Iliadis 2020, ix)*

In Australia, national and state based commissions of inquiry have shed light on the gravity, nature and impacts of sexual violence, and the need to improve prevention and responses to enhance victim-survivors' safety, wellbeing and access to procedural justice (see the *Fourth Plan* (released in 2019) *of the National plan to reduce violence against women and their children 2010-2022*; Council of Australian Government's [COAG] *National advisory panel to reduce violence against women* (2019); VLRC

2016; Royal Commission into Family Violence [RCFV] 2016; Royal Commission into Institutional Responses to Child Sexual Abuse [RCIRCSA] 2017).

Australian and international research has documented the procedural challenges impacting rape/sexual assault victims' (terms used interchangeably) engagement with the justice system. These include the myths and stereotypes underpinning investigations and prosecutions (Iliadis 2020; Powell et al. 2013), and invasive defence questioning that seeks to discredit victim-survivors' character and testimony, particularly during cross-examination at trial – which, as Conley and O'Barr (1998: 32) argue, has 'a poignancy in the rape context that is unmatched elsewhere' (see also Henderson 2015; McGlynn 2017; Powell et al. 2013). Victim-survivors have reported feeling that 'they themselves are placed on trial' (Gillen 2019: 163) and seen as 'collateral damage' in a process where they lack independent voice (ibid: 173–175).

Over the past four decades, while there has been a shift towards greater inclusion and consideration of victims in justice processes, particularly vulnerable victims, their continued minimal role in the process, has limited their opportunity to experience procedural justice. Authors such as Bronitt (1998: 42) have observed that, even since the introduction of victim-focused reforms, 'the criminal justice system's treatment of women who allege rape has not significantly improved, and in some respects, may be worse than before the reforms were enacted'. Stubbs (2003: 23) similarly identifies that legislative changes to the victim's role have been 'limited in effectiveness' because of the 'resilience of cultural mythologies about women and sexuality'. This is especially evidenced by the fact that current legal reforms have not impacted on reporting or conviction rates in sexual assault cases, nor have they significantly improved victim-survivors' experiences or perceptions of the justice system (Australian Bureau of Statistics 2004: 54–7; Braun 2014: 820; Daly & Bouhours 2010: 619).

In 2016, VLRC advanced this view, noting that while the victim's role has continued to evolve:

The cumulative effect of the reforms have [sic] not been driven by a vision of what it should be; nor is there an adequate description of what it has become. The ambiguity this has created causes inconsistencies in how victims are perceived, how they see themselves, their expectations and how they are treated. (23)

Similarly, Kirchengast (2016: 2) argues that:

The twenty-first century criminal trial is increasingly reconceived in form and substance, yet victims remain controversial and contested participants of justice, despite being increasingly connected to the criminal trial.

In the VLRC's (2016) final report, it was proposed that there is a fundamental need to reconceive the victim's role and level of contribution in the justice system to address the discrete needs and interests of vulnerable victims, such as victims of sexual offences. The VLRC (2016: 41) recommended that the role of a victim in the criminal justice process be characterised as that of a 'participant' (rather than a witness) – 'but not a party' – to proceedings, and that this should include:

- treating victims with respect and dignity

- providing information and support
- a level of participation in court processes and decision-making
- protection from trauma, intimidation and unjustified interference with privacy during the criminal trial process
- having the ability to seek reparation. (VLRC 2016: xv)

To date, however, there continues to be grave concerns among academic scholars, practitioners and victim advocates about how victims of sexual violence perceive and experience the criminal justice system. Indeed, a key way in which sexual assault victims' experiences of procedural and substantive justice could be improved is to transform their role and level of contribution in the criminal justice system; in other words, to reconceive victim-survivors as 'integral players ... rather than mere bystanders' in the prosecution process (O'Connell 2012: 1). This would provide a mechanism to potentially reduce the likelihood of secondary victimisation, also referred to as the 'second injury' – whereby 'the psychological impact of victimisation can be considerably exacerbated by ... the criminal justice system' (Doak 2008: 51; see also Ellison 2007; Jordan 2001).

This can be achieved by affording greater credence to victim-survivors' privacy and interests in justice processes, and their associated 'rights' in the criminal trial process. As Doak (2008: 54) argues, promoting victims' rights and interests in justice processes is 'not only within the victim's interest, but also in the public interest' to ensure 'that victims feel able to enter into the criminal justice system' without fear of the legal process. Acknowledging sexual offence victims' discrete needs and interests will not only help to improve attitudes towards victim-survivors, but it will also help to ensure that their needs are acknowledged alongside those of the state and the accused, thereby acknowledging '*a triangulation of interests*' (emphasis added, *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118).

## **7. What other issues affect the criminal justice process and what should be done to address them?**

*Recommendation: victim-survivors' role and level of contribution in the criminal justice process be enhanced to promote their protection and empowerment.*

The rights, status and plight of crime victims have emerged as a significant 21st-century concern, occupying the forefront of legal commentary on international policy agendas. Consensus has emerged around the need to further strengthen the rights of sexual assault victim-survivors to advance their standing and access to justice, although questions prevail as to how their rights, privacy and interests can be secured in a system based on adversarial exchange between the state and the accused (Iliadis 2020). Conceptions of fairness within adversarial justice processes have traditionally been premised on the protection of an accused person's due process rights, against the might of the state, which prosecutes in the public interest. As noted by Kirchengast, Iliadis and O'Connell (2019: 3–4), 'criminal procedure thus sets out the rights of the accused, which recently, have said very little about the rights of victims'. Even so, procedural rights protections afforded to accused people are largely focused on eliciting aspects of probative evidence from vulnerable victims, including victims of sexual violence (Kirchengast, Iliadis & O'Connell 2019). This has led to an appetite

for reform that better promotes the protection, interests and rights of victim-survivors alongside those of the state and the accused.

Over the past four decades, victim-focused reforms have commonly centred on the particular needs of vulnerable and at-risk victims, including victims of sexual offences, and the need to better support and protect their privacy and interests against adversative court processes. Recognition of the unique needs of sexual assault victims espouses the broader aims of adversarial systems, ‘where attaining justice is traditionally associated with equality, fairness and respect for individual rights, encompassing those of both the victim and accused’ (Iliadis & Flynn 2018: 551). The integrity of criminal prosecution processes then, as noted by Kirchengast, Iliadis and O’Connell (2019: 2), relies upon ‘victims’ confidence that the reporting of offences will not cause further secondary harm, or exacerbate existing harm’. Indeed, research has consistently shown that consideration of victims and their interests promotes the shift in a victim’s status from ‘peripheral to integral’ (ibid. 8), enabling victims to feel like ‘important constituents in the justice system’ (ibid. 2). While some victim-survivors may not wish to have an active role in justice processes, meaningful opportunities for participation should exist for those who wish to do so. The following section outlines one such approach that could further promote victim-survivors’ protection and empowerment, thereby enhancing their role and level of contribution in the criminal justice system.

### **Issue Paper G – Sexual Offences: Alternative Justice Models**

*Recommendation: victim-survivors of sexual violence ought to be afforded separate legal representation (SLR) in defined contexts in criminal justice processes to protect their sensitive third-party evidence, including previous sexual history evidence, medical and counselling records and digital communications (such as phone records containing private data).*

Across Australian states and territories, separate commissions of inquiry have considered matters affecting victim-survivors of sexual violence and their recourse to justice (VLRC; RCIRCSA 2017; RCFV 2016). The absence of SLR and support for victim-survivors during the criminal justice process has surfaced as a major factor contributing to the feelings of isolation and fear that drives the lack of reporting of these crimes and the high attrition rates (Iliadis 2020). Prospects for reform therefore need to be centred on the discrete needs of sexual offence victim-survivors and the provision of protections to minimise the likelihood of secondary harm and their withdrawal from the criminal trial process.

As in most archetypal adversarial systems, Victoria’s common law principles are underpinned by the need to safeguard the accused person’s rights to a fair and impartial trial. Within this context, victim-survivors lack justiciable rights to protect their privacy and interests, as the adversarial contest between the state prosecutor and the accused precludes victims from actively participating in proceedings. While a victim-survivor’s status as mere ‘witness’ to proceedings is neither ‘novel nor uncommon’ in adversarial systems, victim-survivors ‘are often shocked, and members of the public surprised, to discover that complainants [victims] do not have legal representation’ (Gillen Review 2019: 13; Iliadis, Smith & Doak 2021, *forthcoming*).

Despite repeated legislative attempts to restrict the use of victims' sensitive third-party evidence in criminal trials, it continues to be drawn upon by defence counsel to undermine victim-survivors' credibility and claims in criminal prosecution processes (Burgin 2019; Dowds 2019; Iliadis 2020; McGlynn 2017; Powell et al. 2013). This includes the use of sexual history evidence and private records, such as medical and counselling notes, and digital communications, such as phone records containing private data. Across Australian states and territories, evidential rules are in place that aim to restrict irrelevant and offensive defence questioning of victim-survivors' sexual history and character evidence, including evidence drawing on victims' private communications, such as counselling records (see, for example, s. 4 *Criminal Law (Sexual Offences) Act 1978* (QLD); s. 352 *Criminal Procedure Act 2009* (Vic); s. 34(L)(1)(2) *Evidence Act 1929* (SA)). However, research reveals that safeguards on victims' sensitive third-party evidence, and sexual history in particular, are 'evaded, circumvented and resisted' (Kelly, Temkin & Griffiths 2006: 77), and in practice, such evidence continues to be admitted in court (Iliadis 2020). This is because the majority of rape trials hinge on the question of consent (or reasonable belief thereof), as the victim and accused are the only witnesses; therefore, the verdict frequently relies on a battle of credibility between the two.

In 2016, the VLRC's report on *The role of victims of crime in the criminal trial process* uncovered that 'judicial intervention is not always adequate and improper questioning [of victims' sensitive third-party evidence] still occurs' (96). Research has likewise found that questioning of victims' sexual history evidence and the use of private records in particular are commonly cited as key impediments to victims' access to procedural and substantive justice, deterring victims from reporting across Victoria, South Australia, England and Wales, and Ireland (Iliadis 2019, 2020). A Victorian study by Burgin and Flynn (2019) also found that defendants in rape trials rely on narratives of *implied consent*, which can include drawing upon evidence relating to a victim's sexual reputation or experience that creates a (false) perception that the victim consented to sexual activity or is the 'type' of person who is *more likely* to consent. This has led to considerable debate over the effectiveness of existing rape shield protections in Victoria and Australia, and indeed, throughout the common law world. It has also led to calls for the introduction of publicly funded SLR to further safeguard sexual assault victims' privacy and interests in criminal trials (Braun 2019; Gillen Review 2019; Iliadis 2020; Iliadis 2019; Iliadis, Fitz-Gibbon & Walklate 2019; Iliadis, Smith & Doak 2021, *forthcoming*; O'Connell 2015; RCFV 2016).

At the same time, however, concerns remain that victim participation rights, such as through SLR, are opposed to the traditional parameters of the adversarial justice system. As noted by the VLRC's 2016 report, objections tend to centre on the perceived threat to the accused person's right to a fair trial and the equality of arms principle. As the adversarial system relies on the balance of power achieved through the clear delineation of roles of the prosecution and defence, critics argue that the system could be perceived as 'out-of-balance' if another party – the victim – involved in the case could actively work against the interests of the defence (Iliadis, Smith & Doak 2021, *forthcoming*). The perception of 'dual representation' for the victim is commonly cited by lawyers and law reform bodies as one of the main reasons why SLR is unworkable, particularly if a victim's representative were allowed to cross-examine other witnesses and the accused, and granted access to privileged documents

ordinarily reserved for the prosecution and/or defence (Braun 2014, 2019; Iliadis 2020; VLRC 2016). Yet, as noted by Iliadis, Smith and Doak (2021, *forthcoming*), ‘this view fails to acknowledge that victims have legitimate rights and interests, which may compete not only with the fair trial rights of the accused, but also with the interests of the prosecution’. These include the rights to privacy regarding the disclosure of medical/counselling records and to be free of the degrading treatment that may arise from character attacks or cross-examination on sexual history evidence. The prosecutor has a duty to protect the public interest (which includes the defendant, victim and society); but victim interests may not align with public interests. The introduction of victim SLR may ‘save the prosecutor from having to juggle two roles which are ultimately incompatible’ (Doak 2005: 307), and potentially further safeguard victims’ privacy and interests. There are different models of SLR operating throughout common law jurisdictions, and the justification for its introduction has hinged particularly on protecting victims’ sensitive third-party evidence.

SLR is available to sexual offence victims in Australian and international jurisdictions. It has operated in New South Wales (NSW) since 2011 to prevent or restrict the disclosure of sexual assault victims’ counselling notes that may contain confidential material, for example, in relation to victims’ previous sexual history (*Evidence Amendment (Confidential Communications) Act 1997* (NSW)). In Queensland, it is available to counselled persons for representation at domestic violence and criminal law proceedings to determine if leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or if material produced under a subpoena can be disclosed (Division 2A of the *Evidence Act 1977* (QLD)). SLR also has precedence internationally. For example, it is available to victims in Ireland to prevent the disclosure of victims’ sexual history evidence (s. 34 *Sex Offenders Act 2001* (IRE); Iliadis 2019). England and Wales also piloted SLR under the Sexual Violence Complainants’ Advocates scheme in Northumbria between 2018 and 2020, and Northern Ireland commenced a pilot for SLR in September 2020 following the *Gillen review into the law and procedures in serious sexual offences* (Gillen Review 2019).

The extent to which victim SLR is viable within an adversarial system will depend upon the parameters of the representative’s role. If the role of the SLR is confined to specific matters of evidence and procedure that interfere with the privacy and interests of victims, such as in Queensland and NSW, then this would enable the SLR to test the rationale for, and present counter-arguments to, contentions advanced by defence counsel, such as when submissions are made for the disclosure of sensitive third-party evidence (Iliadis, Smith & Doak 2021, *forthcoming*). Departing from the notion that victim SLR would jeopardise the accused person’s fair trial rights, it has been suggested that SLR could be valuable where the defence submits an application to adduce such evidence. Furthermore, international research suggests that the provision of SLR not only enhances a victim’s role and level of contribution in justice processes, but it also enhances the likelihood of victim-survivors experiencing procedural justice, particularly as it enables victims to receive more information, have more of a voice and degree of control, and in some instances, it may even enable victims to feel validated.

The consideration of SLR was raised in the VLRC’s 2016 report. However, there was notable resistance to the notion of its introduction. In light of ongoing and enduring

concerns raised in relation to sexual assault victims' access to procedural and substantive justice, the consideration of victim SLR should be considered meaningfully in further detail. Drawing from national and international experiences where SLR exists, its use within defined and limited parameters has the potential to enhance victim-survivors' perceptions of and experiences within justice processes.

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